

NOTICE OF FILING

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File Title: RITCHIE WHITE v TRANSPORT FOR NSW T/A SYDNEY TRAINS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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

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



Defence

No. NSD730 of 2023

Federal Court of Australia
District Registry: New South Wales
Division: Fair Work

Ritchie White

Applicant

Sydney Trains (ABN 38 284 779 682)

Respondent

PRELIMINARY MATTERS

- A. Headings are used in this Defence for convenience only. They do not form part of the response to the Further Amended Statement of Claim filed on 22 March 2024 (**FASOC**).
- B. Unless the context requires otherwise, the Respondent adopts the defined terms used in FASOC, but does not admit any factual assertions contained in, or in any way implied by, any defined term used in the FASOC and repeated in this Defence.

In response to the allegations within the FASOC, Sydney Trains says as follows:

A. THE APPLICANT

1. In answer to paragraph 1, Sydney Trains:
- admits that the Applicant has purported to commence this proceeding as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth);
 - in answer to sub-paragraph 1(b):

Filed on behalf of (name & role of party) Sydney Trains, Respondent
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SYDNEY NSW 2000

- i. will rely on the terms of the 2018 Agreement and the 2022 Agreement for their full force and effect;
- ii. says that the term “Operations Position” is not defined in either the 2018 Agreement or the 2022 Agreement;
- iii. says that neither the 2018 Agreement nor the 2022 Agreement defines a position classification of “Area Controller” or “Signaller”;
- iv. further says that:
 - 1. Schedule 4A to the 2018 Agreement and 2022 Agreement classifies various positions under the sub-heading “Operations”;
 - 2. various positions listed under the sub-heading “Operations” in Schedule 4A to the 2018 Agreement and 2022 Agreement include reference to “Area Controller” and “Signaller”; and

Particulars

Signaller Grade 1 1 st Year
Signaller Grade 1 Thereafter
Signaller Grade 2 1 st Year
Signaller Grade 2 Thereafter
Signaller Grade 3 1 st Year
Signaller Grade 3 Thereafter
Signaller Grade 4
Area Controller Grade 1
Area Controller Grade 2
Area Controller Grade 3

- c. otherwise denies the allegations in paragraph 1.
2. In answer to paragraph 2, Sydney Trains:
- a. admits that the Applicant was a national system employee (within the meaning of the FWA) at all material times during the Relevant Period;
 - b. says that ss 12 and 14 of the FWA provide the meaning of “national system employer” rather than national system employees;
 - c. says that ss 12 and 13 of the FWA provide that a national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement;

- d. will rely on the terms of ss 12, 13 and 14 of the FWA for their full force and effect; and
 - e. otherwise denies the allegations in paragraph 2.
3. In answer to paragraph 3, Sydney Trains does not know and therefore cannot admit the allegations.

B. THE RESPONDENT

4. In answer to paragraph 4, Sydney Trains:
- a. admits sub-paragraph 4(a);
 - b. in answer to sub-paragraph 4(b):
 - i. says that s 52 of the FWA provides that an enterprise agreement applies to an employee, employer or employee organisation if the agreement is in operation, covers the employee, employer or organisation, and no other provision of the FWA provides, or has the effect, that the agreement does not apply to the employee, employer or organisation;
 - ii. says that s 53(1) of the FWA provides that an enterprise agreement covers an employee or employer if the agreement is expressed to cover (however described) the employee or the employer;
 - iii. says that cl 5.1 of the 2018 Agreement and 2022 Agreement provided that those agreements would be binding on Sydney Trains;
 - iv. admits that by reason of cl 5.1 of the 2018 Agreement, that agreement covered Sydney Trains within the meaning of s 53(1) of the FWA;
 - v. further says that the 2018 Agreement had a nominal expiry date of 1 May 2021 but continued to operate until 16 February 2023, when it was replaced by the 2022 Agreement (**2018 Agreement Period**);
 - vi. admits that by reason of s 52(1) of the FWA, the 2018 Agreement applied to Sydney Trains during the 2018 Agreement Period;
 - vii. admits that by reason of cl 5.1 of the 2022 Agreement, that agreement covers Sydney Trains within the meaning of s 53(1) of the FWA; and
 - viii. admits that by reason of s 52(1) of the FWA, the 2022 Agreement applies to Sydney Trains;
 - c. says that, at all material times during the Relevant Period, Sydney Trains:
 - i. was a statutory corporation and New South Wales government agency constituted by s 36 of the *Transport Administration Act 1988* (NSW); and

- ii. was liable to take proceedings and be proceeded against in its corporate name within the meaning of s 50 of the *Interpretation Act 1987* (NSW);
- d. otherwise denies the allegations in paragraph 4.

