FEDERAL COURT OF AUSTRALIA

Gall v Domino's Pizza Enterprises Limited (No 2) [2021] FCA 345

File number:	VID 685 of 2019
Judgment of:	**MURPHY J**
Date of judgment:	13 April 2021
Catchwords:	**PRACTICE AND PROCEDURE** – Representative Proceedings - application to strike out Further Amended Statement of Claim (FASOC) – approach to pleadings having regard to modern case management – whether parts of FASOC should be struck out as they do not disclose a reasonable cause of action – whether *Fair Work Act 2009* (Cth) (Fair Work Act) constitutes a code in relation to claims concerning underpayment of award entitlements which precludes such claims under the *Australian Consumer Law* (ACL) in Sch. 2 of the *Competition and Consumer Act 2010* (Cth) – whether by necessary implication ss 52 and 82 of *Trade Practices Act 1974* (Cth) impliedly limited or repealed to the extent of any inconsistency by later enactment of Fair Work Act – whether ss 18 and 236 of the ACL should be construed as limited in relation to claims concerning underpayment of award entitlements by the operation of ss 45, 539 and 545 of the Fair Work Act– whether the pleading is sufficient to show that the applicant and group members have suffered loss and damage when their rights to bring an action under the Fair Work Act are intact – whether the pleading of causation and reliance is sufficient – whether the applicant is required to plead a counterfactual – whether the applicant is required to plead whether "but for" or "a material cause" test for causation is relied upon – whether the applicant is required to plead that the reliance of third parties on the alleged representations was reasonable – whether the pleading of the representations is adequate – whether miscellaneous parts of FASOC should be struck out as conclusory, rolled up, embarrassing, confusing, vague or ambiguous – strikeout application dismissed
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) *Competition and Consumer Act 2010* (Cth) *Conciliation and Arbitration Act 1904* (Cth) *Corporations Act 2001* (Cth) *Fair Work Act 2009* (Cth)

Federal Court of Australia Act 1976 (Cth)
Federal Court Rules 2011 (Cth)
Human Rights and Equal Opportunity Act 1986 (Cth)
Industrial Relations Act 1988 (Cth)
Trade Practices Act 1974 (Cth)
Workplace Relations Act 1996 (Cth)
Civil Procedure Act 2005 (NSW)
Industrial Arbitration Act 1912 (NSW)
Supreme Court (General Civil Procedure) Rules 2015 (Vic)
Explanatory Memorandum for the Fair Work Bill 2008

Cases cited:

Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (unreported, Beaumont J, 13 September 1994)
Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; 250 CLR 640
Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2020] FCAFC 130
Banque Commerciale S.A., En Liquidation v Akhil Holdings Ltd [1990] HCA 11; (1990) 169 CLR 279
Barclay Mowlem Construction Ltd v Dampier Port Authority and Another [2006] WASC 281; (2006) 33 WAR 82
Berry v CCL Secure Pty Ltd [2020] HCA 27; (2020) 94 ALJR 715
Bond Corp Pty Ltd v Thiess (1987) 14 FCR 215; (1987) 71 ALR 615
Brosnan v Katke [2016] FCAFC 1
Builders Licensing Board v Inglis (1985) 1 NSWLR 592
Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; 218 CLR 592
Butler v Attorney-General (Victoria) [1961] HCA 32; (1961) 106 CLR 268
Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410
Campbell v BackOffice Investments Pty Ltd [2009] HCA 25; (2009) 238 CLR 304
Construction, Forestry, Mining and Energy Union v Gordonstone Coal Management Pty Ltd [1997] FCA 1014; (1997) 78 FCR 437
Dafallah v Fair Work Commission [2014] FCA 328; (2014) 225 FCR 559
Doe d Rochester (Bishop) v Bridges (1831) 1 B&Ad 847; 109 ER 1001

Downer Connect Pty Ltd v McConnell Dowell Construction (Aust) Pty Ltd [2008] VSC 77

Energex Limited v Alstom Australia Limited [2005] FCAFC 215; (2005) 225 ALR 504

Ethicon Sarl v Gill [2021] FCAFC 29

Ezekiel v Law Society of the Australian Capital Territory [2013] FCA 725

Forty Two International Pty Ltd v Barnes [2010] FCA 397

Goodwin v Phillips [1908] HCA 55; (1908) 7 CLR 1

Google Inc v Australian Competition and Consumer Commission [2013] HCA 1; 259 CLR 435

I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd [2002] HCA 41; (2002) 210 CLR 109

Janssen-Cilag Pty Ltd v Pfizer Pty Ltd [1992] FCA 649; (1992) 37 FCR 526

Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [2000] FCA 1572; (2000) 104 FCR 564

Josephson v Walker [1914] HCA 68; (1914) 18 CLR 691

Kernel Holdings Pty Ltd v Rothmans of Pall Mall (Australia) Pty Ltd (3 September 1991, French J, unreported)

Mallinson v Scottish Australian Investment Co Ltd [1920] HCA 51; (1920) 28 CLR 66

March v E & MH Stramare Pty Ltd [1991] HCA 12; (1991) 171 CLR 506

Marks v GIO Australia Holdings [1998] HCA 69; (1998) 196 CLR 494

McGuirk v University of New South Wales [2009] NSWSC 1424

McKellar v Container Terminal Management Services Limited [1999] FCA 1101; (1999) 165 ALR 409

Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1; [2002] HCA 27

Multigroup Distribution Services Pty Ltd v TNT Australian Pty Ltd [1996] FCA 781; (1996) ATPR 41-522

National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd (1995) 132 ALR 514

Oztech Pty Ltd v Public Trustee of Queensland [2019] FCAFC 102; (2019) 269 FCR 349

P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2) [2010] FCA 176

Parkdale Custom Built Furniture v Puxu Pty Ltd [1982] HCA 44; (1982) 149 CLR 191

Pasmore v Oswaldtwistle Urban District Council (1898) AC 387

Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476

Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4) [2011] FCA 1126; (2011) 203 FCR 293

Pt Bayan Resources TBK v BCBC Singapore Pte Ltd [2015] HCA 36; (2015) 258 CLR 1

Qantas Airways Limited v Gama [2008] FCAFC 69; (2008) 167 FCR 537; 247 ALR 273

Re Punters Show Pty Ltd [2017] NSWSC 605

Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu (A Firm) [2017] FCA 1202

Sarawati v The Queen [1991] HCA 21; (1991) 172 CLR 1

Sellars v Adelaide Petroleum [1994] HCA 4; (1994) 179 CLR 332; (1994) 120 ALR 16

Shergold v Tanner [2002] HCA 19; (2002) 209 CLR 126

SMEC Australia Pty Ltd v McConnell Dowell Constructions (Aust) Pty Ltd (No. 2) [2011] VSC 492

State of Queensland v Pioneer Concrete (Qld) Pty Ltd [1999] FCA 499; [1999] ATPR 41-691

Taco Co of Australia Inc v Taco Bell Pty Ltd [1982] FCA 170; (1982) 42 ALR 177

Taylor v Lederman [2013] VSC 99

Thomas v Powercor Australia Ltd (No 1) [2010] VSC 489

Thomson v STX Pan Ocean Co Ltd [2012] FCAFC 15

Truth About Motorways Pty Ltd v Macquarie Infrastructure Investments Management Ltd [1998] FCA 525; (1998) ATPR 41-633; (1998) 42 IPR 1

Uber Australia Pty Ltd v Andrianakis [2020] VSCA 186

United States v Jennings [1983] 1 AC 624

Wardley Australia Ltd v State of Western Australia [1992] HCA 55; (1992) 175 CLR 514

Wheelahan v City of Casey (No.12) [2013] VSC 316

Williams v Pisano [2015] NSWCA 177; (2015) 90 NSWLR 342

Wride v Schulze [2004] FCAFC 216

Wyzenbeek v Australasian Marine Imports Pty Ltd [2019] FCAFC 167; (2019) 272 FCR 373

Y Primavera v T Bakos [2019] NSWSC 825

Division:	General Division
Registry:	Victoria
National Practice Area:	Employment and Industrial Relations

Number of paragraphs:	208
Date of hearing:	9 June 2020
Counsel for the Applicant:	Ms R Doyle SC, Mr D Fahey and Ms S Kelly
Solicitor for the Applicant:	Phi Finney McDonald Lawyers
Counsel for the Respondent:	Mr G Harris QC and Mr N Harrington
Solicitor for the Respondent:	DLA Piper Australia

ORDERS

VID 685 of 2019

BETWEEN:	**RILEY GALL** Applicant
AND:	**DOMINO'S PIZZA ENTERPRISES LIMITED (ACN 010 489 326)** Respondent

ORDER MADE BY:	**MURPHY J**
DATE OF ORDER:	**13 APRIL 2021**

THE COURT ORDERS THAT:

1. The Respondent's amended interlocutory application to strike out the Further Amended Statement of Claim be dismissed.
2. The Respondent pay the costs of the application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MURPHY J:

1 By an amended interlocutory application the respondent, Domino's Pizza Enterprises Ltd (**Domino's**), sought an order that, pursuant to rr 16.21 and 16.45 of the *Federal Court Rules 2011* (Cth) (**Rules**), the Applicant's Amended Statement of Claim filed 26 September 2019 be struck out on grounds including that it is evasive or ambiguous, likely to cause prejudice, embarrassment or delay in the proceeding, contains rolled up allegations, fails to plead material facts and discloses no reasonable cause of action. In response to the interlocutory application the applicant, Mr Riley Gall, filed a Further Amended Statement of Claim (**FASOC**) which sought to rectify the asserted deficiencies. Domino's did not accept that the asserted deficiencies were remedied by the FASOC and it pressed its strikeout application. The application was heard as an application to strike out the FASOC, it being the current pleading.

2 The parties' submissions in the application were lengthy and sometimes pedantic, between them the parties relied on four lever arch binders of authorities, and the hearing took a full day. The hearing, conducted remotely because of the pandemic, was plagued by audio problems and the transcript is thus incomplete.

3 For the reasons I explain, it is appropriate to dismiss the application. While the FASOC is sometimes convoluted and repetitive I consider it meets the main purposes of a pleading by putting Domino's on notice of the case it has to meet, avoiding surprise to Domino's, defining the issues both in aid of discovery and for trial, and together with other case management orders it will allow the trial to be conducted efficiently and fairly to both parties. I have no doubt that Domino's understands the case it has to meet, and in my opinion its complaints about the ambiguity, embarrassment and delay that it said will arise from the alleged deficiencies in the pleading were exaggerated. Any continuing concerns Domino's has in this regard will be better dealt with through further case management orders, including for the exchange of evidence and written submissions in advance of trial, rather than through an application of technical pleadings rules to this novel, large and complex case. To the limited extent that I have directed further pleading and particularisation of the FASOC those matters are not sufficiently important to delay the further progress of the matter.

THE PROCEEDING

4 At all material times Domino's and its franchisees, from time to time, conducted a business in Australia in the fast food industry, selling food, predominantly pizza, from stores trading as Domino's Pizza. Domino's owned and operated some of the stores directly (**Corporate Stores**) and also granted franchise agreements under which third parties were licensed to operate Domino's Pizza stores in Australia in accordance with the terms of a franchise agreement (**Franchise Operators**).

5 The applicant was:

(a) employed as a delivery driver by a Franchise Operator, Dominoids Pty Ltd (**Dominoids**), at a Domino's Pizza store in North Caboolture, Queensland (**the North Caboolture store**) in the period from October 2015 to July 2016; and

(b) later employed as a delivery driver by another Franchise Operator, MA CS Pizza Pty Ltd (**MC Pizza**), at the North Caboolture store in the period from August 2016 to March 2018.

6 On 24 June 2019, the applicant commenced this class action pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA**), brought by him on his own behalf and on behalf of all persons who, at any time during the period 24 June 2013 to 23 January 2018 (**the relevant period**):

(a) were employed to perform work in Australia as delivery drivers or in-store workers by a Franchise Operator of Domino's:

(b) were covered by the *Fast Food Industry Award 2010* (the **Award**) within the meaning of s 48 of the *Fair Work Act 2009* (Cth) (the **FW Act**);

(c) to whom the Award applied, within the meaning of s 47 of the FW Act;

(d) were not paid the rates applicable under, or were not afforded the terms and conditions of employment in accordance with, the Award; and

(e) suffered loss and damage as a result.

7 The proceeding is novel. The applicant on his own behalf and on behalf of other employees of the Franchise Operators seeks damages from the franchisor, Domino's, under s 236 of the *Australian Consumer Law* (**ACL**) in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (the **CCA**) for alleged loss caused by misleading or deceptive conduct in contravention of s 18 of the ACL, based in representations and conduct by Domino's directed to the Franchise

Operators as to the pay rates and terms of conditions of employment applicable to the Franchise Operator's employees. The loss or damage alleged by the applicant and the other employees is that they were underpaid the wages and terms of conditions to which they were entitled and that they also thereby suffered a loss of opportunity. No claim is made by the employees directly against their employers, the Franchise Operators.

8 The applicant summarised the main elements of the case as follows, which in my view captures the gist of the applicant's case. As I have said, I consider Domino's understands the case advanced against it.

9 *First*, the FASOC alleges that Domino's represented (and by its conduct impliedly represented or conveyed) to Franchise Operators and persons who were considering becoming Franchise Operators (**Prospective Franchise Operators**) that:

(a) the terms and conditions of employment of all Domino's employees were governed by two enterprise bargaining agreements (the **Agreements**); and

(b) that it was lawful to pay the employees rates of pay, and afford them conditions, contained in or based on the Agreements.

In the alternative, the FASOC alleges that Domino's represented (and by its conduct impliedly represented or conveyed) to Franchise Operators and Prospective Franchise Operators that it held an opinion to this effect, and that its opinion was based on reasonable grounds.

10 In support of the contention that Domino's made the alleged representations to Franchise Operators and Prospective Franchise Operators, the applicant relies upon a number of documents discovered by Domino's, including:

(a) a document headed "Fair Work Laws - Australia" dated 30 April 2012 which is said to have been provided by Domino's to Franchise Operators and Prospective Franchise Operators, which states amongst other things:

(i) the "terms and conditions of Domino's Employees are governed by two Enterprise Bargaining Agreements (EBA). The 2001 agreement provides the conditions for Drivers and the 2009 agreement for In Stores and Managers"; and

(ii) "the wage rates for in-stores are provided by the 2009 EBA which was negotiated with the Union under the Fair Work Act. The rates were agreed and certified by Fair Work Australia."

(b) the Dominoids Sub-Franchise Agreement which states that Dominoids is required to comply with the terms and conditions of any enterprise bargaining agreement or other workplace agreement to which Domino's was a party in respect of its Corporate Store employees;

(c) a document entitled "Industrial Relations Facts – Australia" dated 8 September 2016 which states, amongst other things, that:

(i) Domino's has an "IR team to help set up systems correctly and maintain compliance"; and

(ii) the Domino's Bookkeeping Service (**DBS**) provided "Payroll and bookkeeping completed on your behalf by experience [sic] accountants. Allows you to concentrate on the important part of your business, customer service".

11 It is said by the applicant that, since 1 September 2012, Domino's has required all new Franchise Operators to use DBS for a period of at least two years for services including payroll, bookkeeping, accounting and reports. Further, at all times during the relevant period, Franchise Operators were permitted to opt in to use DBS. The payroll services provided by DBS included processing the weekly payroll, provision of payslips to employees, and preparing the bank upload file for payroll payment to the Franchise Operator. DBS functions also included determining the terms and conditions to be afforded to in-store workers and delivery drivers and calculating the wages to be paid to in-store workers and delivery drivers. The applicant says that the pay rates and other terms and conditions of employment that were supplied or applied by the DBS were drawn from the Agreements, not from the Award.

12 *Second*, it is alleged that Domino's representations and conduct constituted misleading or deceptive conduct or conduct which was likely to mislead or deceive within the meaning of s 18 of the ACL because the two Agreements did not, in fact, govern or provide the wages required to be paid to specified classes of delivery drivers and in-store workers employed by Franchise Operators, styled as Award Workers in the FASOC. The applicant alleges that during the relevant period Award Workers were, in fact, covered by the Award, and that the rates of pay and terms and conditions of employment applicable under the Award are superior to those applicable under the Agreements.

13 *Third,* the applicant alleges that the Franchise Operators relied upon Domino's representations and conduct in paying their delivery drivers and in-store workers in accordance with the Agreements. In part he says that reliance should be inferred because hundreds of Franchise

Operators simultaneously elected to pay delivery drivers and in-store workers the rates of pay and afford the conditions of employment derived from the Agreements, doing so after receipt of detailed information from Domino's about the franchise they operated or proposed to operate which included the representations or involved the conduct referred to above.

14 *Fourth,* it is alleged that as a result of Domino's contravening conduct, the applicant and the group members suffered loss and damage, including:

(a) loss and or damage referable to the difference between the rates of pay and terms and conditions of employment to which the applicant and group members were entitled under the Award as and when that entitlement arose, and the rates and conditions they were in fact paid or afforded by the Franchise Operators; and

(b) the loss of opportunity to pay for goods or services the applicant and group members wished to buy, by reason of the fact that Award wages were not paid to them as and when those wages were required to be paid (being no less often than weekly, as required by the Award).

RELEVANT PRINCIPLES

15 Domino's submitted that the requirement for pleadings that comply with the rules is central to proper case management, particularly in a large complex class action like the present case. It cited *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102; (2019) 269 FCR 349 at [28]-[35] (Middleton, Perram and Anastassiou JJ) where the Full Court said (at [30]):

> There should be no doubt about whether any particular cause of action is relied upon. At a minimum, the pleading should be pellucidly clear about the causes of action, or claims, relied upon by the applicant, including any claims made upon an alternative hypothesis. The explicit clarity with which a claim is expressed should ensure that there be no need for the opposite party to closely scrutinise the pleading in a process of textual construction to determine whether a particular fact is relied upon, or the purpose for which it is alleged, much less to decide whether a particular cause of action is raised. The same basic requirement applies to any defence raised in answer to a claim.

16 It argued that compliance with pleadings principles is not mere pedantry but is a matter of basic procedural fairness, citing, amongst other authorities: *Banque Commerciale S.A., En Liquidation v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279 at 286-287 (Mason CJ and Gaudron J); *McKellar v Container Terminal Management Services Limited* [1999] FCA 1101; (1999) 165 ALR 409 at [22] (Weinberg J); and *Ezekiel v Law Society of the Australian Capital Territory* [2013] FCA 725 at [40] (Yates J). It said that a properly drawn pleading is

fundamental to achieving the overarching purposes of s 37M of the Act by, allowing both the parties and the Court to clearly and precisely understand the issues in dispute at an early stage, define and confine the need for discovery and determine relevant evidence, both for lay and expert, as required, thus ensuring a just, quick and cheap resolution of the real issues in dispute, citing authorities including *McGuirk v University of New South Wales* [2009] NSWSC 1424 at [21] - [24] (Johnson J) (in the context of s 56 of the *Civil Procedure Act 2005* (NSW), the State cognate of s 37M of the FCA); *Re Punters Show Pty Ltd* [2017] NSWSC 605 at [69] (Black J); *Y Primavera v T Bakos* [2019] NSWSC 825 at [35] (Black J); ***Sadie Ville*** *Pty Ltd v Deloitte Touche Tohmatsu (A Firm)* [2017] FCA 1202 at [17] (Moshinsky J); ***Wheelahan*** *v City of Casey* (No.12) [2013] VSC 316 at [25] (Dixon J); ***SMEC*** *Australia Pty Ltd v McConnell Dowell Constructions (Aust) Pty Ltd* (No. 2) [2011] VSC 492 at [9] (Vickery J); *Downer Connect Pty Ltd v McConnell Dowell Construction (Aust) Pty Ltd* [2008] VSC 77 at [1]-[4] (Harper J (as he then was)); *Taylor v Lederman* [2013] VSC 99 at [3] (Ferguson J (as her Honour then was)); *Multigroup Distribution Services Pty Ltd v TNT Australian Pty Ltd* [1996] FCA 781 at [2]; (1996) ATPR 41-522 (Burchett J); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investments Management Ltd* [1998] FCA 525 at [5]; (1998) ATPR 41-633; (1998) 42 IPR 1 at 5 (Foster J). It contended that the more complex the claims the more important compliance with pleadings rules becomes, citing *Wheelahan* at [25(e)]; *SMEC* at [8].

17 In general terms I have no difficulty accepting the principles in relation to adequacy of pleadings advanced by Domino's. Two things must, however, be kept in mind.

18 First, the decision as to whether it is appropriate to strike out a pleading is a case specific enquiry. The application of the principles will differ depending on the case and on the pleading.

19 Second, different courts from time to time have espoused such principles in terms which are not always consistent. In modern times courts have often taken a less strict approach to the application of such principles, and have preferred to use pre-trial disclosure of evidence and exchange of submissions and interventionist case management techniques to address some of the difficulties sometimes associated with pleadings. I broadly agree with the approach taken by Martin CJ in *Barclay Mowlem Construction Ltd v Dampier Port Authority and Another* [2006] WASC 281; (2006) 33 WAR 82 at [4]-[7]. His Honour said:

> The purposes of pleadings are, I think, well known and include the definition of the issues to be determined in the case and enabling assessment of whether they give rise to an arguable cause of action or defence as the case may be, and apprising the other

parties to the proceedings of the case that they have to meet.

In my view, the contemporary role of pleadings has to be viewed in the context of contemporary case management techniques and pre-trial directions. In this Court, those pre-trial directions will almost invariably include; first, a direction for the preparation of a trial bundle identifying the documents that are to be adduced in evidence in the course of the trial; second, the exchange well prior to trial of non-expert witness statements so that non-expert witnesses will customarily give their evidence-in-chief only by the adoption of that written statement; third, the exchange of expert reports well in advance of trial and a direction that those experts confer prior to trial; fourth, the exchange of chronologies; and fifth, the exchange of written submissions.

Those processes leave very little opportunity for surprise or ambush at trial and, it is my view, that pleadings today can be approached in that context and therefore in a rather more robust manner, than was historically the case; confident in the knowledge that other systems of pre-trial case management will exist and be implemented to aid in defining the issues and apprising the parties to the proceedings of the case that has to be met.

In my view, it follows that provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and apprising the parties of the case that has to be met, the court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment.

20 This approach was echoed by the Full Court in *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 at [13] (Greenwood, McKerracher and Reeves JJ) as follows:

> It is well-established that the main purposes of pleadings are to give notice to the other party of the case it has to meet, to avoid surprise to that party, to define the issues at trial, to thereby allow only relevant evidence to be admitted at trial and for the trial to be conducted efficiently within permissible bounds: see, eg *Dare v Pulham* (1982) 148 CLR 658 (at 664–665). However, it is also well-established that pleadings are not an end in themselves, instead they are a means to the ultimate attainment of justice between the parties to litigation: see *Banque Commerciale S.A. (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 (at 293) per Dawson J who cites Isaacs and Rich JJ in *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 (at 517). For these reasons, the courts do not, at least in the current era, take an unduly technical or restrictive approach to pleadings such that, among other things, a party is strictly bound to the literal meaning of the case it has pleaded. The introduction of case management has, in part, been responsible for this change in approach: see the observations of Martin CJ in *Barclay Mowlem Construction Limited v Dampier Port Authority* (2006) 33 WAR 82 (at [4]–[8]). Even before the widespread use of case management, the High Court reflected this approach in decisions such as *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 (at 668–669) per Stephen, Mason and Jacobs JJ and *Water Board v Maustakas* (1988) 180 CLR 491 (at 497) per Mason CJ and Wilson, Brennan and Dawson JJ.

I take the same view, and I approach the application on that basis.

THE LOSS AND DAMAGE PLEADING

21 The main focus of Domino's strikeout application is the pleading of loss and damage in paragraphs [63] and [64] of the FASOC. On the basis that paragraphs [63] and [64] should be struck out, Domino's also sought orders for the entirety of the claim under s 236 of the ACL to be struck out. Domino's ultimately sought that the entire pleading be struck out.

22 Paragraphs [63] and [64] allege as follows:

> [63] By reason of the conduct pleaded in paragraphs 30, 30A, 34, 34A, 48, 49, 50, 50A, 51 and 51A above, the Award Workers (that is, the Group Members) have suffered loss and damage as a result of the contraventions by Domino's.
>
> **Particulars**
>
> 1. The loss and damage suffered by the Award Workers (that is, the Group Members) because of the contravening conduct engaged in by Domino's is the harm to the economic interests of the Award Workers by reason of the fact that they:
>
> (A) were not paid the wages to which they were entitled during the period of their employment by Franchise Operators as and when those wages fell due to be paid and were required to be paid, namely at no less than weekly intervals (as is required by clause 9 of the Award), being:
>
> (i) the loss of the opportunity to pay for goods or services the Award Workers needed or wanted to buy during their period of employment by a Franchise Operator; and
>
> (ii) the loss of the opportunity to pay for goods or services of superior quality than those which the Award Workers in fact bought during their period of employment by a Franchise Operator.
>
> And
>
> (B) were paid less than the wages to which they were entitled pursuant to the terms of the Award and were afforded conditions of employment of lesser value than those to which they were entitled pursuant to the terms of the Award during the period of their employment by Franchise Operators, namely:
>
> (i) the difference between the rates of pay to which the Award Workers were entitled under the Award and the rates the Award Workers were in fact paid by Franchise Operators, being the rates derived from the Agreements as affected by the Deemed Base Rates;
>
> (ii) the difference in the value of the terms and conditions of employment to which they were entitled under the Award and the terms and conditions of employment in fact afforded to them by Franchise Operators

derived from the Agreements.

(iii) interest in relation to (i) and (ii) above.

And

(C) were not afforded the conditions of employment to which they were entitled pursuant to the Award during each shift that they worked during their period of employment with Franchise Operators, including the failure to roster Award Workers for shifts of a minimum of three hours duration, namely the loss of one hour's pay at the Award rate each time the Award Workers worked a two hour shift, rather than a three hour shift as required by the Award.

[64] By reason of the conduct pleaded in paragraphs 50, 50A, 51, 51A, 56, 57 and 58 above, the applicant has suffered loss and damage as a result of the contraventions by Domino's.

Particulars

1. The loss and damage suffered by the applicant because of the contravening conduct engaged in by Domino's is the harm to the economic interests of the applicant by reason of the fact that he:

(A) was not paid the wages to which he was entitled during the period of his employment by Dominoids and by MC Pizza as and when those wages fell due to be paid and were required to be paid, namely at no less than weekly intervals (as is required by clause 9 of the Award), being:

(i) the loss of the opportunity to pay for goods or services the applicant needed or wanted to buy during his period of employment by Dominoids and MC Pizza; and

(ii) the loss of the opportunity to pay for goods or services of superior quality than those which the applicant in fact bought during his period of employment by Dominoids and MC Pizza.

where the goods and services referred to in (i) and (ii) above included items for the applicant's infant son born in 2016 and maintenance and repairs on a 1998 Toyota RAV4 which he owned.

And

(B) was paid less than the wages to which he was entitled pursuant to the terms of the Award and was afforded conditions of employment of lesser value than those to which he was entitled pursuant to the terms of the Award during the period of his employment by Dominoids and MC Pizza, namely:

(i) the difference between the rates of pay to which the applicant was entitled under the Award and the rates the applicant was in fact paid by Dominoids and MC Pizza, being the rates derived from the Agreements as

affected by the Deemed Base Rates;

(ii) the difference in the value of the terms and conditions of employment to which the applicant was entitled under the Award and the terms and conditions of employment in fact afforded to him by Dominoids and MC Pizza derived from the Agreements; and

(iii) interest in relation to (i) and (ii) above.

And

(C) was not afforded the conditions of employment to which he was entitled pursuant to the Award during each shift that he worked during his period of employment with Dominoids and MC Pizza, including the failure to roster the applicant for shifts of a minimum of three hours duration, namely the loss of one hour's pay at the Award rate each time the applicant worked a two hour shift, rather than a three hour shift as required by the Award.

2. Further particulars of the loss suffered by the applicant will be provided following discovery and the return of subpoena.

23 It is necessary to briefly summarise paragraphs [30], [30A], [34], [34A], [48], [49], [50], [50A], [51], [51A], [56], [57] and [58] which sit behind the allegation of loss and damage in paragraphs [63] and [64]. They set out the applicant's allegations that by its representations and conduct in contravention of s 18 of the ACL, Domino's conveyed misleading express and implied representations (broadly to the effect that the Award did not apply to identified classes of delivery drivers and in-store workers) to Prospective Franchise Operators and Franchise Operators, upon which representations the Prospective Franchise Operators and Franchise Operators relied and paid delivery drivers and in-store workers the rates of pay and afforded the terms and conditions of employment under the Agreements rather than under the Award.

(a) paragraph [30] sets out six similar representations alleged to have been conveyed by Domino's to Franchise Operators and to Prospective Franchise Operators in respect to the rates of pay and conditions of employment applicable to the group members, broadly to the effect that the Agreements rather than the Award applied, called the **Franchise Representations**;

(b) the cognate allegations to paragraph [30] relating to the applicant are in paragraphs [50] and [51]. Paragraph [50] alleges that, as part of the Franchise Representations, Domino's conveyed five similar representations to Dominoids, which was the applicant's employer in the period from October 2015 to July 2016, broadly to the effect that the Agreements rather than the Award applied, called the **Dominoids**

Representations. Paragraph [51] makes the similar allegations in relation to MC Pizza, which was the applicant's employer in the period from October 2015 to July 2016, called the **MC Pizza Representations**;

(c) in the alternative, paragraph [30A] sets out the same six representations alleged in paragraph [30] to have been conveyed by Domino's in respect of the rates of pay and conditions of employment applicable to the group members, except that they are said to be representations of opinion and that Domino's had reasonable grounds for those opinions, called the **Franchise Opinion Representations**;

(d) the cognate allegations to paragraph [30A] in respect of the applicant are in paragraphs paragraphs [50A] and [51A]. Paragraph [50A] alleges that, as part of the Franchise Opinion Representations, Domino's made the same representations of opinion to Dominoids, called the **Dominoids Opinion Representations**. Paragraph [51A] makes the same allegation in relation to MC Pizza called the **MC Pizza Opinion Representations**;

(e) paragraph [34] alleges that Domino's conduct in engaging in the Compliance and Audit Activities alleged in paragraph [32] and Domino's provision of the Payroll Services to Franchise Operators alleged in paragraphs [33] and [33A] (together and severally the **Franchise Conduct**), gave rise to four implied representations broadly to the effect that the minimum rates of pay and the minimum terms and conditions of employment of delivery drivers and in-store workers that could lawfully be paid and afforded were those contained in the Agreements; specifically, that the Franchise Conduct constituted implied representations that by engaging DBS for the provision of services including payroll services, and/or by using the TANDA system, Franchise Operators would pay rates of pay and terms of conditions of employment to delivery drivers and in-store workers that were compliant with applicable industrial laws; further that by reason of the Franchise Conduct, Domino's engaged in conduct which conveyed that the minimum rates of pay and terms and conditions of employment were those contained in the Agreements and provided by payroll services.

(f) Paragraph [34A] alleges the same conduct by Domino's alleged in paragraph [34] except that the implied representations are said to be representations of opinion and that Domino's had reasonable grounds for those opinions, called the **Franchise Opinion Conduct**;

(g) paragraphs [48] and [49] allege reliance by the Franchise Operators. They allege that, in reliance on the Franchise Representations and the Franchise Opinion Representations, and/or because of the Franchise Conduct and/or Franchise Opinion Conduct, in the relevant period Franchise Operators engaged workers, including workers who were in fact covered by the Award, to work for the rates of pay and terms and conditions set out in the Agreements rather than those set out in the Award to which they were entitled; and

(h) paragraphs [56], [57] and [58) allege reliance by Dominoids and MC Pizza in respect to the rates of pay and terms and conditions of employment applicable to the applicant. Paragraph [56] alleges that, in reliance on the Dominoids Representations and/or the Dominoids Opinion Representations, Dominoids employed workers, including the applicant and other workers covered by the Award, to work on the rates of pay and terms and conditions set out in the Agreements, and did not pay the applicant and Award Workers the rates of pay or afford the terms and conditions of employment provided for in the Award to which they were entitled. Paragraph [57] makes the same allegation in relation to MC Pizza. Paragraph [58] alleges that because of the matters pleaded in paragraphs [56] and/or [57] the applicant was paid the rates of pay and terms and conditions of employment under the Agreements instead of the rates of pay and terms and conditions under the Award to which he was entitled.

Domino's submissions

The alleged failure to adequately plead loss and damage

24 Domino's cited ***Sellars*** *v Adelaide Petroleum* [1994] HCA 4; (1994) 179 CLR 332 at 348; (1994) 120 ALR 16 at 27 (Mason CJ, Dawson, Toohey and Gaudron JJ) for the proposition that loss or damage is the gist of a claim for compensation under s 236 of the ACL for contravention of s 18, which are the successors to ss 82 and 52 of the *Trade Practices Act 1974* (Cth) (the **TPA**). It submitted that the existence of loss or damage is for the applicant to prove and therefore to plead. It drew a distinction between "damage", being the injury or harm sustained, and "damages" being the amount sought to be awarded by a court on account of the damage alleged to have been caused by contravening conduct.

25 Domino's contended that in the context of an economic or financial interest, "loss or damage" equates to the "harm" done to that interest. It said that the cause of action of the applicant and group members under s 236 of the ACL is incomplete unless and until loss or damage has been

suffered and said that paragraphs [63] and [64] of the FASOC fail to identify the economic interest of the applicant and group members alleged to have been harmed, how their economic interests are said to have been harmed, nor plead what acts or omissions may be said to have caused the alleged harm. Domino's argued that the FASOC confuses "damage" with "damages", and said that the particulars to paragraphs [63] and [64] merely set out what will be said to be the measure of compensation sought, but do not identify the economic interest lost or said to have been harmed by Domino's conduct. It said that if, for example, the economic interest relied on by the applicant and group members is the satisfaction of their entitlements under the Award, the applicant must plead that economic interest, and that it is *that* interest that has been lost or injured, and how. On its argument no such loss or harm is pleaded as a material fact or otherwise, and it is not apparent how that interest could have been so harmed.

26 Domino's submitted that an action for monies payable for unpaid entitlements under an industrial award is not an action for damages, citing ***Byrne*** *v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410 at 425-6 (Brennan CJ, Dawson and Toohey JJ), for the proposition that award entitlements are "statutory debts" imported into the employment relationship and do not depend on the terms of the employment contract. The plurality referred to ***Mallinson*** *v Scottish Australian Investment Co Ltd* [1920] HCA 51; (1920) 28 CLR 66 and described the ratio in that case, which considered a right under the *Conciliation and Arbitration Act 1904* (Cth), as saying that an entitlement to be paid the difference between what an employee was paid by their employer (where it was lower) and the higher amount pursuant to an award was a "debt pursuant to an obligation created by statute" (at 418). Similarly, referring again to *Mallinson,* the plurality said that that "[i]n that case the nature of the cause of action which was held to arise was that of debt, the obligation giving rise to the debt being statutorily created" it is a claim "not for damages" (at 424).

27 Domino's also cited *Byrne* (at 424) where the plurality said that the decision in *Mallinson* was not authority for the existence of a cause of action for damages for breach of statutory duty consequent upon a breach of an industrial award. The plurality said that "the nature of the cause of action which was held to arise was that of debt, the obligation giving rise to the debt being statutorily created. Debt is a form of action for a liquidated sum and not for damages."

28 Domino's said that if the applicant and the delivery drivers and in-store workers employed by its Franchise Operators during the relevant period were covered by the terms of the Award,

(and were therefore Award Workers as the applicant alleges) the character of their alleged interest is that of a statutory debt which is due and owing to them by the relevant Franchise Operator. It contended that the fact that the applicant and group members claim to have suffered loss and damage because - in reliance upon alleged misleading representations and conduct by Domino's, Franchise Operators failed to pay them their entitlements under the Award - does not change the character of their claims as "statutory debts". It said that the fact that a claim by an employee for underpayment of award entitlements arises because of the alleged conduct of a third person (in the present case Domino's) cannot change the character of the employee's claim.