C. ENTERPRISE AGREEMENT

- 5. In answer to paragraph 5, Sydney Trains:
 - a. will rely on the terms of the 2018 Agreement for their full force and effect;
 - b. will rely on the terms of ss 52, 53 and 54 of the FWA for their full force and effect;
 - c. in answer to sub-paragraph 5(a):
 - i. admits that the 2018 Agreement operated from 1 May 2018 by reason of s 54(1) of the FWA;
 - ii. repeats sub-paragraph 4(b)(v) of this Defence;
 - d. in answer to sub-paragraph 5(b):
 - i. repeats sub-paragraphs 4(b)(i), 4(b)(ii) and 4(b)(v) to this Defence;
 - ii. admits that by reason of cl 5.1 of the 2018 Agreement, that agreement covered employees of Sydney Trains within the meaning of s 53(1) of the FWA;
 - iii. says that by reason of s 52(1) of the FWA, the 2018 Agreement applied to employees of Sydney Trains during the 2018 Agreement Period; and
 - e. otherwise denies the allegations in paragraph 5.
- 6. In answer to paragraph 6, Sydney Trains:
 - a. repeats sub-paragraphs 5(a), 5(c) and 5(d) of this Defence;
 - b. admits that the 2018 Agreement applied to the Applicant during the 2018 Agreement Period; and
 - c. otherwise denies the allegations in paragraph 6.
- 7. In answer to paragraph 7, Sydney Trains:
 - a. will rely on the terms of ss 50 and 51 of the FWA for their full force and effect;
 - b. says that s 50 of the FWA prohibits a person from contravening a term of an enterprise agreement;
 - c. says that s 51 of the FWA provides that an enterprise agreement does not impose obligations on a person, and a person does not contravene a term of an enterprise agreement, unless the agreement applies to the person;

- d. repeats sub-paragraph 4(b)(vi) of this Defence; and
 - e. otherwise denies the allegations in paragraph 7.
8. In answer the paragraph 8, Sydney Trains:
- a. repeats sub-paragraph 5(b) of this Defence;
 - b. will rely on the terms of the 2022 Agreement for their full force and effect;
 - c. admits that the 2022 Agreement has operated from 17 February 2023 by reason of s 54(1) of the FWA and remains in operation;
 - d. in response to sub-paragraph 8(b):
 - i. repeats sub-paragraphs 4(b)(ii) of this Defence;
 - ii. admits that by reason of cl 5.1 of the 2022 Agreement, that agreement covers employees of Sydney Trains within the meaning of s 53(1) of the FWA;
 - iii. says that by reason of s 52(1) of the FWA, the 2022 Agreement applies to employees of Sydney Trains; and
 - e. otherwise denies the allegations in paragraph 8.
9. In answer the paragraph 9, Sydney Trains:
- a. repeats sub-paragraphs 4(b)(i), 4b(ii), 8(b), 8(c) and 8(d) of this Defence;
 - b. admits that the 2022 Agreement applies to the Applicant; and
 - c. otherwise denies the allegations in paragraph 9.
10. In answer to paragraph 10, Sydney Trains:
- a. repeats sub-paragraphs 4(b)(viii), 7(a), 7(b) and 7(c) of this Defence;
 - b. otherwise denies the allegations in paragraph 10.