29 On its argument, the interests of the applicant and group members in receiving any unpaid entitlements they have under the Award are capable of calculation and enforcement by them against the relevant Franchise Operator, and thus their economic interests have not been injured, lost or damaged by any conduct on the part of Domino's. If they enforce their right to payment of their entitlements under the Award from their employers the statutory debt will then be discharged. Upon discharge of the debt the applicant and those group members would no longer have any right to recover against the relevant Franchise Operator or anyone else, including Domino's, in respect of that discharged economic interest.

30 Domino's also described paragraphs [63] and [64] as a pleading of a conclusion which does not identify any particular injury to the economic interest of the applicant and group members that would be compensable. It said that if the applicant wishes to make a claim of damage to his financial interests he must identify that interest. If the financial interest is his entitlement to payment of wages under an award the applicant must allege "the injury is that we have lost our award entitlement", and cannot simply plead that he has not been paid those entitlements. It characterised the particulars as merely pleading "a delay in payment" of the award entitlement of the applicant and group members. It submitted that the applicant and group members having not been paid their entitlements under the Award does not mean that those entitlements will not be paid.

31 Domino's raised the risk of double recovery through the failure of the pleading to identify the economic interest which had been lost or damaged. It said that if the applicant and group members succeeded in their claim against Domino's and then proceeded under the FW Act against their employers, the Franchise Operators would have no option but to pay any entitlements due under the Award as that is what the FW Act provides.

32 Domino's also contended that before the applicant and group members can show that they have suffered loss and damage "because of" Domino's misleading conduct, as required by s 236 of the ACL, they must show that their position has been altered to their detriment because of the Franchise Operator's reliance on the alleged contravening conduct, and they have not properly pleaded the causal link between loss and damage. It said that they cannot do so, nor establish loss and damage, when any right they have to recover any unpaid Award entitlements from the Franchise Operators remains intact.

33 In an alternative argument, Domino's accepted that the right to bring an application seeking award entitlements against an employer under the FW Act would be damaged or lost if the employer had gone into liquidation, and that in such circumstances a claim might be available under the ACL if the lost right was causally related to the alleged misleading or deceptive conduct.

The contention that the FW Act is an exclusive code

34 In the alternative Domino's argued that a claim under s 236 of the ACL is not available to the applicant and group members as a matter of law. That is, that the pleading of loss and damage discloses no reasonable cause of action.

35 It said, and it is common ground between the parties, that the FW Act creates the obligation for parties to a modern award to be bound by its terms, and provides specific mechanisms for obtaining orders in relation to contravention of an award and for compensation to be awarded upon a finding of contravention. It is uncontentious that the FW Act provides a comprehensive regime for enforcement of rights and entitlements under a modern award.

36 Domino's submitted that any rights the applicant and group members have to payment of any entitlements under the Award are rights created by the FW Act, and the FW Act delineates the remedies that are available for the contravention of those rights and the means by which they are to be enforced, including in relation to limitation periods. It said that the fact that the FW Act creates the right to entitlements under an award, together with a remedy for the enforcement of award entitlements, demonstrates that Parliament intended the statutory remedy to be exclusive and, relevantly, against the person contravening the FW Act. On its argument the FW Act sets out a code in relation to an employee's rights in relation to his or her entitlements under an award.

37 It said that the claim by the applicant and group members under the ACL, which it characterised as their seeking recovery of their alleged unpaid Award entitlements through a claim for misleading or deceptive conduct, is not available at law. It relied on the rule in ***Pasmore*** *v Oswaldtwistle Urban District Council* (1898) AC 387 at 394 where the Earl of Halsbury L.C. said:

> The principle that where a specific remedy is given by a Statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the Statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v Bridges*. He says: "where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

38 The rule is recognised in Pearce and Geddes, *Statutory Interpretation in Australia* (ninth edition at 5.52) which states:

> **If legislation includes a remedy for breach no other remedy is available**
>
> This assumption was defined by Brett MR in *Bailey v Bailey* (1884) 13 QBD 855 at 859 as follows:
>
> > It is an old and well-known rule of construing statutes that when a special remedy is given for the failure to comply with the directions of the statute that remedy must be followed, and no other can be supposed to exist.

The authors went on to note that "[a]s always, a contrary intention may displace the presumption…"

39 Domino's submitted that while the rule in *Pasmore* is one of broad application, it has been repeatedly applied in the context of the enforcement of entitlements under industrial awards. In ***Josephson*** *v Walker* [1914] HCA 68; (1914) 18 CLR 691, at 695, 697 (Griffith CJ), and 700-702 (Isaacs J), (Power J agreeing) the rule was applied in the context of enforcement of entitlements under an industrial award made under the *Industrial Arbitration Act 1912* (NSW). In that case Mr Walker sought a declaration in the Supreme Court of NSW in relation to unpaid wages due pursuant to certain industrial awards. Mr Josephson demurred to the declaration on the ground that the Supreme Court of New South Wales had no jurisdiction to entertain the cause of action.

40 Isaacs J said the following (at 700-701) as follows:

> It is an action to enforce payment of moneys due to the plaintiff, not by virtue of a contract, express or implied, but by virtue of a statutory obligation….
>
> …the present case is avowedly not based on contract at all. For a considerable time wages were paid and accepted as correct on a lower basis than, as is now considered

> by the plaintiff, the award attaches to the class of work done. And the unpaid balance is claimed as due by virtue, not of a common law contract, but of the statutory obligation which subsists notwithstanding any agreement to the contrary – no man being capable under the Statute of contracting himself out of his rights or obligations in this respect. The right claimed is a new right. It is a right which was unknown before to the law: a right to receive from an employer more than was bargained for. Parliament has on the ground of public policy found that that is a just and a necessary right. But it is a new one. And in the same section we find that Parliament has also enacted a new and special mode of enforcing that right. If the right had been simply created and no specific method of enforcement had been pointed out, the existing law itself would have provided a method through any Court already invested with jurisdiction to determine a claim of that nature (*Doe d. Bishop of Rochester v Bridges*). But a specific method having been created, it becomes a question whether that method is exclusive or not. That depends, not upon any rigid rule but upon the intention of Parliament appearing from the Act.
>
> *Prima facie,* where the same Statute creates a new right and specifies the remedy, that remedy is exclusive. The natural presumption to begin with is that Parliament in creating the novel right attaches to it the particular mode of enforcement as part of its statutory scheme. To that extent the enactment is a code. *Pasmore's Case* (1898) A.C. 387 is the leading authority.

41 At 701-702 Isaacs J said:

> But on examination of the legislation, the legislative intention may be found to be different. In *Brain v Thomas* 50 L.J.Q.B. 662 at 663 Lord Selborne LC, in speaking of a rule on conduct made under a certain Statute, said: "…The ground is said to be that where a Statute creates an offence, and defines particular remedies against the person committing that offence, primâ facie the party injured can avail himself of the remedy so defined, and no other. I see no reason to call that rule in question. But it must be examined with reference to the terms in which the statute deals with the subject."
>
> So that the terms of this Statute must be looked at…. If the fair reading of the Statute leads to the view that Parliament intended to create the right absolutely and independently of any specific form of remedy, the respondent's action is well brought. If on the other hand the proper construction is that the right and the remedy are inseparable, that they are combined and essential parts of a new scheme of public policy, then the action is wrongly conceived and the demurrer is right.

42 Domino's argued that in *Byrne* the High Court took the same approach to construing the operation of the *Industrial Relations Act 1988* (Cth) (the **IR Act**) as it took in 1914 to the construction of the *Industrial Arbitration Act 1912* (NSW). In *Byrne* at 420 the plurality said:

> A right to the payment of award rates is imported by statute into the employment relationship, which is contractual in origin, and, express promise apart, it is only in that sense that it can be said that award rates are imported into the contract of employment. The award regulates what would otherwise be governed by the contract. But award rates are imported as a statutory right imposing a statutory obligation to pay them. The importation of the statutory right into the employment relationship does not change the character of the right.

Domino's noted that the plurality said (at 426) (in relation to whether the appellants in *Byrne* could establish the existence of a cause of action for damages for breach of statutory duty

consequent upon a breach of the relevant award) that "as a matter of construction, awards cannot in our view be regarded as conferring private rights enforceable by way of an action for damages. When regard is had to the enforcement mechanism provided by the Act, the situation is even plainer."

43 It also relied on the remarks of McHugh and Gummow JJ in *Byrne* at 456:

> Counsel for the respondent referred to the long line of authority propounding the general rule that, where a statute creates an obligation and enforces performance in the specified manner, performance is not to be enforced in any other manner. In *Josephson v Walker*, this Court applied that reasoning to the construction of the *Industrial Arbitration Act 1912* (NSW). Section 49 of that statute created procedures for enforcement of obligations imposed on employers by an award. The Court held an action did not otherwise lie at general law for recovery by the employee of the difference between wages paid under the contract of employment and those payable under an award. This was because the legislation did not make the statutory rate of wages part of the contract of employment; rather, a new right was created with an inseparable new remedy. Their Honours pointed out that, upon an examination of the particular statute, it might be found that the legislative intention was different. Thus the intention, as one would expect, was that of the Parliament not of the body making the award, in that case the New South Wales Court of Industrial Arbitration.
>
> (Citations omitted.)

44 Further, Domino's relied on *Construction, Forestry, Mining and Energy Union v* ***Gordonstone*** *Coal Management Pty Ltd* [1997] FCA 1014; (1997) 78 FCR 437 (Burchett J), in which the applicant brought an application for an interlocutory injunction to restrain the respondent employer from contravening a clause of an industrial agreement, certified under the *Workplace Relations Act 1996* (Cth) (the **WR Act**), a predecessor to the FW Act. Burchett J held that the WR Act did not contain a power to order an interlocutory injunction, and that the general power to order injunctive relief in s 23 of the FCA was not a source of power for such relief in relation to an alleged contravention of a certified agreement. In effect his Honour held (at 441) that the only remedies for enforcement of rights under a certified agreement were those in the WR Act, citing *Josephson* and *Byrne*. His Honour concluded that the Court had no jurisdiction to grant such interlocutory relief.

45 Domino's accepted the applicant's contention that the FW Act is in different and broader terms than the industrial legislation considered in *Josephson* and *Byrne*, but said that Parliament's intention was to provide an additional armoury for contraventions of the FW Act, for example by allowing the recovery of interest on late payment of award entitlements, a power to grant an injunction, a power to enforce award entitlements against a person involved in a contravention of a civil remedies provision, and more recently to provide a direct cause of action against a

franchisor. It said that the FW Act comprises a code in relation to the enforcement of entitlements under an award and no other cause of action is available. On its argument the applicant and group members could only seek to recover their Award entitlements through a proceeding under the FW Act, that is, an action under ss 539 and 545 for a contravention of s 45, and they could not by a "sidewind" use the ACL to get around or supplement those rights or mode of enforcement.

46 Domino's also argued that the reasoning in *Josephson* and *Gordonstone* applies to the applicant's claim for a declaration of a contravention of s 18 of the ACL, which does not include a claim for damages. Ultimately it said that the applicant and group members are precluded "in absolute terms" from bringing the present proceeding, including the application for declaratory relief.

The loss of opportunity claim

47 Domino's submitted that the pleading of the loss of opportunity claim in paragraph [64] is deficient. In the particulars to paragraph [64] the applicant claims to have suffered the loss of his opportunity to pay for the goods and services he needed or wanted, or to pay for goods of superior quality than those which he in fact bought. He says that those goods and services included items for the applicant's infant son born in 2016 and for the maintenance and repairs of a 1998 Toyota RAV4 which he owned.

48 It argued, first, that the provision of particulars cannot cure the gap arising from the applicant's failure to properly plead loss or damage as a material fact, citing *Bond Corp Pty Ltd v Thiess* (1987) 14 FCR 215 at 222-3; (1987) 71 ALR 615 (French J (as his Honour then was)). Second, it said that the loss of opportunity claim is opaque and embarrassing and ought be struck out. It cited *Sellars* at 347 where Mason CJ, Dawson, Toohey and Gaudron J explained the elements of a loss of opportunity claim under s 82 of the TPA, which remarks apply equally to a claim under s 236 of the ACL. The plurality said (at 348):

> In the context of contraventions of s 52(1) in the form of misleading conduct constituted by misrepresentations, acts done by the representee in reliance upon the misrepresentations amount to a sufficient connexion to satisfy the concept of causation. And, if those acts result in economic or financial loss, it will ordinarily be recoverable under s 82(1). So, in a case such as the present, the applicant is entitled to recover "a sum representing the prejudice or disadvantage [the applicant] has suffered in consequence of his altering his position under the inducement" (citation omitted).
>
> The prejudice or disadvantage which the respondents suffered in the present case was the loss of the opportunity or chance of securing commercial benefits which entry into the Pagini agreement and completion of it would have brought. The lost opportunity

> or chance, assuming it to have value, as a form of economic loss. The question, therefore, is: how is the value of that lost opportunity or chance to be measured?

49 Domino's contended that the FASOC was required but failed to:

(a) identify the opportunity that was lost. It asserts that all the particulars do is provide a past hypothetical that the applicant would have spent additional money on extra consumables or better quality consumables, which is insufficient;

(b) that if the applicant had that extra money he could have and would have spent that money on those consumables;

(c) if he obtained that extra money today, he can no longer buy those consumables, that being the "lost opportunity"; and

(d) that opportunity had some compensable value, being more than negligible.

50 It also contended that the loss of opportunity claim is not available to the applicant because any such claim could be included in a claim for compensation under the code in the FW Act.

Consideration

51 I am not persuaded that it is appropriate to strike out the pleading of loss and damage in [63] and [64] of the FASOC.

The application of the pleadings principles

52 At least in relation to the loss and damage pleading, the general principles in relation to the adequacy of pleadings on which Domino's relied are not central to Domino's submissions.

53 At the core, Domino's submissions regarding the loss and damage pleading revolved around two related contentions. It argued that:

(a) the applicant and group members could not show that they suffered loss or damage because their ability to recover any unpaid entitlements under the Award from their employers, the Franchise Operators, has not been damaged or lost, as they have the ability to commence a proceeding under the FW Act for contravention of the Award and for compensation if they so choose. Based on that, Domino's submitted that paragraphs [63] and [64] do not clearly articulate the economic interest(s) of the applicant and group members that are alleged to have been lost or damaged, and does not plead material facts to show how such economic interest(s) have been lost or damaged; and

(b) the FW Act constitutes an exclusive code in relation to the enforcement of entitlements under an award, which operates to preclude the applicant and group members from bringing a claim for loss or damage under s 236 of the ACL for contravention of s 18.

54 In response, the applicant did not dispute that he and the group members have rights to bring a proceeding under the FW Act to seek a finding of contravention of s 45 against the relevant Franchise Operator under s 539 and an order for compensation under s 545. The applicant accepted the existence of such rights. Rather, the applicant said that the availability of remedies against their employer under the FW Act (and/or against Domino's as an accessory), did not preclude them from bringing a claim for damages against Domino's under the ACL for misleading or deceptive conduct. The applicant submitted that to succeed in an action under the ACL there is no requirement for him to show, and therefore to plead, that his rights (and those of the group members) to recover any unpaid Award entitlements through an action under the FW Act have somehow been damaged or lost.

55 Boiled down, the differences between the parties in relation to the loss and damage pleading, are not differences based in the application of the general principles referred to above. The real question is whether the claim under s 236 of the ACL, as pleaded, discloses a reasonable cause of action, see: r 16.21(e) of the Rules.

56 For the reasons I now explain, I am satisfied that the loss and damage pleading discloses a reasonable cause of action. Whatever other deficiencies there may be in the loss and damage pleading they are insufficient to justify striking out those parts of the FASOC.

The high bar that Domino's faced

57 Domino's faced a high bar in seeking that the loss and damage pleading, indeed the entire claim under s 236 of the ACL, be struck out on that basis that it does not disclose a reasonable cause of action.

58 In *Wride v Schulze* [2004] FCAFC 216 at [25]-[26] (Spender, Tamberlin and Bennett JJ), the Full Court explained that for the purpose of a strikeout application a "reasonable cause of action" means "one which has some chance of success if regard is had only to the allegations and the pleadings relied on by the applicant." Their Honours endorsed the statement of principles in ***Allstate Life*** *Insurance Co v Australia & New Zealand Banking Group Ltd* (unreported, Beaumont J, 13 September 1994), cited with approval by Lindgren J in *National*

Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd (1995) 132 ALR 514 at 529, as follows:

> (1) A 'reasonable cause of action' means one with some chance of success if regard be had only to the allegations in the pleadings relied upon by the claimant; in such a case, the claim cannot be struck out: *Davey v Bentinck* [1893] 1 QB 185.
>
> (2) The mere fact that the case appears to be a weak one is not of itself sufficient to justify the striking out of the action: cf *Wenlock v Moloney* [1965] 1 WLR 1238.
>
> (3) Normally, the power to strike out should be exercised only in plain and obvious cases, where no reasonable amendment could cure the alleged defect: cf *Hodson v Pare* [1899] 1 QB 455.
>
> (4) It goes without saying that if a substantial case is involved in the claim, the power to strike out cannot be exercised.
>
> (5) Where a point of law has to be decided, and the judge is satisfied that this can be done by him appropriately, thereby avoiding the necessity of, and expense in going to trial, he is entitled to determine the point: cf Williams& Humbert v W & H Trade Marks [1986] AC 368.'

59 Having regard to these principles it is generally accepted that the power to strike out a pleading under r. 16.21 of the Rules "must be exercised with caution and should only be exercised in the plain and obvious case": *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* [2011] FCA 1126; (2011) 203 FCR 293 at [10] (Kenny J). In that case her Honour referred with approval to *Energex Limited v Alstom Australia Limited* [2005] FCAFC 215; (2005) 225 ALR 504 at 512 [28] (French J (as his Honour then was), Hely and Merkel JJ) where the Full Court said that, similar to the power to order summary judgment, the power to strike out a pleading where it will lead to a summary disposition of the proceedings "should not be exercised unless it is obvious that there is no real question to be tried."