D. THE APPLICANT'S EMPLOYMENT

11. In answer to paragraph 11, Sydney Trains:
- a. says that immediately prior to 26 September 2016, the Applicant was an existing employee of Sydney Trains;
 - b. says that:
 - i. by letter dated 26 September 2016, Sydney Trains made an offer of provisional employment for a position titled "Signaller – Grade 2" at Parramatta (Signal Box) with a commencement date of 2 October 2016;

- ii. the Applicant accepted the offer of provisional employment in writing on 26 September 2016,
(Applicant's Signaller Contract);
- c. further says that the Applicant's appointment to the position "Signaller – Grade 2" at Parramatta (Signal Box) was confirmed on 2 October 2016; and
- d. otherwise denies the allegations in paragraph 11.

Particulars

Letter from Sydney Trains to Ritchie White dated 26 September 2016

Acceptance & Personal Details Form signed 26 September 2016

12. In answer to paragraph 12, Sydney Trains:
- a. will rely on the terms of the Applicant's Signaller Contract for their full force and effect;
 - b. says that the Applicant's Signaller Contract relevantly provided that:
 - i. the Applicant was to be employed on a permanent, full-time basis;
 - ii. the Applicant's ordinary hours of work were 76 hours per fortnight (excluding meal breaks) divided into not more than 10 shifts (**Signaller Ordinary Hours**);
 - iii. the Applicant was employed as a shift worker and was required to work roster patterns which may include weekends, overtime, rotating shifts, night shifts or similar on an as needs basis, as determined by Sydney Trains;
 - iv. as a shift worker, the Applicant's start and finish times would vary according to the roster that needed to be worked;
 - v. the Applicant's pay rate was \$1,169.30 per week, including an Industry Allowance of \$3,106 per annum;
 - vi. the Applicant may be entitled to receive shift and other allowances;
 - c. further says that:
 - i. it will rely on the terms of cl 25 and 108 of the 2018 Agreement for their full force and effect;
 - ii. cl 25.2 of the 2018 Agreement provided that the ordinary hours of work shall be 76 hours per fortnight (excluding meal breaks) divided into not more than 10 shifts;

- iii. cl 108.1 of the 2018 Agreement provided that ordinary hours may be worked in shifts of up to 12 hours; and
- d. otherwise denies the allegations in paragraph 12.

Particulars

Letter from Sydney Trains to Ritchie White dated 26 September 2016
2018 Agreement

- 13. In answer to paragraph 13, Sydney Trains:
 - a. repeats sub-paragraphs 5(d)(ii), 5(d)(iii) and 6(b) of this Defence;
 - b. says that cl 14.2 of the 2018 Agreement provided that Sydney Trains shall initiate every appointment and promotion by a letter of offer;
 - c. says that the Applicant was employed pursuant to the Applicant's Signaller Contract between 26 September 2016 and 2 November 2019;
 - d. says that condition 9 of the Applicant's Signaller Contract provided that the Applicant's employment was subject to the Sydney Trains Enterprise Agreement 2014 or such other enterprise agreement that may replace that agreement;
 - e. further says that cl 9.2 of the 2018 Agreement provided that that agreement replaced the Sydney Trains Enterprise Agreement 2014; and
 - f. otherwise denies the allegations in paragraph 13.
- 14. In answer to paragraph 14, Sydney Trains:
 - a. says that the allegation that the Applicant "understood his duties to include" the matters referred to at paragraphs 14(a) to 14(i) is vague and embarrassing;
 - b. says that the matters referred to at paragraphs 14(a) to 14(j) broadly reflect the "Key Accountabilities" detailed in the Position Description attached to the Applicant's Signaller Contract; and
 - c. otherwise does not know and therefore cannot admit the allegations in paragraph 14.

Particulars

Signaller Grade 2 Position Description dated 3 February 2016

Employment as a "Area Controller"

- 15. In answer to paragraph 15, Sydney Trains:
 - a. says that:

- i. by letter dated 17 October 2019, Sydney Trains made an offer of employment for a position titled “Area Controller – Grade 2 (PMR)” at the Granville Signal Box with a commencement date of 3 November 2019;
- ii. the Applicant accepted the offer of employment in writing on 18 October 2019, and

(Applicant’s Area Controller Contract);

- b. otherwise denies the allegations in paragraph 15.

Particulars

Letter from Sydney Trains to Ritchie White dated 17 October 2019

Acceptance & Personal Details Form signed 18 October 2019

16. In answer to paragraph 16, Sydney Trains:

- a. will rely on the terms of the Applicant’s Area Controller Contract for their full force and effect;
- b. says that the Applicant’s Area Controller Contract relevantly provided that:
 - i. the Applicant was to be employed on a permanent, full-time basis;
 - ii. the Applicant’s ordinary hours of work were 72 hours per fortnight (excluding meal breaks) divided into not more than 9 shifts (**Area Controller Ordinary Hours**);
 - iii. the Applicant was employed as a shift worker and was required to work roster patterns which may include weekends, overtime, rotating shifts, night shifts or similar on an as needs basis, as determined by Sydney Trains;
 - iv. as a shift worker, the Applicant’s start and finish times would vary according to the roster that needed to be worked;
 - v. the Applicant’s pay rate was \$1,672.20 per week, including an Industry Allowance of \$65.20 per week;
 - vi. the Applicant may be entitled to receive shift and other allowances;
- c. repeats paragraph 12(c); and
- d. otherwise denies the allegations in paragraph 16.

Particulars

Letter from Sydney Trains to Ritchie White dated 17 October 2019

17. In answer to paragraph 17, Sydney Trains:

- a. repeats sub-paragraphs 5(d)(ii), 5(d)(iii), 6(b), 8(d)(ii), 8(d)(iii), 9(b) and 13(b) of this Defence;
 - b. says that the Applicant was employed pursuant to the Applicant's Area Controller Contract from 3 November 2019;
 - c. says that condition 10 of the Applicant's Area Controller Contract provided that the Applicant's employment was subject to the 2018 Agreement or such other enterprise agreement that may replace that agreement;
 - d. further says that cl 9.2 of the 2022 Agreement provides that that agreement replaced the 2018 Agreement; and
 - e. otherwise denies the allegations in paragraph 17.
18. In answer to paragraph 18, Sydney Trains:
- a. says that the allegation that the Applicant "understood his duties to include" the matters referred to at paragraphs 18(a) to 18(j) is vague and embarrassing;
 - b. says that the matters referred to at paragraphs 18(a) to 18(j) broadly reflect the "Key Accountabilities" detailed in the Position Description attached to the Applicant's Area Controller Contract; and
 - c. otherwise does not know and therefore cannot admit the allegations in the paragraph.

Particulars

Area Controller Grade 2 Position Description dated 10 June 2015

19. In answer to paragraph 19, Sydney Trains:
- a. refers to and relies on the terms of the definition Shiftworker in cl 3 of the 2018 Agreement and the 2022 Agreement for their full force and effect;
 - b. says that cl 3 of the 2018 Agreement provided that and the 2022 Agreement provides that a Shiftworker means an Employee whose ordinary working hours regularly (day to day) provide for work being performed during hours which result in a Shiftwork entitlement or whose ordinary hours of work are regularly rostered to incorporate weekends (i.e. Saturday and Sunday working);
 - c. repeats sub-paragraphs 12(b)(iii) and 16(b)(iii); and
 - d. otherwise denies the allegations in paragraph 19.
20. In answer to paragraph 20, Sydney Trains says that the allegations in that paragraph are not capable of being pleaded to and otherwise does not know and cannot admit the allegations.

21. In answer to paragraph 21, Sydney Trains:

- a. will rely on the terms of cl 112 of the 2018 Agreement and the 2022 Agreement for their full force and effect;
- b. says that clause 112.1 of the 2018 Agreement provided that and 2022 Agreement provides that, for all employees:
 - i. an Afternoon Shift meant a Shift on which ordinary time commences before and concludes after 1800;
 - ii. a Night Shift meant a Shift on which ordinary time commences at or between 1800 and 0359;
 - iii. an Early Morning Shift meant a Shift on which ordinary time commences at or between 0400 and 0530;
- c. says that the Applicant's Signaller Contract and the Applicant's Area Controller Contract provided that the Applicant's start and finish times would vary according to the roster that needed to be worked; and

Particulars

Condition 5 of the Letter from Sydney Trains to Ritchie White dated 26 September 2016

Condition 5 of the Letter from Sydney Trains to Ritchie White dated 17 October 2019

- d. otherwise denies the allegations in paragraph 21.