60 Recently, the Victorian Court of Appeal in *Uber Australia Pty Ltd v* ***Andrianakis*** [2020] VSCA 186 (Niall, Hargrave and Emerton JJA) considered an application for an order under r 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) to strike out the statement of claim as either not disclosing a cause of action or being embarrassing. Their Honours said (at [35]):

> Uber's contentions on ground 1 fail to grapple with the high hurdle it must cross, and the low bar confronting the plaintiff. When a defendant contends that a statement of claim should be struck out because it does not disclose a cause of action it is necessary for a defendant in the position of Uber to establish that it would be futile to allow the statement of claim to go forward, because it raises a claim that has no real prospect of success in the sense of being 'fanciful'. It follows that, where there is a contentious or debatable point of law which arises on a pleading, it is usually inappropriate for a trial

> judge or the Court of Appeal to determine the issue on a strike-out application, particularly where the answer may depend upon the factual context.

61 While Domino's submissions are not without merit, it did not get over the substantial hurdle it faced in seeking that the Court determine, at a preliminary stage, and without evidence as to the full factual context, the novel questions that arise in the case. The case raises debatable questions of law which are better resolved in the context of all the evidence rather than by reference to only the allegations and the pleadings. Domino's did not persuade me that it is plain or obvious that applicant has no real prospect of success in the sense of the claim under the ACL being "fanciful".

62 I now turn to deal with Domino's arguments in more detail but it should be kept in mind that I express these views only for the purpose of resolving the strikeout application. For the purpose of this application I need only be satisfied that there is a reasonable basis for the applicant's case. If it is necessary to deal with these or similar issues at trial my ultimate conclusion may be different.

Whether the FW Act is an exclusive code?

63 It is common ground that the FW Act creates the obligation for parties to an award to be bound by its terms, and provides specific mechanisms for obtaining orders in relation to contravention of an award and for compensation to be awarded in respect of loss or damage upon a finding of contravention. The FW Act provides as follows:

(a) section 45 provides that "a person must not contravene a term of a modern award";

(b) section 48(1) provides that a modern award covers an employee or employer if the award is expressed to do so. It is alleged that during the relevant period delivery drivers and in-store workers employed by the Franchise Operators were covered by the Award;

(c) item 2 of the table in section 539 in Pt 4-1, Div 2, provides that s 45 is a civil remedy provision and that, amongst other persons, an employee may apply to specified courts, including this Court, for orders in relation to a contravention or proposed contravention of the section;

(d) section 540(1)(a) provides that an employee may apply for an order under Pt 4-1, Div 2 in relation to a contravention or proposed contravention of a civil remedy provision, only if the employee is affected by the contravention or will be affected by the proposed contravention;

(e) section 544 provides that, subject to some exceptions which are not relevant in this case, a person may only apply for an order in relation to a contravention of a civil remedy provision if the application is made within six years after the day on which the contravention occurred;

(f) s 545(1) provides that this Court "*may make any order the court considers appropriate* if the Court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision" (emphasis added);

(g) s 545(2)(b) relevantly provides, without limiting subsection (1), that orders that this Court may make include "an order *awarding compensation for loss* that a person *has* suffered *because of* the contravention" (emphasis added);

(h) s 545(5) provides that a court must not make an order in relation to an underpayment that relates to a period that is more than six years before the proceedings commenced;

(i) s 547 provides that where a person is required to pay, whether on their own behalf or on behalf or another, an amount to a person by an order (other than a pecuniary penalty order) made under Div 2, the Court must include, on application, an amount of interest on the sum ordered, unless good cause is shown to the contrary;

(j) s 550 in Div 4 provides that a person who is involved in the contravention of a civil remedy provision, such as s 45, is taken to have contravened that provision. That is, it permits proceedings to be brought against an accessory; and

(k) since 15 September 2017, ss 558A and 558B of the FW Act have provided a right by an employee to enforce payment of award entitlements, among other civil remedies, owed by a franchisee by proceeding directly against a head franchisor or relevantly related holding company.

64 Domino's contention that the FW Act comprises a comprehensive code for the enforcement and recovery of entitlements under an award and that no claim in relation to award entitlements is available to the applicant and group members under the ACL is not without force. It is, however, at least reasonably arguable that a claim under the ACL is also available to the applicant and group members.

65 *First*, *Byrne* does not directly relate to the position in the present case. It concerned whether the terms of an award were to be implied into a contract of employment, such that the right to payment of wages payable under an award gave rise to a private right to sue for damages for breach of the contract, and whether breach of the award gave rise to a claim for damages for a

breach of statutory duty. It did not deal with the availability of a claim under s 82 of the TPA (and by analogy s 236 of the ACL) for loss and damage suffered because of misleading or deceptive conduct. Unlike the position in *Josephson*, *Byrne* and the other authorities on which Domino's relied, the question in the present case is not whether the FW Act operates to exclude rights to relief under the common law, such as for damages for breach of a contract of employment or damages for breach of a statutory obligation, but whether on its proper construction the FW Act operates to preclude rights to relief otherwise available under the TPA (and its successor the ACL).

66 The presumption in *Pasmore* is closely related to the principle that where a statute creates a new right or obligation without specifying the remedy or means of enforcement, the common law will supply one: *Doe d Rochester (Bishop) v Bridges* (1831) 1 B&Ad 847 at 859; 109 ER 1001 at 1006 (Lord Tenterden CJ for the Court). *Josephson* and *Byrne* refer to the principle in *Pasmore* in the factual context of those cases which concerned the availability of causes of action in contract or tort. It is reasonably arguable that those authorities do not mean that the applicant and group members' claim under the ACL is precluded by the FW Act.

67 *Second*, Domino's argument boils down to the proposition that it is not open to bring a claim for loss and damage under s 236 of the ACL where the claim is somehow factually referrable to an alleged entitlement to unpaid amounts due under an award. But the FW Act does not state that it operates as an exclusive code. It does not, in terms, set up a regime under which the only means by which a party can obtain redress for a loss which is measured by reference to the gap between wages due under an industrial instrument and the amount they were actually paid, is under the FW Act. Nor does the FW Act state in terms that a person cannot commence an action under the ACL, against a person other than his or her employer, for such loss and damage.

68 When Parliament passed the FW Act in 2009 it should be taken to have been aware of the existence of other causes of action under other statutory regimes, including under s 82 of the TPA for misleading or deceptive conduct in contravention of s 52 of that Act. I express this view cautiously as the parties' submissions did not address these principles, but in my view Domino's argument that the FW Act operates to preclude relief otherwise available under the TPA (and the ACL) engages the principles of statutory construction relating to implied repeal, derogation or alteration of an earlier statute.

69 In ***Shergold*** *v Tanner* [2002] HCA 19; (2002) 209 CLR 126 at [34] (Gleeson CJ, McHugh, Gummow , Kirby and Hayne JJ) the Court cited with approval *Sarawati v The Queen* [1991] HCA 21; (1991) 172 CLR 1 at 17 (Gaudron J) where her Honour said:

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other: see *Butler v Attorney General (Vict)* (citation omitted).

70 At the time of enacting the FW Act this Court had jurisdiction for actions brought for compensation under s 82 of the TPA for loss and damage suffered by contravention of s 52, (which jurisdiction was maintained when analogous provisions were enacted in the ACL). A finding of inconsistency between the asserted code in ss 539 and 545 of the FW Act and the broad and remedial provisions in ss 52 and 82 of the TPA (at least in relation to claims of misleading and deceptive conduct where the loss is said to be related to underpayment of award entitlements), would lead to the implied repeal of the TPA provisions by necessary implication to the extent of the inconsistency: *Goodwin v Phillips* [1908] HCA 55; (1908) 7 CLR 1 at 7 (Griffiths CJ).

71 In the absence of express words there must be very strong grounds to support such an implication because there is a general presumption that the legislature intended that the provisions of both Acts should operate. The presumption that Parliament intended both statutes to operate is strong given that modern standards of parliamentary drafting are high: *United States v Jennings* [1983] 1 AC 624 at 643 (Lord Roskill, Lords Fraser, Scarman, Bridge and Brightman agreeing). In *Shergold* at [27] the Court said that it is to be expected that Parliament will clearly state its will "where the Parliament, by redefining the jurisdiction of a federal court, withdraws rights and liabilities from what otherwise would be the engagement of Ch III".

72 The principles relating to incompatibility of earlier statutes with later enactments were explained in *Shergold* by reference to ***Butler*** *v Attorney-General (Victoria)* [1961] HCA 32; (1961) 106 CLR 268. It is necessary to consider whether the provisions of the two statutes could "stand together" or "live together", or were in "direct conflict", or whether they were clearly and indisputably contradictory displaying such repugnancy that they could not be reconciled: *Butler*, Kitto J at 280, Taylor J at 285, Windeyer J at 290.

73 I do not consider the express words of the FW Act reveal a Parliamentary intention to somehow limit the operation of ss 52 and 82 of the ACL to the extent of any inconsistency or where there was relevant overlap. I consider it to be reasonably arguable that the fact that the relief available for a contravention of s 45 under ss 539 and 545 of the FW Act may in some circumstances overlap to an extent with relief available under ss 52 and 82 of the TPA does not result in a clear and indisputable contradiction between the provisions (and by analogy does not result in a contradiction between the FW Act and ss 18 and 236 of the ACL).

74 *Third*, in construing the proper interaction between the FW Act and the TPA (and with the ACL) it should be kept in mind that at the time of enactment of the FW Act the breadth of the protective and remedial function under ss 52 and 82 was well-recognised: see, for example, ***Marks*** *v GIO Australia Holdings* [1998] HCA 69; (1998) 196 CLR 494.

75 In *Marks* the High Court considered s 82 of the TPA, the then equivalent to s 236. Gummow J said the following (at [99]-[103]):

> [99] The TP Act is a fundamental piece of remedial and protective legislation which gives effect to "matters of high public policy". It is to be construed so as "to give the fullest relief which the fair meaning of its language will allow".
>
> [100] Section 82 applies across a spectrum of diverse legal norms created by Pts IV and V. A number of these will have no direct analogue in the general law. Given the objective of the legislation that is not surprising. However, it does emphasise the need for caution against treating a provision such as s 82 "as a mere supplement to or eking out of" pre-existing law. To the contrary, as Mason P put it, the court should not be "fearing to move far from the familiar coastline of traditional common law and equitable approaches".
>
> [101] In *Janssen-Cilag Pty Limited v Pfizer Pty Limited*, Lockhart J said:
>
> > Section 82 is the vehicle for the recovery of loss or damage for multifarious forms of contravention of the provisions of Pts IV and V of the [TP] Act. It is important that rules laid down by the courts to govern entitlement to damages under s 82 are not unduly rigid, since the ambit of activities that may cause contravention of the diverse provisions of Pts IV and V is large and the circumstances in which damage therefrom may arise will vary considerably from case to case.
> >
> > What emerges from an analysis of the cases (and there are many of them) is that they do not impose some general requirement that damage can be recovered only where the applicant himself relies upon the conduct of the respondent constituting the contravention of the relevant provision.
> >
> > Also, a perusal of the provisions of Pts IV and V, the contravention of which gives rise to an entitlement to an applicant for compensation for loss or damage, points to the conclusion that applicants may claim compensation when the contravener's conduct caused other persons to act in a way that led to loss or damage to the applicant...

> [102] These considerations, reflecting the apparent scope and purpose of the statute, militate against the presence of any legislative intention that before the court comes to assess the amount for which applicants are to be compensated under s 82 it first must identify any relevant general common law rules or analogies, understand the reasons that led to their development, and then seek to adapt or adopt them consistently with the scope and purpose of the legislation.
>
> [103] As I have indicated earlier in these reasons, what was said by this Court in *Gates* (and *Kizbeau Pty Ltd v W G & B Pty Ltd*) does not determine that the measure of compensation which is recoverable in an action under s 82 is confined by analogies with tort or otherwise. The measure of damages recoverable in actions of a varied nature for which s 82 provides is not to be determined on the basis that the appropriate guide in most cases will be found by asking what would have been the measure if the common law did what it does not do, namely treat as a tort any facts which happen to give rise to an action under s 82. Analogy, like the rules of procedure, is a servant not a master.
>
> (Citations omitted.)

76 The plurality in *Marks* (McHugh, Hayne and Callinan JJ) expressed similar views (at [38]) as follows:

> It can be seen, therefore, that both ss 82 and 87 require examination of whether a person has suffered (or, in the case of s 87, is likely to suffer) loss or damage "by conduct of another person" that was engaged in the contravention of one of the identified provisions of the Act. That inquiry is one that seeks to identify a causal connection between the loss or damage that it is alleged has been or is likely to be suffered and the contravening conduct. But once that causal connection is established, there is nothing in s 82 or s 87 (or elsewhere in the Act) which suggests either that the amount that may be recovered under s 82(1), or that the orders that may be made under s 87, should be limited by drawing some analogy with the law of contract, tort or equitable remedies. Indeed, the very fact that ss 82 and 87 may be applied to widely differing contraventions of the Act, some of which can be seen as inviting analogies with torts such as deceit (eg, s 52) or with equity (eg, s 51AA) but others of which find no ready analogies in the common law or equity, shows that it is wrong to limit the apparently clear words of the Act by reference to one or other of these analogies.

77 It can be accepted, as Domino's contended, that those passages were concerned with the measurement of damages, not with identification of the injury or damage suffered. Even so, they indicate the breadth of the remedial function of s 82, and thus of s 236 of the ACL, across a spectrum of diverse legal norms, including the prohibition on misleading and deceptive conduct in s 18. If s 82 (and by analogy s 236) is construed "so as to give the fullest relief which the fair meaning of its language will allow" it is reasonably arguable that it permitted employees in the position of the applicant and group members to bring an action to recover loss and damage from a franchisor (Domino's) which is alleged to have made misleading or deceptive representations to their employers (the Franchise Operators), in reliance upon which

the Franchise Operators did not pay them their entitlements under the applicable industrial instrument.

78 *Fourth*, the FW Act indicates that Parliament was aware of the existence of other causes of action and other regimes for recovery of compensation, and the reality that the operation of the different regimes may intersect and overlap. Pt 6-1, Div 3, is headed "Preventing multiple actions". Sections 725 and 732 in that Division are concerned with, among other matters, claims for unlawful termination of employment. Relevantly, they provide that where an application or complaint in relation to unfair dismissal has been made under another law of the Commonwealth or a law of a State or Territory, such as anti-discrimination legislation, the applicant is forced to elect between proceeding under the FW Act or under the other law. The FW Act made explicit provision when an election was required. There is no similar provision requiring a claimant to elect between proceeding under ss 539 and 545 for a contravention of s 45 of the FW Act or an action under the TPA.

79 It might be argued that Parliament did not include any express provision in the FW Act to:

(a) prohibit a person from obtaining redress under the TPA for a loss which is measured by reference to the gap between wages due under an industrial instrument and the amount they were actually paid; or

(b) require a person bringing a claim for losses referrable to the gap between wages due under an industrial instrument and the amount they were actually paid to elect between proceeding under the FW Act or the TPA,

because it did not foresee any intersection between the operation of the two Acts. In my view any such argument would not be a strong one given the broad protective and remedial purposes of ss 52 and 82 of the TPA.

80 Such an argument would also lack force because s 53B of the TPA (like its successor in s 31 of the ACL) expressly prohibited misleading or deceptive conduct in relation to aspects of employment. It provided:

> **Misleading conduct in relation to employment**
>
> A corporation shall not, in relation to employment that is to be, or may be, offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.

At least insofar as offers of employment are concerned, in enacting the FW Act Parliament enacted legislation which permitted some overlap with the TPA in the broad sphere of protections for employees, and the FW Act does not expressly exclude the operation of s 52 or 53B of the TPA.

81 *Fifth*, and relatedly, when Parliament enacted the CCA (including the ACL) in 2010 it should be taken to have been aware of the existence of other causes of action under other statutory regimes, including under the FW Act. As I have said, there is a general presumption that Parliament intended the causes of action under the ACL to operate alongside the causes of action available under other statutory regimes.

82 Having regard to the text and context of ss 18 and 236 of the ACL and their broad remedial and protective purposes it is reasonably arguable that Parliament did not intend that their operation should be limited by the operation of ss 45, 539 and 545 of the FW Act.

83 It is relevant that where Parliament intended to narrow or limit the operation of the CCA or the ACL it did so expressly. For example, s 131A(1) of the CCA provides that, with the exception of the linked credit provisions, the ACL does not apply as a law of the Commonwealth in relation to the supply or possible supply of financial services or of financial products. Rather than ss 18 and 236 of the ACL applying to any misleading or deceptive conduct in relation to such supply, such conduct is regulated by ss 1041H and 1041I of the *Corporations Act 2001* (Cth) and ss 12DA and 12GF of the *Australian Securities and Investments Commission Act 2001* (Cth). Similarly, s 137C(1) of the CCA expressly provides that a claim for damages cannot be brought under s 236 of the ACL where the conduct constitutes a contravention of Part 2-1 (s 18) or Part 3-1 and the loss or damage is, or results from, death or personal injury. Yet nothing in the CCA or the ACL expressly states that to the extent that the relationship between employer and employee and the rates of pay and terms and conditions of employment of employees is governed by the FW Act, the protections provided by the ACL do not apply.

84 *Sixth*, it is significant that the proceeding seeks a declaration that Domino's conduct contravened s 18 of the ACL. That claim does not depend upon the applicant establishing that he has suffered loss or damage nor does it require the applicant to prove a contravention of s 45 of the FW Act.

85 Domino's argued that the applicant and group members are precluded "in absolute terms" from bringing an application for declaratory relief under the ACL, but it is not plain or obvious why

that is so. Domino's sought to rely on the reasoning in *Josephson*, *Byrne* and *Gordonstone* to argue that the general power in s 21 of the FCA to make binding declarations of right is not a source of power to make a declaration of contravention of s 18 of the ACL in relation to an alleged contravention of an award made under the FW Act. That submission, however, omitted reference to s 564 of the FW Act which provides:

> To avoid doubt, nothing in this Act limits the Federal Court's powers under section 21, 22 or 23 of the Federal Court of Australia Act 1976.