22. In answer to paragraph 22, Sydney Trains:

- a. refers to and relies on cl 28 of the 2018 Agreement and the 2022 Agreement which sets out employees' leave entitlements applicable at the date of approval those agreements;
- b. repeats paragraphs 12 and 16 above;
- c. says that the allegation that "the Applicant for so long as he was employed by Sydney Trains" is vague and embarrassing where such period is not defined or otherwise stated; and
- d. otherwise does not know and therefore cannot admit the allegations in paragraph 22.

E. WAGES TERM

23. In answer to paragraph 23, Sydney Trains:

- a. will rely on the terms of cl 11.5 of the 2018 Agreement and the 2022 Agreement for their full force and effect;
 - b. says that cl 11.5 of the 2018 Agreement provided that and the 2022 Agreement provides that each Employee is to be paid fortnightly;
 - c. admits that, during the Relevant Period, the Applicant had a Sunday to Saturday fortnightly pay period and Thursday was his regular pay day; and
 - d. otherwise does not know and therefore cannot admit the allegations in paragraph 23.
24. In answer to paragraph 24, Sydney Trains:
- a. repeats sub-paragraphs 23(a) and 23(b) of this Defence;
 - b. the entitlement to be paid base salary, loadings, allowances and entitlements is subject to the specific requirements contained in the 2018 Agreement and the 2022 Agreement for their full force and effect; and
 - c. otherwise denies the allegations in paragraph 24.

F. SYSTEM LEADING TO CONTRAVENTIONS

25. In answer to paragraph 25, Sydney Trains:
- a. says, in answer to sub-paragraph 25(a):
 - i. that it will rely on the terms of cl 27 of the 2018 Agreement and the 2022 Agreement for their full force and effect;
 - ii. that the allegation that rosters were drawn without regard to and not in conformity with the “Rostering Principles” has not been properly pleaded or particularised and is therefore vague and embarrassing;
 - iii. that it does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - iv. that it otherwise denies the allegations in sub-paragraph 25(a);
 - b. says, in answer to sub-paragraph 25(b):
 - i. that it repeats sub-paragraphs 12(b)(iii), 16(b)(iii), 25(a)(i) and 25(a)(ii) of this Defence;
 - ii. that the allegation that rosters were drawn without regard to, and in excess of, the Signaller Ordinary Hours or the Area Controller Ordinary Hours has not been properly pleaded or particularised and is therefore vague and embarrassing;

- iii. that the 2018 Agreement and the 2022 Agreement does not prevent the Applicant and Group Members from working in accordance with a roster outside the Signaller Ordinary Hours or the Area Controller Ordinary Hours so long as they are paid overtime penalties in accordance with cl 109.4, 114.6, 118.2, 118.3, 118.4, 118.12 of the 2018 Agreement and the 2022 Agreement;
 - iv. that the Applicant did work according to rosters which included hours in excess of the Signaller Ordinary Hours or the Area Controller Ordinary Hours and that these overtime hours were paid overtime penalties in accordance with the 2018 Agreement and the 2022 Agreement;
 - v. that it does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - vi. that it otherwise denies the allegations in sub-paragraph 25(b).
- c. says, in answer to sub-paragraph 25(c):
- i. that it repeats sub-paragraphs 12(b)(iii) and 16(b)(iii) of this Defence;
 - ii. that the allegation that the Applicant and Group Members were required to work outside of the hours rostered has not been properly pleaded or particularised and is therefore vague and embarrassing;
 - iii. under cover of the objection in subparagraph (ii), the Applicant worked from time to time according to rosters which were in excess of the Signaller Ordinary Hours or the Area Controller Ordinary Hours but received payments in accordance with the 2018 Agreement and the 2022 Agreement;
 - iv. that it does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - v. that it otherwise denies the allegations in sub-paragraph 25(c).
- d. in answer to sub-paragraph 25(d):
- i. says that it repeats sub-paragraphs 12(b)(iii) and 16(b)(iii) of this Defence;
 - ii. says that it does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - iii. says that it otherwise denies the allegations in sub-paragraph 25(d).
- e. says, in answer to sub-paragraph 25(e):