86 The Explanatory Memorandum for the Fair Work Bill 2008 (**EM**) said in respect of s 564 (see: paragraph 2213 of the EM) that it:

> …is intended to address authorities which have held that federal industrial laws exhaustively contain the remedies available to enforce those laws. The Federal Court will, for example, be able to make declarations relating to the meaning of industrial instruments made under the Bill. It will also be able to grant injunctions (including interim or interlocutory injunctions) in matters arising under the Bill, even where not granted under Part 4-1 (Civil remedies).

87 Section 564 and the EM were not the subject of submissions but, keeping that caution in mind, it seems likely that in enacting the provision Parliament was referring to authorities such as *Josephson*, *Byrne* and *Gordonstone*. Parliament has expressly provided that the Court's power under the FCA to grant declaratory relief is *not* limited by the FW Act.

88 In *Shergold* at [34] the Court said "that a law of the Commonwealth is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably.": see also *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; (2003) 211 CLR 476 at [32] (Gleeson CJ), [72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Pt Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36*;* (2015) 258 CLR 1 at [29] (French CJ, Kiefel (as her Honour then was), Bell, Gageler and Gordon JJ). In enacting s 564 of the FW Act, Parliament turned its attention to the question of the Court's jurisdiction under s 21of the FCA and expressly said that the FW Act does not limit the Court's power to grant declaratory relief.

89 The present case involves novel and debatable questions as to the proper interaction between the causes of action and relief available under the FW Act and those that are, or at least may be, available under the ACL. There is a reasonable basis to argue that the FW Act does not operate as an exclusive code such that it is not open to the applicant and group members to make a claim for loss and damage under s 236 of the ACL suffered because of misleading or deceptive conduct in contravention of s 18. I am therefore not persuaded that the pleading does

not disclose a reasonable cause of action. It is also relevant that the case involves claims of loss and damage suffered by a large number of group members, which claims are likely to be substantial in aggregate: *Allstate Life* factor (4). In such circumstances it would not be appropriate to strike out the claim under s 236.

Whether the applicant has adequately pleaded loss and damage

90 Domino's submissions focussed on the proposition that because the applicant and group members have a right to bring an action under the FW Act against the Franchise Operators (and perhaps also against Domino's as an accessory) for any unpaid Award entitlements, which right remains on foot, they cannot demonstrate that they have suffered loss or damage. Again, this is not an argument based in the application of general pleadings principles but a contention that the pleading should be struck out as it does not disclose a reasonable cause of action. That requires Domino's to show that it would be futile to allow the claim to go forward as pleaded, because it raises a claim that has no real prospect of success in the sense of being 'fanciful': *Andrianakis* at [35]. Again, Domino's failed to get over that high bar.

91 Domino's made too much of the contention that a claim for underpaid award entitlements is a "statutory debt". The High Court in *Byrne* did not use the phrase "statutory debt" at any point. Rather, the plurality described the award entitlements of the appellant baggage handlers as a debt "which owed its origins to the statute and not to contract" (at 425-6). That can be accepted. It can also be accepted that the same can be said about the source of any entitlements the applicant and group members may have under the Award in the present case.

92 The plurality in *Byrne* should not, though, be understood to have been characterising under or unpaid award entitlements as a "statutory debt" in the sense that term is used to describe actions for debt recovery in other regimes where mere service of proof of debt will suffice, see: *Builders Licensing Board v Inglis* (1985) 1 NSWLR 592 (Kirby P (as his Honour then was), Samuels and Mahoney JJA). His Honour (at 597) cited with approval Maitland in *The Forms of Action at Common Law* (1948) where the author said that an action of debt is "an action for a fixed sum of money". His Honour also said that an action for debt "serves for the recovery, for example, of statutory penalties and moneys adjudged by a court to be due". I do not consider an action seeking an order for compensation under s 545 of the FW Act to be an action for a fixed sum of money.

93 It also bears mention that the plurality in *Byrne* (at 424), in explaining the decision in *Mallinson*, said that there was no basis, as a matter of statutory construction, for concluding

that Parliament intended that an action for common law damages (whether for breach of contract or in tort) was available for breach of the statutory obligation to pay rates of pay prescribed by the *Conciliation and Arbitration Act 1904* (Cth). One should be cautious before exporting the question of construction of that Act across to different industrial Acts with different words.

94 The plurality in *Byrne* said (at 424) that:

> A cause of action for damages for breach of statutory duty which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection.

When the plurality's discussion of the decision in *Mallinson* is read in context the plurality should not be taken to have said that all claims relating to underpayment of awards are actions in debt. It is a question of construction of the particular Act which provides a remedy for injury caused by breach of an obligation relating to an award.

95 A similar issue attends Domino's reliance on *Josephson*. In that case Griffiths CJ said at 697:

> It may be that the rule is not one of universal application, but only amounts to a very strong presumption which may be rebutted if there are sufficient grounds for thinking that the language of the Act itself shows that the legislature intended that the mode of enforcing the obligation should not be the only mode, but that the party should be also entitled to have recourse to any ordinary means of enforcing it under the general law.

To similar effect, Isaacs J said at 701:

> And in the same section we find that Parliament has also enacted a new and special mode of enforcing that right. If the right had been simply created and no specific method of enforcement had been pointed out, the existing law itself would have provided a method through any Court already invested with jurisdiction to determine a claim of that nature (Doe d. Bishop of Rochester v Bridges). But a specific method having been created, it becomes a question whether that method is exclusive or not. That depends, not upon any rigid rule but upon the intention of Parliament appearing from the Act.

96 At least arguably, the vice in Domino's submissions regarding *Byrne* and *Josephson* is that it seeks to reason from the terms of an obligation in respect of an industrial award under one industrial Act to the existence of a general principle applicable to obligations in respect of awards under other industrial Acts. It is reasonably arguable that Domino's approach pays insufficient attention to the words of both *Josephson* and *Byrne* which: (a) leave open the possibility that a statute will, whether by express words or implication, leave open the availability of a different mode of recovering losses suffered by non-payment of entitlements

under an award (the **first error**); and (b) relate to the different question of whether or not a breach of an obligation in respect to an award under industrial legislation can be enforced by way of a cause of action at common law (the **second error**).

97 Looking to the first error, it is reasonably arguable that Domino's paid insufficient regard to the text of ss 539 and 545 of the FW Act which are different in terms to the statutes the subject of *Josephson* and *Byrne*.

98 *Byrne* was relevantly concerned with s 178 of the IR Act. Section 178(6) of the IR Act provided:

> Where, in a proceeding against an employer under this section, it appears to the court concerned that an employee of the employer has not been paid an amount that the employer was required to pay under an award or order, **the court may order the employer to pay to the employee the amount of the underpayment**.
>
> (Emphasis added.)

99 Section 179(1) of the IR Act provided:

> Where an employer is required by an award or order to pay an amount to the employee, the employee may, not later than six years after the employer was required to make the payment to the employee under the award or order, **sue for the amount of the payment in the Court or in any court of competent jurisdiction**.
>
> (Emphasis added.)

100 Sections 178 and 179 referred to the right to sue for and obtain an order for payment of "the amount of the underpayment" or "amount of the payment". That stands in contrast to the relevant provisions of the FW Act.

101 Section 539 of the FW Act provides that, for each civil remedy provision, prescribed persons, including an employee, may apply to prescribed courts, including this Court, for orders in relation to a contravention or proposed contravention of the relevant provision. Section 45 of the FW Act, which provides that a person must not contravene a term of a modern award, is a civil remedy provision (Item 2 in the table to s 539(2)).

102 Section 545 of the FW Act prescribes the orders that could be made by a prescribed court including in relation to underpayments. It relevantly provides:

> (1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.
>
> (2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:

…

(b) an order awarding compensation **for loss that a person has suffered** because of the contravention;

…

(3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:

(a) the employer was required to pay the amount under this Act or a fair work instrument; and

(b) the employer has contravened a civil remedy provision by failing to pay the amount.

(Emphasis added.)

103 Relevantly, before an employee may be entitled to an order for compensation under s 545 he or she must prove that his or her employment is covered by a modern award, and must satisfy the court that the respondent(s) to the proceeding has contravened a term of the award. If the Court is satisfied that the respondent has contravened the award, the court has power under s 545(1) to make any order it considers "appropriate" including, without limiting the generality of that, "awarding compensation for loss that a person has suffered because of the contravention".

104 The power to order compensation under s 545 is discretionary in nature and the width of the power leaves room for compensation which is less than full compensation for the loss suffered: *Dafallah v Fair Work Commission* [2014] FCA 328; (2014) 225 FCR 559 at [157] (Mortimer J); see also: *Qantas Airways Limited v* ***Gama*** [2008] FCAFC 69; (2008) 167 FCR 537; 247 ALR 273 at [94] (French J (as his Honour then was) and Jacobson JJ, Branson J agreeing). In *Gama* at [94], in the context of s 46PO(4)(d) of the *Human Rights and Equal Opportunity Act 1986* (Cth), which is relevantly analogous to s 545(2)(b) of the FW Act, French and Jacobson JJ said that damages for "compensation for any loss or damage suffered because of the conduct of the respondent" are "entirely compensatory".

105 Thus, the right to bring a proceeding under s 545 of the FW Act and, critically, the form of the remedy, is not the same as a right to sue for and obtain an order for payment of "the amount of the underpayment", provided in ss 178 and 179 of the IR Act. At the least it is reasonably arguable that it is not the same. It is appropriate to be cautious before construing *Byrne* as authority for the proposition that an action for compensation under the FW Act, upon a finding of contravention of a modern award is an action for a "statutory debt" or for a "fixed sum of money".

106 Looking to the second error, it is reasonably arguable that Domino's paid insufficient regard to the fact that the applicant and group members do not make a claim at common law, whether for breach of contract or in tort, based in a contravention of s 45 of the FW Act. As I have said, the applicant makes a different claim. He brings a claim under s 236 of the ACL for loss and damage suffered because of a contravention of s 18 of that Act, in circumstances where the factual matrix may also give rise to an entitlement to compensation under the FW Act.

107 Once it is accepted that a claim for loss and damage under s 236 is available to the applicant and group members, I consider the pleading of loss or damage to be readily understandable. The applicant does not assert that his right or entitlement to bring an action under the FW Act has somehow been damaged or lost. Instead the applicant and group members allege that they have suffered loss and damage because, in reliance on Domino's representations and conduct, the Franchise Operators failed to pay them their pay and other entitlements under the Award as and when those entitlements fell due, and also because they suffered a loss of opportunity arising from that failure.

108 Domino's failed to come to grips with the applicant's argument that their loss and or damage was suffered as at the time that they were underpaid. I consider it to be plain that a worker, particularly a lowly paid pizza delivery driver or in-store worker, can be said to have suffered financial loss and damage if they are not paid their award wages or afforded their award conditions when they were due, particularly when on the applicant's case they were payable between approximately three and five and a half years ago. Domino's submission that the claim is really one of delay in payment of award entitlements, and that the fact that the applicant and group members have not been paid those entitlements does not mean that they will not be paid them, is spurious and ignores the reality of their position. The reality is that in the absence of bringing some form of legal proceeding they will never receive their alleged entitlements. The applicant has chosen to pursue his and the group members' losses through a proceeding under the ACL rather than under the FW Act which (if such a claim is available on a proper construction of the FW Act and the ACL) is his right.

The loss of opportunity claim

109 Domino's contention that the pleading should be struck out because the applicant and group members cannot show loss and damage when their rights to claim their unpaid Award entitlements are intact, also lacks force because the loss and damage alleged is not co-extensive with the alleged underpaid Award entitlements. The applicant and group members claim loss

and damage suffered through loss of the opportunity to spend the amount they were underpaid on things they needed or wanted, or to pay for goods of superior quality than those which they in fact bought. This alleged loss of opportunity occurred at the time that the applicant would have but did not apply the money he would have had in hand, had he been paid the required amounts under the Award, to the consumables and services that he would have purchased at the prices that then prevailed for those goods and services.

110 What the applicant would have spent the unpaid amount on, and whether that lost opportunity has some compensable value being more than negligible, may depend on the level of underpayment, which is a matter for further particularisation and evidence closer to trial. Presently there is nothing to show the amount by which the applicant alleges he was underpaid on a weekly or monthly basis, or in total. This will need to be addressed in time, but for the present I would not conclude that any such loss was negligible. It would not be appropriate to strike out the applicant's loss of opportunity claim at this early stage.

111 Domino's contended that the loss of opportunity claim should be struck out on the basis that it is opaque and embarrassing. I do not accept that contention. It can be accepted that the applicant's claim for damages for loss of opportunity in paragraph [64] is set out in particulars rather than pleaded. But given the nature of the case and its history I expect that there will be further amendments to the statement of claim prior to the hearing, and this relatively minor issue can be addressed at that time.

112 Presently the pleading fulfils its main purposes of identifying the issues, disclosing an arguable cause of action and apprising Domino's of the applicant's case. Prior to trial I will direct the applicant to replead paragraph [64] so that the material facts in relation to his claim for loss of opportunity are properly pleaded and I will direct the provision of further particulars.

113 In relation to the loss of opportunity claim advanced on behalf of group members in paragraph [63] the situation is different. Whether any group member has such a claim will depend upon him or her establishing the elements of such a claim (as described in *Sellars*) having regard to their individual circumstances, and any such claim cannot be determined as part of the common questions. The particulars provided are scant but they cannot be developed without requiring group members to provide instructions to the applicant's solicitors regarding their individual circumstances. They are not required to do so, as class proceedings under the Part IVA regime in the FCA are intended to require little or no active involvement by class members: *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [40] (Gaudron, Gummow

and Hayne JJ); *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176 at [16] (Finkelstein J); *Thomas v Powercor Australia Ltd (No 1)* [2010] VSC 489 at [30] (Forrest J). It would not be appropriate to strike out paragraph [63] (which concerns group members' claims) on the basis that group member's claims are not fully pleaded or particularised at this stage.

114 Overall, I consider the loss and damage pleading fulfils its main purposes of ensuring that Domino's is on notice of the case it has to meet, avoiding surprise to Domino's, and disclosing a reasonable cause of action. To the extent that the pleading has deficiencies they can be addressed later through a variety of case management techniques which will avoid any unfairness to Domino's.

THE CAUSATION AND RELIANCE PLEADING

115 Causation in respect of the applicant's claim is pleaded at paragraphs [56] to [58] of the FASOC, which allege as follows:

> [56] In reliance on the Dominoids Representations and/or the Dominoids Opinion Representations, Dominoids:
>
> (a) employed workers including the applicant and other Award Workers to perform work in the Caboolture Store;
>
> (b) paid all Delivery Drivers and In-Store Workers employed by it, including the applicant and other Award Workers, the rates set out in the Agreements (as affected by the Award Deemed Base Rates) and afforded Delivery Drivers and In-Store Workers including the Applicant and Award Workers the terms and conditions of employment set out in the Agreements; and
>
> (c) did not pay or afford the applicant and Award Workers the rates of pay and terms and conditions of employment provided for in the Award, including, where applicable:
>
> (i) a 25% casual loading;
>
> (ii) evening work penalties;
>
> (iii) weekend penalties;
>
> (iv) public holiday penalties;
>
> (v) a meal allowance;
>
> (vi) a special clothing allowance;
>
> (vii) an excess travelling cost payment;
>
> (viii) a travelling time reimbursement payment;
>
> (ix) a kilometre-based delivery allowance; and

(x) minimum 3-hour shifts for casual employees.

Particulars

1. It is to be inferred that Dominoids relied on the Dominoids Representations and/or the Dominoids Opinion Representations by reason of the fact that it is inherently unlikely that the not fewer than 300 Franchise Operators who have been parties to Franchise Agreements during the Relevant Period (including Dominoids) each independently and simultaneously determined to pay the Delivery Workers and In-Store Workers the rates of pay contained in the Agreements (as affected by the Deemed Base Rates) and to afford Delivery Workers and In-Store Workers the terms and conditions of employment contained in the Agreements (as affected by the Deemed Base Rates) absent information and advice supplied to them by the Franchisor, Domino's, that the Agreements were binding on them and applied to Franchise Stores operated by them.

[57] In reliance on the MC Pizza Representations and/or the MC Pizza Opinion Representations, MC Pizza:

(a) employed workers including the applicant and other Award Workers to perform work in the Caboolture Store;

(b) paid all Delivery Drivers and In-Store Workers employed by it, including the applicant and other Award Workers, the rates set out in the Agreements (as affected by the Deemed Base Rates) and afforded Delivery Drivers and In-Store Workers including the Applicant and Award Workers the terms and conditions of employment set out in the Agreements; and

(c) did not pay or afford the Applicant and Award Workers the rates of pay and terms and conditions of employment provided for in the Award, including, where applicable:

(i) a 25% casual loading;

(ii) evening work penalties;

(iii) weekend penalties;

(iv) public holiday penalties;

(v) a meal allowance;

(vi) a special clothing allowance;

(vii) an excess travelling cost payment;

(viii) a travelling time reimbursement payment;

(ix) a kilometre-based delivery allowance; and

(x) minimum 3-hour shifts for casual employees.

Particulars

1. It is to be inferred that MC Pizza relied on the MC Pizza

> Representations and/or the MC Pizza Opinion Representations by reason of the fact that it is inherently unlikely that the not fewer than 300 Franchise Operators who have been parties to Franchise Agreements during the Relevant Period (including MC Pizza) each independently and simultaneously determined to pay the Delivery Drivers and In-Store Workers the rates of pay contained in the Agreements (as affected by the Deemed Base Rates) and to afford Delivery Drivers and In-Store Workers the terms and conditions of employment contained in the Agreements (as affected by the Deemed Base Rates) absent information and advice supplied to them by the Franchisor, Domino's, that the Agreements were binding on them and applied to Franchise Stores operated by them.
>
> [58] Because of the matters pleaded in paragraphs 56 and/or 57 above during the Relevant Period, the applicant was paid the rates of pay (as affected by the Award Deemed Base Rates), and afforded the terms and conditions of employment, derived from the Agreements, instead of the rates of pay and terms and conditions of employment which were provided for in the Award, to which he was entitled.