- i. that it repeats sub-paragraphs 12(b)(iii), 12(b)(vi), 16(b)(iii) and 16(b)(vi) of this Defence;
 - ii. that the allegation that the Applicant and Group Members were “regularly” required to work at times attracting penalty rates has not been properly pleaded or particularised and is therefore vague and embarrassing;
 - iii. under cover of the objection in subparagraph (ii), the Applicant worked from time to time according to rosters which were in excess of the Signaller Ordinary Hours or the Area Controller Ordinary Hours but received payments in accordance with the 2018 Agreement and the 2022 Agreement;
 - iv. that it does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - v. that it otherwise denies the allegations in sub-paragraph 25(e).
- f. says, in answer to sub-paragraph 25(f):
- i. that each fortnight, the Applicant was sent a draft timesheet for review by email and had the opportunity to request that corrections to their actual hours of work be made at that time;
 - ii. that the allegation that the Applicant and Group Members “were not required” to record their actual hours of work in their systems has not been properly pleaded or particularised and is therefore vague and embarrassing;
 - iii. that it does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - iv. that it otherwise denies the allegations in sub-paragraph 25(f).
- g. says, in answer to sub-paragraph 25(g):
- i. that it admits that the Applicant’s weekly rate of pay was as set out in Schedule 4A to the 2018 Agreement and the 2022 Agreement and reflected in the Applicant’s Signaller Contract and the Applicant’s Area Controller Contract; and
 - ii. that it does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - iii. that it otherwise denies the allegations in sub-paragraph 25(g).
- h. says, in answer to sub-paragraph 25(h):

- i. that the allegation that the Applicant and Group Members were paid further loadings and entitlements calculated based on rostered hours rather than actual hours worked has not been properly pleaded or particularised and is therefore vague and embarrassing;
 - ii. that it does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - iii. that it otherwise denies the allegations in sub-paragraph 25(h).
- i. says, in answer to sub-paragraph 25(i):
- i. it will rely on the terms of cl 110.2 of the 2022 Agreement for their full force and effect;
 - ii. that cl 110.2 of the 2022 Agreement provides for a 20 minute crib break at a time that meets the operational needs and the need for the Operational Wages Employee to rest where that employee is working greater than a 5 hour shift;
 - iii. it admits the Applicant is an Operational Wages Employee within the meaning of cl 110.2 of the 2022 Agreement;
 - iv. that there was no equivalent entitlement to meal breaks in the 2018 Agreement applicable to the Applicant;
 - v. that the allegation that the Applicant and Group Members were “regularly required” to work shifts without meal and rest breaks has not been properly pleaded or particularised and is therefore vague and embarrassing;
 - vi. that it does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - vii. that it otherwise denies the allegations in sub-paragraph 25(i).

26. In answer to paragraph 26, Sydney Trains:

- a. says the allegation that the Applicant and the Group Members “worked generally in accordance with the system” described in paragraph 26 is vague and embarrassing; and
- b. otherwise denies the allegations in paragraph 26.

G. CONTRAVENTIONS OF THE *FAIR WORK ACT 2009 (CTH)*

27. In answer to paragraph 27, Sydney Trains:

- a. says that the allegations in that paragraph are not capable of being pleaded to and otherwise does not know and cannot admit the allegations; and
- b. refers to and repeats paragraphs 28 to 81 of this Defence.

G-1. FWA s 535(1) and s 535(3) – Record-keeping obligations & Inspection obligations

28. In answer to paragraph 28, Sydney Trains:

- a. will rely on the terms of s 535(1) of the FWA and regs 3.33 and 3.34 of the *Fair Work Regulations 2009* (Cth) (**FW Regulations**) for their full force and effect;
- b. denies that paragraph 28 fully or accurately sets out employer obligations in relation to employee records contained in s 535(1) of the FWA or regs 3.33 and 3.34 of the FW Regulations;
- c. admits that s 535(1) of the FWA required it to make, and keep for 7 years, employee records of the kind prescribed by the FW Regulations in relation to each of its employees;
- d. says that reg 3.34 of the FW Regulations provides that if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee, an employer must make and keep a record that specifies:
 - i. the number of overtime hours worked by the employee during each day; or
 - ii. when the employee started and ceased working overtime hours;
- e. says that reg 3.33 of the FW Regulations provides that a record must set out details of an incentive-based payment, bonus, loading, penalty rate or another monetary allowance or separately identifiable entitlement if the employee is entitled to such payment; and
- f. otherwise denies the allegations in paragraph 28.