116 The counterpart pleading in relation to causation of group members' losses is made at paragraphs [48] and [49].

Domino's submissions

117 Domino's submitted that the FASOC does not adequately plead the facts to disclose a causal connection between the alleged misleading conduct and the alleged damage, and on that basis that paragraphs [48], [49], and [56] to [58] should be struck out.

118 It contended that the applicant must plead out those material facts that provide a logically demonstrated relationship between the contravening conduct and the damage, compared with the hypothetical counterfactual. On its submissions, "the applicant must plead those facts that demonstrate that a relevant person was, in fact, misled and so misled reasonably from what would have been the hypothetical counterfactual, thereby factually and legally demonstrating why the respondent's conduct was the cause of the damage suffered", citing for that proposition ***Johnson Tiles*** *Pty Ltd v Esso Australia Pty Ltd* [2000] FCA 1572; (2000) 104 FCR 564 at [64]-[65] per French J (as his Honour then was) with Beaumont and Finkelstein agreeing at [1] and [99] respectively.

119 In reliance on the observations in *Campbell v* ***BackOffice*** *Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 at [146]-[147] (Gummow, Hayne, Heydon JJ and Kiefel J (as her Honour then was)), Domino's argued that the applicant and group members needed to demonstrate "but for" causation in cases of misleading conduct. Domino's argued that is important because in

Brosnan *v Katke* [2016] FCAFC 1 at [123]-[125] (Dowsett, Wigney and Edelman JJ) the Full Court expressly doubted that the test of causation for the purposes of s 82 of the TPA (and thus by analogy s 236 of the ACL) was "material contribution"; as such a test would be inconsistent with the majority's reasoning in *Backoffice* at [146]-[147]. Domino's said that neither it, nor the Court, knows with sufficient clarity whether the case to be mounted is: (a) whether the conduct complained of was the cause of the loss and damage claimed (together with other concurrent causes) in the sense that "but for" the alleged contravening conduct the loss would not have occurred; or (b) whether the conduct was merely a material contribution to the loss or damage (which it said is yet to be properly pleaded).

120 Domino's also argued that the basis for why the alleged reliance is reasonable, must be pleaded, citing in support of that proposition *Parkdale Custom Built Furniture v* ***Puxu*** *Pty Ltd* [1982] HCA 44; (1982) 149 CLR 191 at 199 (Gibbs CJ) and *Johnson Tiles* at [65]. Domino's said, for example, a Franchise Operator could not reasonably continue to rely on a representation that the Franchise Operator knew was no longer accurate.

121 On Domino's submissions, paragraphs [56]-[58] of the FASOC plead an element of factual causation, that is, actual reliance by Dominoids and MC Pizza on the alleged representations. They do not, however, plead legal reliance, namely that both Dominoids and MC Pizza reasonably relied on Domino's conduct and why that reliance was reasonable. It argued that any such plea would appear to be irreconcilable with the allegation that Domino's did not have a reasonable basis for its opinions.

122 Further, Domino's submitted that the FASOC fails to plead the requisite counterfactual. That is, what would have happened if Domino's had not made misleading representations to the Franchise Operators: what action would not have been taken or what inaction would not have occurred, and why. It said that, absent the pleading of the requisite counterfactual, it is not apparent how the applicant and group members have suffered causally related loss or damage. For example, it said that if the claimed loss or damage is alleged to arise because the applicant or some third-party would not have entered into a transaction and it is *that* transaction which produced the loss or damage, then the applicant must plead that material fact. Alternatively, if the claimed loss or damage is said to arise from a different transaction which would have occurred but for the contravening conduct, then that is to be pleaded in the same way, citing ***Wyzenbeek*** *v Australasian Marine Imports Pty Ltd* [2019] FCAFC 167; (2019) 272 FCR 373 at [89] (Rares, Burley and Anastassiou JJ). In post-hearing submissions Domino's also relied

on the decision of *Berry v CCL Secure Pty Ltd* [2020] HCA 27; (2020) 94 ALJR 715 (Bell, Gageler, Keane, Nettle and Edelman JJ) in which the High Court addressed the pleading of counterfactuals.

Consideration

123 I do not accept Domino's contentions.

124 *First*, this is a case involving third party or 'indirect' reliance. Paragraphs [48]-[49] of the FASOC (in relation to group members) and paragraphs [56]-[58] (in relation to the applicant) allege that in reliance on the pleaded representations, and/or because of the alleged conduct, broadly to the effect that the Award did not apply, Dominoids, MC Pizza and the other Franchise Operators in the relevant period:

(a) employed workers, including the applicant and other Award Workers, to perform work in the Franchise Stores;

(b) paid all delivery drivers and in-store workers engaged by them, including the applicant and other Award Workers, the rates of pay and terms and conditions of employment set out in the Agreements; and

(c) did not pay the applicant and other Award Workers the rates of pay and afford them terms and conditions provided for in the Award.

It is alleged that by reason of those matters the applicant and group members were paid lesser rates of pay and afforded lesser terms and conditions of employment derived from the Agreements (as affected by the Award Deemed Base Rates) instead of the rates of pay and terms of conditions of employment which were provided for in the Award, and they thereby suffered loss and damage.

125 The particulars to those paragraphs allege that the Franchise Operators' reliance on the alleged representations and the alleged conduct is to be inferred from the fact that not fewer than 300 Franchise Operators independently and simultaneously determined to pay delivery drivers and in-store workers the rates of pay and conditions of employment derived from the relevant Agreements rather than from the Award, doing so after receipt of detailed information from Domino's including the representations about the franchise they operated or proposed to operate. Without deciding the question, in my view that inference is, at least, open.

126 Section 82 of the TPA provided a statutory cause of action for compensation to a person who suffers loss or damage "by" contravening conduct, and does not stipulate any particular manner

in which the loss or damage must be suffered. It is uncontentious that the principles applicable to section 82 of the TPA are also applicable to section 236 of the ACL: *Williams v Pisano* [2015] NSWCA 177; (2015) 90 NSWLR 342 (Bathurst CJ, McColl and Emmett JJA) at [99] (Emmett JA). Section 236 is clear in its terms; it provides a cause of action for compensation to a person who suffers loss or damage "because of" contravening conduct of another person.

127 In ***Janssen-Cilag*** *Pty Ltd v Pfizer Pty Ltd* [1992] FCA 649; (1992) 37 FCR 526 (Lockhart J) his Honour held that there is no requirement that the applicant must have relied upon the contravening conduct in order to recover damages under s 82. His Honour explained at 530:

> The use of the preposition "by" in s 82(1) is important; it indicates the requirement that there be a sufficient cause or link between the respondent's conduct and the recoverable loss or damage: see *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79 at 88; 53 FLR 340 at 350–351; *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd (No 2)* (1987) 16 FCR 410 at 418; 75 ALR 271 at 279. "By" is used in s 52(1) in the sense of "by reason of" or "as a result of": see *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274; 84 ALR 700; (1989) ATPR 50,026 at 50,037. Loss or damage must directly result from or be caused by the respondent's conduct. The respondent's conduct must be the real or direct or effective cause of the applicant's loss; it must have been "brought about by virtue of" the conduct which is in contravention of s 52 …. Whilst the applicant's loss or damage must be caused by the respondent's misleading or deceptive conduct, I see nothing in the language of the Act or its purpose to warrant the suggestion that the right of an applicant for damages under s 82 is confined to the case where he has relied upon or personally been influenced by the conduct of the respondent which contravenes the relevant provision of Pt IV or Pt V of the Act.

128 In ***Wardley*** *Australia Ltd v State of Western Australia* [1992] HCA 55; (1992) 175 CLR 514 at 525 at [11] (Mason CJ, Dawson, Gaudron and McHugh JJ) the plurality explained the requirements for causation under s 82 (and by analogy under s 236 of the ACL):

> The statutory cause of action arises when the plaintiff suffers loss or damage "by" contravening conduct of another person. "By" is a curious word to use. One might have expected "by means of", "by reason of", "in consequence of" or "as a result of". But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s 82(1) should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this court in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; 99 ALR 423 except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had parliament intended to say something else, it would have been natural and easy to have said so.

129 In *Sellars* at 348 Mason CJ, Dawson, Toohey and Gaudron JJ said:

> In the context of contraventions of s. 52(1) in the form of misleading conduct constituted by misrepresentations, **acts done by the representee in reliance upon the misrepresentations amount to a sufficient connexion to satisfy the concept of causation**. And, if those acts result in economic or financial loss, it will ordinarily be

> recoverable under s. 82(1). So, in a case such as the present, the applicant is entitled to recover "a sum representing the prejudice or disadvantage [the applicant] has suffered in consequence of his altering his position under the inducement" [*Toteff v Antonas* (1952) 87 CLR 647 at 650; *Wardley* (1992) 175 CLR at 526].
>
> (Emphasis added.)

130 I consider it to be sufficiently clear from the causation and reliance pleading that the underpayment and loss of opportunity alleged to have been suffered by the applicant and group members was "brought about by virtue of" or "because of" the Franchise Operators' reliance on the alleged representations and/or the alleged conduct of Domino's in contravention of s 18. It is worth noting that there can be no suggestion that Domino's does not understand the case it is required to meet.

131 *Second*, I can see little merit in Domino's contention that the causation pleading should be struck out because it does not allege that the applicant and group members suffered loss and damage by reference to a counterfactual. Domino's submitted that the counterfactual that the applicant should have pleaded is that, but for Domino's misleading conduct and representations, the Franchise Operators would have paid the applicant and group members the rates of pay and terms and conditions of employment applicable under the Award, rather than those under the Agreements. It argued that material fact needs to be pleaded because, if the Franchise Operators would have paid delivery drivers and in-store workers the rates of pay and terms and conditions under the Agreements anyway, then there would be no causally related loss.

132 I do not accept this contention. Although not expressly stated it is plainly part of the applicant's case on causation that, if Domino's had represented the true position to Franchise Operators and Prospective Franchise Operators (being that the Award applied to Award Workers including the applicant) the Franchise Operators would have paid them the rates of pay and afforded them the terms and conditions under the Award. The applicant's case on causation assumes that Franchise Operators would generally act lawfully. As the applicant submitted, to assume otherwise would be to proceed on the basis that, after receiving correct information and advice from Domino's as to the pay and terms of conditions payable to delivery drivers and in-store workers, more than 300 Franchise Operators would have simultaneously decided not to pay them the Award rates of pay and terms and conditions of employment to which they are entitled despite knowing that the Award applied to them.

133 In any event, I am not persuaded for the purpose of the present application that in the circumstances of present case it is impermissible for the applicant to claim loss and damage under s 236 without relying upon a hypothetical counterfactual. The decision in *Johnson Tiles* at [64]-[65] on which Domino's relied does not stand for the proposition that it is always necessary to do so.

134 It is, of course, open to a person who claims under s 236 of the ACL to have suffered loss or damage because of misleading or deceptive conduct in contravention of s 18 to allege that, if aware of the true position, he or she would have either entered into a different transaction (a "different transaction" case) or not entered into any transaction at all (a "no transaction" case): *Wyzenbeek* at [89]. But whether it is appropriate or necessary to do so depends on the case, and I am not presently persuaded that the applicant's case on causation requires it.

135 In *Wyzenbeek* the Full Court explained at [90]:

> Ordinarily, it is irrelevant to that inquiry to speculate about whether, hypothetically, had the wrongdoer not acted in breach of the legal norm giving rise to the cause of action, the claimant would have done something else, and the claimant also would have suffered some other loss.

136 The Full Court said at [93] that the analytical approach to causation sitting behind the hypothetical counterfactual proposed by the respondent in that case was contrary to established and binding principle. It explained:

> It involves assessing the chance that the claimant would have entered into a different commercial or other opportunity and what financial outcomes that opportunity would have resulted in for the claimant. **Such an analysis would deflect the court from its task of deciding whether the claimant suffered loss or damage in accordance with the rule expressed in s 82, namely by the wrongdoer's contravention of s 52. If that contravention is a cause of the loss or damage, ordinarily, it is not necessary or appropriate to divide up that loss or damage and analyse the operation of other possible causes**: *I&L Securities* 210 CLR at 130 [62].
>
> (Emphasis added.)

137 The Full Court went on to say (at [118]):

> The purpose of s 82 is to compensate a person who has suffered loss or damage by misleading conduct that contravened the TPA, where that conduct was **a** cause that materially contributed to the loss or damage. The statutory purpose of s 52 is to prescribe a norm of conduct (not to engage in conduct that is misleading or deceptive) and to give a person whom the representor has misled or deceived a remedy under ss 82 and 87 for **the** loss or damage the representee suffered **by** that contravening conduct. **The statutory purpose is not served by an hypothetical or counterfactual exegesis into what else might have happened that the representor seeks to raise as an exculpation or mitigation of its liability under ss 82 and 87**: *Abigroup* 67 NSWLR

> at 354-355 [59]-[63]. It could hardly serve the statutory purpose for a contravenor to be able to say that, despite having misled and deceived the representee, the latter is really no worse off because he would have suffered the same loss as that suffered by the misleading conduct in some other transaction that did not eventuate: *cf*: *I & L Securities* 210 CLR at 121-122 [33] and 130 [62].
>
> (Emphasis added.)

138 If Domino's wishes to assert that - even if correctly informed by Domino's about their obligation to pay delivery drivers and in-store workers who were Award Workers the rates of pay and terms and conditions provided by the Award, the Franchise Operators would nevertheless have paid them under the Agreements (and in effect thereby deliberately contravened the Award and the FW Act) - that is a case for Domino's to run and therefore to plead. The applicant's case on causation is that Franchise Operators could generally be expected to pay delivery drivers and in-store workers the rates of pay and terms of conditions of employment that they were advised to pay them by Domino's.

139 *Third*, I do not accept Domino's contention that the causation pleading must be struck out because it is impermissible for the applicant to allege causation based on a "material contribution" approach rather than by application of the "but for" test. Nor do I accept its related contention that the pleading should be struck out because it does not make plain whether causation is put in the "but for" sense or the "material contribution" sense.

140 There is no ambiguity in the applicant's position. The applicant said that, at trial, causation would be shown on the basis that Domino's contravening conduct was *a cause* of the loss and damage suffered by the applicant and group members, in the sense of materially contributing to the loss. The authorities do not, however, require the applicant to elect, at this stage, between alternative methods of establishing a causal connection between the contravening conduct and the loss and damage suffered for the purposes of s 236. This is particularly so prior to the completion of discovery and before any evidence has been filed. In my view it is a matter for submissions after the evidence is on.

141 I do not accept Domino's contention that the authorities provide that the "but for" test is exclusively to be applied or even to be preferred. It depends on the case. In *Janssen-Cilag* at 531 Lockhart J explained that the remarks of Mason CJ (with whom Toohey and Gaudron JJ agreed) in *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, where the Chief Justice rejected the notion that the "but for" test was or should become the exclusive test of causation in a claim for damages for negligence, were also apposite to questions of causation under s 82 of the TPA for misleading or deceptive conduct in contravention of s 52.

In *Wardley* at 525 Mason CJ, Dawson, Gaudron and McHugh JJ also said that, except to the extent the concept is modified or supplemented expressly or impliedly by the provisions of the TPA, s 82(1) should be understood as taking up the common law practical or common-sense concept of causation discussed in *March v Stramare*.

142 ***I & L Securities*** *Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; (2002) 210 CLR 109 is authority for the proposition that in an action under s 82 of the TPA for misleading or deceptive conduct in contravention of s 52 (and by analogy an action under s 236 of the ACL for misleading or receptive conduct in contravention of s 18) the claimant may demonstrate causation by showing that the contravention materially contributed to the loss. In *I & L Securities* Gaudron, Gummow and Hayne JJ said (at [57]):

> …it is now well established that the question presented by s 82 of the Act is not what was the (sole) cause of the loss or damage which has allegedly been sustained. It is enough to demonstrate that contravention of a relevant provision of the Act was *a* cause of the loss or damage sustained.
>
> (Citations omitted.)

143 Their Honours went on to say (at [62]):

> As was recognised in *Henville v Walker* [(2001) 206 CLR 459 at 474 [35] per Gleeson CJ; at 481-483 [65]-[72] per Gaudron J; at 493 [106] per McHugh J; at 507 [153], per Gummow J; at 510 [166] per Hayne J], there may be cases where it will be possible to say that some of the damage suffered by a person following contravention of the Act was not caused by the contravention. But because **the relevant question is whether the contravention was *a* cause of (in the sense of materially contributed to) the loss**, cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare.
>
> (Emphasis in bold added.) See also *I&L Securities* at [33] (Gleeson CJ); at [89]-[93] (McHugh J); and at [210] (Callinan J).

144 At [33] Gleeson CJ explained:

> **The relevant purpose of the statute was to proscribe misleading and deceptive conduct** in circumstances which included those of the present case. In aid of that purpose, the statute provided for compensation, by an award of damages, to a victim of such conduct. **The measure of damages stipulated was the loss or damage of which the conduct was a cause.** It was not limited to loss or damage of which such conduct was the sole cause. In most business transactions resulting in financial loss there are multiple causes of the loss**. The statutory purpose would be defeated if the remedy under s 82 were restricted to loss of which the contravening conduct was the sole cause.**
>
> (Emphasis added.)

145 Domino's sought to rely on the remarks of the Full Court in *Brosnan* at [123]-[125] where the Court expressed doubt as to the availability of a "material contribution" approach to a claim for loss and damage under s 82 for misleading conduct in breach of s 52. Their Honours said:

> [123] The two tests ("but for causation" and "material contribution") are "different beasts": *Clements v Clements* [2012] SCC 32; [2012] 2 SCR 181, 189-190 [14] (McLachlin CJ)….
>
> [124] Before a material contribution approach could be applied to s 82 of the *Trade Practices Act*, there would need to be close attention to each of the following: the terms and context of that provision, the validity of taking a different approach to mental decision making, and the authorities. Such a material contribution approach may not be consistent with the reasoning of Gummow, Hayne, Heydon and Kiefel JJ in *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304, 353 [146]-[147]. And it may be that the same "but for" reasoning might apply to s 82 as that adopted by the Full Court in relation to negligence in *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128; (2011) 196 FCR 145, 171 [104]:
>
> > The rule that a plaintiff must establish as a necessary condition of recovery that he or she would not have suffered loss but for the defendant's actionable misconduct is deeply rooted in the policy of the common law that one person should not be liable for the loss suffered by another unless the plaintiff can establish that the defendant's actionable conduct caused the plaintiff's loss. It is not open to this Court to decide that we should no longer adhere to this rule and that a different and "better" rule should henceforth be applied.
>
> [125] In the absence of full submissions on this point it would not be desirable to attempt to resolve it.