29. In answer to paragraph 29, Sydney Trains:

- a. will rely on the terms of s 535(3) of the FWA reg 3.42 of the FW Regulations for their full force and effect;
- b. says that it gave inspection of the employee records required to be kept under the FWA and reg 3.42 of the FW Regulations in relation to the Applicant and 24 other employees of Sydney Trains for the periods sought by the Applicant;
- c. says that the Applicant has not requested employee records for the entire Relevant Period;

- d. says that a request to inspect employee records has not been made by the Applicant on behalf of all Group Members;
- e. does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
- f. otherwise denies the allegations in paragraph 29.

Particulars

Letter from Sydney Trains to Adero dated 23 February 2023

Excel roster data provided by Sydney Trains to Adero on 23 March 2023

Email from Sydney Trains to Adero dated 26 April 2023

Email from Sydney Trains to Adero dated 4 May 2023

Letter from Sydney Trains to Adero dated 12 May 2023

- 30. In answer to paragraph 30, Sydney Trains:
 - a. repeats paragraph 29 above;
 - b. denies that it failed to comply with its inspection obligations; and
 - c. denies that it has contravened s 535(3) of the FWA or reg 3.42 of the FW Regulations.
- 31. In answer to paragraph 31, Sydney Trains:
 - a. repeats paragraphs 29 and 30 of this Defence;
 - b. says that the assertion that Sydney Trains' alleged failure "leads the Applicant and Group Members to believe" is vague and embarrassing; and
 - c. otherwise does not know and cannot admit the allegations in paragraph 31.
- 32. In answer to paragraph 32, Sydney Trains:
 - a. repeats paragraphs 28, 29, 30 and 31 of this Defence; and
 - b. otherwise denies the allegations in paragraph 32.
- 33. In answer to paragraph 33, Sydney Trains admits that by operation of s 539, s 535(1) of the FWA is a civil remedy provision.
- 34. In answer to paragraph 34, Sydney Trains:
 - a. repeats paragraphs 28, 29, 30, 31, 32 and 33 of this Defence;
 - b. will rely on the terms of ss 557A, 557B and 793 of the FWA for their full force and effect;

- c. says that s 557A(1) of the FWA provided during the Relevant Period that a person's contravention of a civil remedy provision is a serious contravention if the person knowingly contravened the provision and the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons;
- d. says that s 557B of the FWA provides that a body corporate knowingly contravenes a civil remedy provision if the body corporate expressly, tacitly or impliedly authorised the contravention;
- e. says that the allegation that the alleged contraventions of s 535(1) are "serious contraventions" within the meaning of s 557A of the FWA has not been properly pleaded or particularised and is therefore vague and embarrassing; and
- f. otherwise denies the allegations in paragraph 34.

35. In answer to paragraph 35, Sydney Trains:

- a. repeats paragraphs 28, 29, 30, 31 and 32 of this Defence; and
- b. otherwise denies the allegations in paragraph 35.

G-2. FWA s 50 – Underpayments

36. In answer to paragraph 36, Sydney Trains:

- a. repeats paragraphs 25 and 26 above; and
- b. otherwise denies the allegations in paragraph 36.

G-2.1. 'Overtime Loadings'

37. In answer to paragraph 37, Sydney Trains:

- a. repeats paragraphs 6, 9, 12(b)(ii), 12(c), 16(b)(ii) and 16(c) of this Defence;
- b. will rely on the terms of cl 25 and 118 of the 2018 Agreement and 2022 Agreement for their full force and effect;
- c. admits that cl 118.1 of the 2018 Agreement provided that and cl 118.1 of the 2022 Agreement provides that all time worked in excess of the hours prescribed within cl 25 shall be overtime;
- d. says that cl 25.3 of the 2018 Agreement provided that an Employee whose ordinary hours were less than 76 hours per fortnight would retain that condition if the Employee was covered by the Area Controller Classification Structure;