146 To show that the pleading does not disclose a reasonable cause of action Domino's must show that a claim for causally related loss on the basis of material contribution has no reasonable prospect of success, in the sense of it being "fanciful". Domino's fell well short of showing that. I say this because: (a) *Backoffice* was a "no transaction" case which is not the present case; (b) the Court in *Brosnan* did not say that the "but for" test is the exclusive test for causation in a claim under s 82 for misleading or deceptive conduct; (c) the Court's remarks in *Brosnan* were obiter and it gave only passing attention to the issue; it did not refer to the decision in *I & L Securities* and it expressly noted that it was not desirable to attempt to resolve the question in the absence of full submissions; and (d) Domino's argument is arguably contrary to the Full Court decision in *Wyzenbeek* at [75]-[76], [93]-[94], which followed *I & L Securities*.

147 *Fourth*, I do not accept that it is necessary for the applicant to plead why the reliance of the Franchise Operators on Domino's misleading representations is alleged to have been reasonable.

148 Domino's cited two authorities for that proposition: *Puxu* at 199 and *Johnson Tiles* at [65]. Neither case is authority for the proposition that a claimant is required to show and thus to plead why or how the reliance of a third party representee on the misleading representation of a representor is reasonable.

149 It is important to recognise the distinction between, on the one hand, the *characterisation* enquiry which involves deciding whether the conduct is misleading or deceptive or likely to mislead or deceive a relevant section of the public or particular individuals; and on the other hand, the *causation* enquiry which involves deciding whether any person has suffered loss or damage by reason of that conduct. The first task is logically anterior to the second: *Backoffice* at [24] (French CJ); ***Ethicon Sarl*** *v Gill* [2021] FCAFC 29 at [797]-[800] (Jagot, Murphy and Lee JJ).

150 In the characterisation enquiry the question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error, that is, to form an erroneous assumption or conclusion about some fact or matter: *Taco Co of Australia Inc v* ***Taco Bell*** *Pty Ltd* [1982] FCA 170 at 26; (1982) 42 ALR 177 at 200 per Deane and Fitzgerald JJ; *Puxu* at 198 (Gibbs CJ); *Backoffice* at [102] (Gummow, Hayne, Heydon and Kiefel (as her Honour then was) JJ), citing McHugh J in dissent as to the result of the case but no as to these questions of principle in *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 218 CLR 592 at 623 [103]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 at [39] (French CJ, Crennan, Bell and Keane JJ); *Australian Competition and Consumer Commission v* ***TPG*** *Internet Pty Ltd* [2020] FCAFC 130 at [22] per Wigney, O'Bryan and Jackson JJ. In characterising conduct directed to the public at large or to a substantial class of persons, consideration must be given to the characteristics of the class likely to be affected by the conduct: *Puxu* at 199. In such cases the consideration looks to the effect of the misleading and deceptive conduct on the hypothetical ordinary or reasonable member of the class. What is reasonable will of course depend on all the circumstances: *Puxu* at 199 (Gibbs CJ).

151 It is not however necessary to prove that the conduct in question in fact misled or deceived anyone: *Puxu* at 197; *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; 259 CLR 435 at [6] (French CJ, Crennan and Kiefel JJ). While evidence that someone was in fact misled or deceived is admissible, and may be probative, it is not essential and it does not itself establish that conduct is misleading or deceptive within the meaning of the ACL:

Taco Bell at 202; *Puxu* at 198-199. The question whether conduct is misleading or deceptive, or is likely to be so, is an objective question of fact that the court must determine for itself: *Taco Bell* at 202; *Puxu* at 198; *TPG* at [22(c)].

152 In the case of conduct directed to an individual the characterisation may proceed by reference to the circumstances and context of the impugned conduct. The state of knowledge of the person to whom the conduct is directed may be relevant, at least insofar as it relates to the content and circumstances of the conduct. But in either case the characterisation question "involves consideration of a notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of persons. The test is necessarily objective": *Backoffice* at [25]-[26] (French CJ).

153 In the causation enquiry, however, where the causal pathway upon which the applicant relies includes reliance (as in the present case), reliance must be proved and thus pleaded. The FASOC alleges and the applicant must prove that, in reliance on the alleged misleading representations and conduct of Domino's, the Franchise Operators and Prospective Franchise Operators underpaid the applicant and group members who thereby suffered loss and damage.

154 But that does not mean the applicant is required to plead why or how the Franchise Operators or Prospective Franchise Operators' reliance was "reasonable". The question as to whether Dominoids or MC Pizza who employed the applicant, or whether other Franchise Operators who employed the group members, in fact, relied on Domino's conduct is properly a matter for evidence not for pleadings.

155 It should also be kept in mind that causation is not a common question; it will depend on the evidence in relation to each Franchise Operator's reliance on the alleged representations and conduct: *Ethicon Sarl* at [799].

156 If Domino's wishes to deny that a particular Franchise Operator, in fact, relied on the representations and conduct of Domino's, then it can adduce evidence in that regard. It may, for example, adduce evidence which tends to show that the asserted reliance of the relevant Franchise Operator was so unreasonable that it should not be accepted that the Franchise Operator in fact relied on Domino's representations and conduct. If it wishes to run that case that is for Domino's to plead and to prove.

157 Further, in circumstances where the representations and conduct of Domino's was not directed to the applicant, and the Franchise Operators are not parties to the proceeding, one wonders

how the applicant can be expected to further plead or particularise how the reliance of the relevant Franchise Operators was reasonable. The knowledge and opinions of the Franchise Operators is not a matter within the applicant's knowledge and it is difficult to see how he could further plead and particularise his claim.

158 Domino's also said that if its alleged opinion that the Award did not apply lacked reasonable grounds (as the applicant alleges) it could not have been reasonable for the Franchise Operators to have concluded that the Award does not apply. That argument, however, did not grapple with the applicant's point that Domino's was in a different position to the Franchise Operators in terms of its understanding of the relevant industrial law framework and its role in providing information and advice to Franchise Operators and Prospective Franchise Operators regarding the applicable industrial instruments. It is significant to the applicant's case that Domino's provided documents to the Franchise Operators (as particularised at paragraph [30] of the FASOC) which included statements such as that Domino's has an "IR team to help set up systems correctly and maintain compliance" and that Domino's provided the Domino's Bookkeeping System to Franchise Operators, the functions of which included determining the terms and conditions to be afforded to in-store workers and delivery drivers and calculating the wages to be paid to in-store workers and delivery drivers.

159 I consider the causation pleadings satisfies the main purposes of a pleading. It gives notice to Domino's of the case it has to meet, it avoids surprise to Domino's, it defines the issues for trial, and along with further case management orders it will allow the trial to be conducted efficiently and fairly to both parties. I do not consider it appropriate to strike out these parts of the pleading.

THE REPRESENTATIONS PLEADING

Paragraphs [30]-[30A], [50]-[50A], and [51]-[51A]

160 Domino's submits that the following paragraphs should be struck out:

(a) paragraphs [30] and [30A], being the Franchise Representations and the Franchise Opinion Representations respectively;

(b) paragraphs [50] and [50A] being the Dominoids Representations and the Dominoids Opinion Representations respectively; and

(c) paragraphs [51] and [51A] being the MC Pizza Representations and the MC Pizza Opinion Representations.

Having regard to the great similarity of the paragraphs it suffices to consider Domino's contentions by reference to paragraphs [30] and [30A].

161 Paragraph [30], which sets out the Franchise Representations, alleges as follows:

> From not later than April 2021, Domino's represented by providing the Franchise Information and Compliance Information to Franchise Operators and to Prospective Franchise Operators, that:
>
> (aa) the terms and conditions of all Domino's employees were governed by two enterprise bargaining agreements, the first of which provided the conditions for Delivery Drivers, and the second of which provided the conditions for In-Store Workers;
>
> (a) one or more of the Agreements (up to about 2012, as affected by the Agreed Base Rate Increases and, from 2012, as affected by the Deemed Base Rates) was binding upon all Franchise Operators with respect to the rates of pay required to be paid, and the terms and conditions of employment required to be afforded, to all Delivery Drivers and In-Store Workers employed by Franchise Operators to perform work in Franchise Stores;
>
> (b) one or more of the Agreements (up to about 2012, as affected by the Agreed Base Rate Increases and from about 2012, as affected by the Deemed Base Rates) applied to each of the Franchise Operators with respect to the rates of pay required to be paid, and the terms and conditions of employment required to be afforded, to all Delivery Drivers and In-Store Workers employed by Franchise Operators to perform work in Franchise Stores;
>
> (c) the Agreements (up to about 2012, as affected by the Agreed Base Rate Increases and from about 2012, as affected by the Deemed Base Rates) contained the rates of pay required to be paid, and the terms and conditions of employment required to be afforded, to all Delivery Drivers and In-Store Workers employed to perform work by Franchise Operators in Franchise Stores;
>
> (d) the rates required to be paid, and the terms and conditions of employment required to be afforded to, all Delivery Drivers and In-Store Workers employed to perform work in Franchise Stores were the same as those required to be paid and afforded to Delivery Drivers and In-Store Workers employed to perform work in Corporate Stores; and/or
>
> (e) it was lawful to pay Delivery Drivers and In-Store Workers employed to perform work in Franchise Stores, the rates of pay, and to afford them the terms and conditions of employment, set out in the Agreements (up to about 2012, as affected by the Agreed Base Rate Increases and from about 2012, as affected by the Deemed Base Rates),
>
> (together and severally the **Franchise Representations**).

162 The paragraph is accompanied by detailed particulars. Particular 1 states that each of the Franchise Representations were partly written and partly to be implied. Particular 2 states that "insofar as each of the Franchise Representations were in writing they were contained in" the documents there particularised including by reference to the statements relied on in those

documents. Particular 3 states that "insofar as the Franchise Representations were to be implied, they were to be implied from all the facts, matters and circumstances" there particularised.

163 Paragraph [30A], which sets out the Franchise Opinion Representations, is in similar form except that it alleges the representations are opinions held by Domino's coupled with the representation that Domino's held each opinion based on reasonable grounds. It alleges as follows:

> Further and alternatively, by providing the Franchise Information and Compliance Information to Franchise Operators and to Prospective Franchise Operators, Domino's represented that:
>
> (a) Domino's held the following opinions:
>
> (i) the terms and conditions of all Domino's employees were governed by two enterprise bargaining agreements, the first of which provided the conditions for Delivery Drivers, and the second of which provided the conditions for In-Store Workers;
>
> (ii) one or more of the Agreements (up to about 2012, as affected by the Agreed Base Rate Increases and, from 2012, as affected by the Deemed Base Rates) was binding upon all Franchise Operators with respect to the rates of pay required to be paid, and the terms and conditions of employment required to be afforded, to all Delivery Drivers and In-Store Workers employed by Franchise Operators to perform work in Franchise Stores;
>
> (iii) one or more of the Agreements (up to about 2012, as affected by the Agreed Base Rate Increases and from about 2012, as affected by the Deemed Base Rates) applied to each of the Franchise Operators with respect to the rates of pay required to be paid, and the terms and conditions of employment required to be afforded, to all Delivery Drivers and In-Store Workers employed by Franchise Operators to perform work in Franchise Stores;
>
> (iv) the Agreements (up to about 2012, as affected by the Agreed Base Rate Increases and from about 2012, as affected by the Deemed Base Rates) contained the rates of pay required to be paid, and the terms and conditions of employment required to be afforded, to all Delivery Drivers and In-Store Workers employed to perform work by Franchise Operators in Franchise Stores;
>
> (v) the rates required to be paid, and the terms and conditions of employment required to be afforded to, all Delivery Drivers and In-Store Workers employed to perform work in Franchise Stores were the same as those required to be paid and afforded to Delivery Drivers and In-Store Workers employed to perform work in Corporate Stores;
>
> (vi) it was lawful to pay Delivery Drivers and In-Store Workers employed to perform work in Franchise Stores, the rates of pay, and to afford them the terms and conditions of employment, set out in the Agreements (up to about 2012, as affected by the Agreed Base Rate

Increases and from about 2012, as affected by the Deemed Base Rates); and/or

(vii) it was not open to challenge in an Australian Court or industrial tribunal that the rates of pay and terms and conditions of employment set out in the Agreements were binding on Franchise Operators and that the Franchise Operators could lawfully pay those rates to Delivery Drivers and In-Store workers,

(the **Franchise Opinion**);

(b) Domino's held the Franchise Opinion based on reasonable grounds, (together and severally the **Franchise Opinion Representations**).

(Emphasis in original.)

This paragraph is also accompanied by detailed particulars.

164 In relation to the applicant's claim, paragraphs [30] and [30A] are effectively reiterated in relation to his employment by Dominoids at paragraphs [50]-[50A] (the Dominoid's Representations and the Dominoid's Opinion Representations) and in relation to his employment by MC Pizza at paragraphs [51]-[51A] (the MC Pizza Representations and the MC Pizza Opinion Representations).

165 The Dominoids Representations and MC Pizza Representations are stated to be part of the Franchise Representations, and those paragraphs thereby refer back to the representations of fact alleged in paragraph [30]. The Dominoids Opinion Representations at paragraph [50A] and the MC Pizza Opinion Representations at paragraph [51A] are stated to be part of the Franchise Opinion Representations, and those paragraphs thereby refer back to the representations of opinion alleged in paragraph [30A].

Domino's submissions

166 Domino's submitted that the pleading of the Franchise Representations in paragraph [30], fails to provide the necessary particulars of each of the representations alleged, which are also rolled up without any individual attribution to any of the six representations, and the particulars provided do not support the allegations. It argued that the particulars are embarrassing and should be struck out because, absent attribution of which particular(s) relate to which of the six representations it is not possible for Domino's to form a view as to how and why it is alleged the particular representation was made or when and how it was conveyed. It said that it is denied basic procedural fairness as a result.

167 Domino's also contended that the Franchise Representations, which are particularised as partly written and partly to be implied, conflate the written representations with the implied. It said,

for example, that it is unclear, given paragraph 2 of the particulars to paragraph [30], if it is alleged that the representation at [30](aa) is written or implied. It argued, if it was written, which document[s] are relied on for that representation, and when was the relevant document[s] provided to, for example, Dominoids and MC Pizza. If it was implied, which writings and what other conduct or circumstances relied on to convey the meaning that is alleged beyond the text of the writing(s) for that representation.

168 As to the Franchise Representations, and its counterparts, Domino's contended that each of the representations overlaps with the other to the extent that they are attended by uncertainty. It said that the differences between each of them, if there is a difference, is not apparent. Moreover, how each representation is put other than alternatively is not apparent.

169 Domino's said the same about the allegations of representations of opinion at paragraph [30A] and its counterparts. This paragraph alleges that Domino's represented that it held the alleged opinions on reasonable grounds, and Domino's argued that the particulars to that paragraph do not support the allegation.

Consideration

170 Initially I saw some force in Domino's submissions in this regard, but ultimately I was not persuaded that it is appropriate to strike out these parts of the pleading.

171 *First*, there is no force in Domino's contention that paragraphs [30] and [30A] and their counterparts do not provide the necessary particulars of each of the representations alleged. The particulars provided are extensive and they set out a variety of documents, statements and acts, matters and circumstances in support of the allegation that the representations were conveyed.

172 *Second*, it must be kept in mind that, in substance, paragraphs [30] and [30A] and their counterparts allege that six identical or at least very similar representations were made by Domino's. Each of the representations are said to be representations of fact (the Franchise Representations), or alternatively they are said to be representations of opinion held by Domino's (the Franchise Opinion Representations).

173 Apart from subparagraph [30](aa) and its counterparts the similarity of the representations is plain. Subparagraphs [30](a)-(e), allege that Domino's represented the following to Franchise Operators and Prospective Franchise Operators, as follows:

(a) that one or more Agreements was *binding* upon all Franchise Operators in terms of the rates of pay and terms and conditions of employment for all delivery drivers and in-store workers they employed;

(b) that one or more Agreements *applied to* all Franchise Operators in terms of the rates of pay and terms and conditions of employment for all delivery drivers and in-store workers they employed;

(c) the Agreements *contained* the rates of pay and terms and conditions of employment for all delivery drivers and in-store workers employed by Franchise Operators;

(d) the rates of pay and terms and conditions of employment for all delivery drivers and in-store workers employed by Franchise Operators were the same as those *required to be paid and afforded* to delivery drivers and in-store workers employed to work in Corporate Stores; and/or

(e) it was *lawful* for Franchise Operators to pay delivery drivers and in-store workers the rates of pay and conditions of employment set out in the Agreements.

Subparagraph (aa) is different because it alleges that Domino's represented that the terms and conditions of all delivery drivers and in-store workers *employed by Domino's* were "governed by" the Agreements.

174 In relation to the similarity of the representations alleged in subparagraphs [30](a)-(e) and in subparagraphs [30A](a)(ii)-(vii) (and their counterparts) Ms Doyle, senior counsel for the applicant, submitted that the applicant's legal representatives had conscientiously attempted to reduce the number of representations alleged. She said that the applicant's legal representatives gave "great and anxious consideration" to addressing the fact that the representations of fact alleged in subparagraphs [30](a)-(e) are, in substance, the same or very similar, as are the representations of opinion alleged in subparagraphs [30A](a)(ii)-(vii). Having gone through a careful process of reconsideration the applicant considered that each of the variations "governed by", "binding", "applied to", "contained", "required to be paid or afforded" and "lawful" were discernible as representations made either expressly, or to be implied from express words, having regard to the context.

175 On senior counsel's submission, in part, the problem arose from slightly different language used in some documents and also because there was different language in the two principal iterations of the industrial legislation, which moved from "binding" to "applied", and at another time from "applied" to "covered". Ms Doyle said that the applicant's legal representatives

were concerned to avoid falling between two stools because of the requirement for some precision in relation to representations alleged, which might mean the applicant failed because he had not invoked the statutory language at a particular time and had instead invoked a synonym found in one of or more of Domino's documents. She said that the applicant had taken a conservative approach to the pleading.

176 I accept the applicant's submission in this regard, and Domino's complaints about the pleading must be addressed in this context.

177 Ms Doyle also said that the applicant's legal representatives had sought to address Domino's complaint that it did not know which representations arose from which documents by particularising, almost in full, the terms of the documents in which the alleged Franchise Representations were expressly made, and from which the alleged Franchise Opinion Representations were in part to be implied.

178 I accept this submission too, and the complaints about the pleading should be seen in this light. For example, particulars 2(a) – (c) provide as follows:

> Insofar as each of the Franchise Representations were in writing they were contained in:
>
> (a) the Fair Work Laws – Australia Document, which stated, among other things, that:
>
> (i) the "terms and conditions of Dominos Employees are governed by two Enterprise Bargaining Agreements (EBA). The 2001 agreement provides the conditions for Drivers, and the 2009 agreement for In-Stores and Managers" (slide 32);
>
> (ii) "the wage rates for in-stores are provided by the 2009 EBA which was negotiated with the Union under the Fair Work Act. The rates were agreed and certified by Fair Work Australia" (slide 33); and
>
> (iii) the wage rates for all Domino's driver employees were defined into two specific transitioning groups, depending on whether there was an enterprise award or an industry award (slides 34-36);
>
> (b) the Workplace Laws Training Manual, which stated, among other things, that:
>
> (i) the "terms and conditions of Dominos Employees are governed by two Enterprise Bargaining Agreements (EBA). The 2001 agreement provides the conditions for Drivers, and the 2009 agreement for In-stores and Managers" (page 8);
>
> (ii) "the wage rates for in-stores are provided by the 2009 EBA which was negotiated with the Union under the Fair Work Act. The rates were agreed and certified by Fair Work Australia" (page 8); and
>
> (iii) "the wage rates for all Domino's driver employees were defined into

two specific transitioning groups, depending on whether there was an enterprise award or an industry award" (page 8);

(iv) "On 1 January 2014 wage rates will be no less than the Modern Award. The terms and conditions of the employees will continue to be dictated by the 2001/09 EBAs until a party decides to either terminate or renegotiate one of the agreements (as described above). Please note that after 2014, any renegotiations of the EBA's will need to be compared to the Modern Fast Food Award with what is called the BOOT (Better Off Overall Test)" (page 9); and

(v) "Transfer of business – Generally speaking, if a transfer of business occurs between two national system employers (including those from referring states) the transfer of business rules and obligations under the Fair Work Act 2009 apply. Division 2B State awards and State employment agreements are transferable instruments (i.e. they can apply to the new employer) for the purpose of a transfer of business under the Fair Work Act 2009." (page 6)

(c) the Fair Work Laws – Franchise Orientation Program Document which stated, among other things, that:

(i) the "terms and conditions of Dominos Employees are governed by two Enterprise Bargaining Agreements (EBA). The 2001 agreement provides the conditions for Drivers, and the 2009 agreement for Instores and Managers" (slide 32);

(ii) "the wage rates for in-stores are provided by the 2009 EBA which was negotiated with the Union under the Fair Work Act. The rates were agreed and certified by Fair Work Australia" (slide 33); and

(iii) the wage rates for all Domino's driver employees were defined into two specific transitioning groups, depending on whether there was an enterprise award or an industry award (slides 34-36).

179 Having regard to the similarity in the representations of fact and opinion alleged I consider Domino's submissions overstated the ambiguity of the pleading and exaggerated the difficulty it faced in understanding it. I can see little force in the contention that without attribution of which particulars relate to which of the six representations it is not possible for Domino's to form a view as to how and why it is alleged each representation was made or when and how it was conveyed. The documents relied on are Domino's documents and they must know when they were created and provided (if they were) to Franchise Operators and Prospective Franchise Operators. If Domino's seriously maintain they cannot understand which particulars sit beneath which representation (when they are in substance the same or similar) it can address that by reviewing the documents, which are particularised, against the representations and the relevant legislation at the point in time the documents were provided to Franchise Operators and Prospective Franchise Operators. Alternatively, if this asserted difficulty cannot be more sensibly resolved between the parties I will direct the applicant to more fully explain, in

correspondence, how the representations arise from slightly different language used in some documents and also because there was different language in the two principal iterations of the industrial legislation.

180 Nor, given that the representations are in substance the same, can I see any force in the contention that the pleadings are embarrassing and difficult to understand because the particulars conflate the written representations with the implied. The particulars expressly state that the written representations are set out in the documents that follow as particulars and that the implied representations are to be implied from all the facts, matters and circumstances that are set out. The thrust of the applicant's case is clear and the pleading fulfils the purpose of putting Domino's on notice of the case it has to meet. Further, in my view it is sufficiently clear that Domino's understands the representations that it is alleged to have made and the basis upon which it is asserted that they were either made expressly or impliedly.

181 It is also plain from its Defence that Domino's understands subparagraphs [30](aa) and [30A](a)(i) and their counterparts. At paragraph [30] of its Defence, undercover of an objection on the basis that the pleading was embarrassing, evasive and ambiguous with 'rolled up' and unsupportive particulars, Domino's admitted that:

> …since about 2012 various documents 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).

Domino's denied that the statements so admitted were representations of fact, but admitted that they were statements of opinion. In the cognate paragraphs [50] and [51], which concern representations alleged to have been made by Domino's to Dominoids and MC Pizza respectively, Domino's made the same or similar admissions.

182 In my view there is some merit in Domino's contention that, if each of the representations alleged is essentially the same, then the applicant should be forced to "nail its colours to the mast" and decide which of the representations it proceeds with. But having regard to the difficulties to which senior counsel for the applicant pointed, I am not prepared to force the applicant to do so at this stage. I can see no real prejudice or unfairness to Domino's in not doing so, at least at this stage. I will revisit the issue prior to trial if necessary.

183 Again, I am satisfied that the pleading of the representations satisfies the main purposes of a pleading by giving notice to Domino's of the case it has to meet, avoiding surprise to Domino's,

defining the issues for trial and allowing the trial to be conducted efficiently. I do not accept that it is appropriate to strike them out.

OTHER PARAGRAPHS SOUGHT TO BE STRUCK OUT

184 Domino's also sought orders to strike out other miscellaneous parts of the FASOC. I now turn to deal with those parts, while noting that they were not central in the application and little attention was given to them in the submissions. Some of these complaints in relation to the pleading were addressed through the FASOC, but Domino's subsequent submissions did not make it clear whether or not its complaints are maintained. I have proceeded on the assumption that they are.

185 *First*, Domino's submitted that paragraphs [28], [29] and [31] of the FASOC are, at best, allegations of representational conduct relied on in paragraphs [30]-[30A]. It also said that paragraphs [28] and [29] are impermissible because they plead evidence in contravention of r.16.02(1)(d) of the Rules.

186 Paragraph [28] alleges that Domino's was obliged to provide Franchise Information, including in relation to revenue, profits and overheads of its Franchise Stores to Franchise Operators and Prospective Franchise Operators, and particularises the documents from which the alleged obligation is said to arise. Paragraph [28A] alleges that the Franchise Information which Domino's was obliged to provide was in fact provided to Franchise Operators and Prospective Franchise Operators. Paragraph 29 alleges that Domino's provided information and training to Franchise Operators and Prospective Franchise Operators, including in relation to employment laws and compliance with industrial obligations, and particularises the documents and things through which Domino's is alleged to have provided the relevant information.

187 I do not understand how it is said these paragraphs plead evidence, and I do not accept that it is appropriate to strike the paragraphs out on this basis. In my view they allege that Domino's was obliged to and in fact did, on and from 30 April 2012, provide Franchise Operators and Prospective Franchise Operators with information and training regarding applicable employment laws and compliance with industrial obligations, and they particularise the basis for that allegation. Further, it is again clear that Domino's understands the case it has to meet. In its Defence it admitted paragraph [28], [28A] and in response to paragraph [29] it admitted that it provided information and training to Franchise Operators in relation to employment laws and compliance with industrial obligations but denied that it provided similar information and training to Prospective Franchise Operators.

188 Paragraph [31] is additional to paragraphs [30]-[30A] in that it pleads that it should be inferred that the Franchise Representations and/or the Franchise Opinion representations were made by Domino's when it provided the Franchise Information and Compliance Information to Franchise Operators and Prospective Franchise Operators.

189 Paragraph [31] does not appear to add much to but I would not strike it out on that basis. In my view the pleading is not one of representational conduct. It pleads a material fact; that the representations alleged in paragraphs [30] and [30A] were made. It is alleged that this fact should be inferred from other matters, including alleged facts ([31](a)], inferences or implications ([31](b) and (e)], the existence of legal obligations ([31(c), (d), (fa) - (fd)]), and public representations ([31](f). The pleading puts Domino's on notice of the case which the applicant advances.

190 *Second*, Domino's complained that the allegation in paragraph [52] that "no Agreement" covered Dominoids or MC Pizza delivery drivers who were Award Workers, is pleaded as a bald conclusion without pleading the material facts in support of the conclusion. It contended that paragraph and the counterpart paragraphs [38], [39] and [40] should be struck out.

191 I disagree. The paragraph has to be understood in context and having regard to the particulars. The basis upon which the applicant alleges that neither of the two relevant Agreements covered delivery drivers and in-store workers employed by Dominoids and MC Pizza in the relevant period is sufficiently clear, as is the basis upon which the applicant asserts that the Award rather than the Agreements applied to his employment. I consider paragraph [52] to be sufficiently clear to put Domino's on notice of the case it has to meet.

192 Moreover, a pleading of a conclusion may also be a pleading of a material fact. In *Sadie Ville* at [20] and [57] Moshinsky J cited *Kernel Holdings Pty Ltd v Rothmans of Pall Mall (Australia) Pty Ltd* (3 September 1991, French J (as his Honour then was), unreported), where his Honour said:

> I do not accept that the pleading of something which can be described as a conclusion cannot also be a pleading of a material fact. The real issue in a case where such an objection is raised is whether the facts are pleaded at too great a level of generality. In my opinion, the level of generality of the statement of claim in this case is too great for Rothmans to know with any precision what case it has to meet.

In *McKellar* at [20], Weinberg J approved the remarks of Drummond J in *State of Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] FCA 499; [1999] ATPR 41-691 at [21] where his Honour said "[t]he modern approach to litigation in this Court is not to strike out or order

further particulars of a conclusionary pleading, if it appears that that is unnecessary in the circumstances of the particular case to achieve the object of pleadings."

193 I consider it to be sufficiently clear that Domino's understands the case it has to meet, and there is no requirement for further pleading or particularisation.

194 *Third*, Domino's contended that the pleading at paragraph [54A] and [55A] (and its cognates at paragraphs [40A] and [44A] are embarrassing, a pleading of a legal conclusion and should be struck out. It said that it is alleged that Domino's ought to have reasonably known that its opinion was wrong or ought to have reasonably requested or received advice to that effect, without any pleading or particularisation as to why that reasonably ought to have been the position. Thus Domino's argued that the FASOC fails to plead the material facts alleged to have been known to and relied upon by Domino's as the basis for the opinion alleged, and said that when viewed objectively the particulars do not afford a basis sufficient to ground that opinion as being reasonably held. On its argument, absent the pleading of such material facts at paragraphs [54A] and [55A], the applicant has impermissibly pleaded a legal conclusion drawn from unstated facts, which is not saved by the inclusion of particulars, even if they were adequate.

195 It is true that paragraphs [54A] and [55A] express the alleged lack of reasonable grounds as a conclusion, and the particulars are broadly uninformative. It cannot, however, reasonably be said that the FASOC does not disclose the basis for the allegation that delivery drivers and in-store workers employed by Franchise Operators during the relevant period were covered by the Award rather than by the relevant Agreements.

196 The FASOC must be read as a whole. Paragraph [50A] (in relation to Dominoids) and [51A] (in relation to MC Pizza) plead that, as part of the Franchise Opinion Representations, Domino's made the Dominoids Opinion Representations and the MC Pizza Opinion Representations, including that Domino's held those opinions based on reasonable grounds. Paragraph [54A] alleges that Domino's did not have reasonable grounds for those opinions, and particularises that by stating that a reasonable company in the position of Domino's ought to have known of the matters pleaded in paragraph [52] and/or received advice to the effect of the matters pleaded in that paragraph. Paragraph [55A] reiterates the same particulars.

197 Paragraph [54A] refers back to the matters pleaded in paragraph [52] which particularises the pathway by which the applicant alleges that during the relevant period neither of the relevant

Agreements applied to delivery drivers and in-store workers employed by Dominoids and MC Pizza, including the applicant. The particulars to paragraph [52] in turn refer back to paragraphs [37]-[39] and [41]-[43] which appear under the heading "The True Position" and set out the basis upon which the applicant alleges that, during the relevant period, delivery drivers and in-store workers employed by Franchise Operators were, by operation of the applicable industrial legislation, in fact covered by the Award.

198 Thus the pleadings show that the basis for the allegation that Domino's lacked reasonable grounds for the Franchise Opinion Representations (including the Dominoids and MC Pizza Opinion Representations) is that the "true position" under the applicable industrial legislation was that the Award and not the Agreements applied. The applicant's case is that this was a matter observable by anyone who read the applicable legislation (see the particulars to paragraph [40A]), and thus the reasonable company in the position of Domino's ought to have known and/or received advice in that regard. That might be criticised as a weak basis for asserting that Domino's lacked reasonable grounds for its alleged opinion but it is reasonably arguable.

199 Again, it is apparent from Domino's Defence that it understands the case it has to meet. In its Defence to paragraphs [40A], [44A] and [54A], undercover of various objections, and with reference to its pleading at [30A.4], Domino's denied the alleged representations.

200 At paragraph [30A.4] of the Defence Domino's also alleged:

> …since about 6 May 2009 and in respect of the period prior to 24 January 2018, the Fair Work Ombudsman resolved underpayment claims against, and conducted audits of, Franchise Operators who were not listed in the annexure to a WR Act Agreement or a FW Act Agreement on the basis of the employee entitlements of those Franchise Operators are governed by an 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.

That engaged with the allegations in [30A] and positively alleged that the regulator had previously resolved underpayment claims made against three Franchise Operators on the basis that the rates of pay and terms and conditions of employment in the relevant Agreements applied. The particulars to [30A] of the Defence state that "Domino's also refers to and relies on the Summary of Legal Position agreed as between FWO and Domino's about 7 December 2011 and FWO Domino's Compliance Activity Report 2018." Those contentions could only be advanced in order to show that Domino's had reasonable grounds for the opinion alleged,

and it shows that Domino's understands the basis upon which it is alleged that it did not have reasonable grounds.

201 In circumstances where the substance of the allegation is clear and no embarrassment or prejudice will be caused by it, and Domino's has notice of the case it has to meet and the issues for determination, there is no proper basis to strike out [54A] and [55A] and their cognates: *Forty Two International Pty Ltd v Barnes* [2010] FCA 397 at 110 (Yates J); *Wheelahan* at [25(o)], [25(d)].

202 *Fourth*, Domino's submitted that paragraphs [32] to [34A] do not reconcile with paragraph [47], in which it is alleged that the Franchise Conduct and/or the Franchise Opinion Conduct was misleading and deceptive which is alleged and particularised by reference to the matters in paragraphs [40], [40A], [44] and [44A]. This submission was not developed beyond an assertion, except by reference to a letter by Domino's solicitors dated 30 August 2019, to which I was not taken. In the circumstances I will not take this issue any further.

203 *Fifth*, Domino's also submits that the pleading at paragraph [34](b) appears to cover the same ground as pleaded at [34](a). In summary:

(a) paragraph [34](a) alleges that the Franchise Conduct constituted an implied representation by Domino's that the minimum rates of pay and minimum terms and conditions that could lawfully be paid and afforded were those contained in the Agreements; and

(b) paragraph [34](b) alleges that the Franchise Conduct conveyed to Franchise Operators that the minimum rates of pay and minimum terms and conditions that could lawfully be paid and afforded were those contained in the Agreements.

204 Domino's submits that paragraph [34](b) should therefore be struck out. I am inclined to agree with Domino's contention. Domino's did not though mention this contention in oral submissions and I am not sure if it is pressed, the applicant did not address the submission, and these paragraphs are not central to the pleading. In the circumstances I will not direct that paragraph [34](b) be struck out. The applicant is directed to either explain to Domino's legal representatives how the two subparagraphs cover different ground, and if not to delete either subparagraph (a) or (b). I will hear further submission from the parties on this if necessary.

205 *Sixth*, Domino's submitted that the Franchise Opinion alleged at paragraph [30A](a)(vii) is a freestanding allegation of opinion without any further particulars to those provided in relation

to the Franchise Representations. That subparagraph alleges that Domino's held the opinion that:

> …it was not open to challenge in an Australian Court or industrial tribunal that the rates of pay and terms and conditions of employment set out in the Agreements were binding on Franchise Operators and that the Franchise Operators could lawfully pay those rights to Delivery Drivers and In-Store workers.

206 I accept Domino's contention that proper particulars are required for that allegation. The applicant is directed to provide particulars for that allegation and for the counterpart allegations of opinion at [50A](a)(vii) in relation to the Dominoid's Opinion and [51A](a)(vii) in relation to the MC Pizza Opinion.

207 Domino's further contended that particulars are required for the opinion alleged at paragraphs [50A](vi). It did not develop this submission and the applicant did not respond to it. I can see no basis to require further particulars of this allegation.

COSTS

208 Domino's was unsuccessful and it is appropriate to order that it pay the applicant's costs of the application.

I certify that the preceding two hundred and eight (208) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Murphy.

Associate: 

Dated: 13 April 2021