- e. further says that cl 25.3 of the 2022 Agreement provided that the ordinary hours of work for Area Controllers shall be 72 hours per fortnight divided into not more than 9 shifts; and
 - f. otherwise denies the allegations in paragraph 37.
38. In answer to paragraph 38, Sydney Trains:
- a. says that cl 118.2 of the 2018 Agreement provided that and the 2022 Agreement provides that within each 24 hour period, overtime shall be paid at the rate of time and one half for the first 3 hours and double-time thereafter calculated from the commencement of work on any day;
 - b. denies that paragraph 38 fully or accurately sets out the approach to overtime within the meaning of cl 118 of the 2018 Agreement or the 2022 Agreement; and
 - c. otherwise denies the allegations in paragraph 38.
39. In answer to paragraph 39, Sydney Trains:
- a. admits that the Applicant and Sydney Trains did not enter into any agreement of the kind contemplated by cl 108.1 of the 2018 Agreement or the 2022 Agreement;
 - b. does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - c. otherwise denies the allegations in paragraph 39.
40. In answer to paragraph 40, Sydney Trains:
- a. repeats paragraphs 37, 38 and 39 of this Defence; and
 - b. otherwise denies the allegations in paragraph 40.

G-2.2. Interval between Shift Entitlements

41. In answer to paragraph 41, Sydney Trains:
- a. repeats paragraphs 6 and 9 of this Defence;
 - b. will rely on the terms of cl 109 of the 2018 Agreement and the 2022 Agreement for their full force and effect;
 - c. denies that paragraph 41 fully or accurately sets out the approach to intervals between shifts within the meaning of cl 109 of the 2018 Agreement or the 2022 Agreement; and
 - d. otherwise denies the allegations in paragraph 41.
42. In answer to paragraph 42, Sydney Trains:

- a. repeats paragraphs 6, 9 and 41 of this Defence;
 - b. says that cl 109.2 of the 2018 Agreement provided that and the 2022 Agreement provides that operational wages employees which included the Applicant shall be 10 hours off duty between ordinary shifts except:
 - i. when changing shifts, in which case a minimum of 8 hours shall apply;
 - ii. when returning to home station, in which case the provision of cl 120 shall apply; and
 - c. otherwise denies the allegations in paragraph 42.
43. In answer to paragraph 43, Sydney Trains:
- a. repeats paragraphs 6, 9, 37, 38, 41 and 42 of this Defence;
 - b. will rely on the terms of cl 109.3 of the 2018 Agreement and the 2022 Agreement for their full force and effect;
 - c. says that cl 109.3 of the 2018 Agreement provided that and the 2022 Agreement provides that operational wages employees, which included the Applicant, required to commence work on a new shift within 10 hours of completing a shift, but after 8 hours off duty, shall be paid time and a quarter for such shift;
 - d. says that cl 109.3 of the 2018 Agreement provided that and the 2022 Agreement provides that cl 109.3 does not apply to employees working in accordance with cl 109.2;
 - e. further says that cl 109.4 of the 2018 Agreement provided that and 2022 Agreement provides that operational wages employees, which included the Applicant, required to commence work on a new shift with fewer than 8 hours off duty shall be paid overtime rates; and
 - f. otherwise denies the allegations in paragraph 43.
44. In answer to paragraph 44, Sydney Trains says that the allegations in that paragraph are not capable of being pleaded to and otherwise does not know and cannot admit the allegations.
45. In answer to paragraph 45, Sydney Trains:
- a. admits that the Applicant and Sydney Trains did not enter into any agreement of the kind contemplated by cl 109.5 of the Agreement;
 - b. does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - c. otherwise denies the allegations in paragraph 45.

46. In answer to paragraph 46, Sydney Trains:
- a. repeats paragraphs 41, 42, 43, 44 and 45 of this Defence;
 - b. says that the allegation that the Applicant and Group Members were “regularly not provided” the benefit of the Minimum Shift Interval has not been properly pleaded or particularised and is therefore vague and embarrassing; and
 - c. otherwise denies the allegations in paragraph 46.

G-2.3. ‘Limits of Shifts Entitlements’

47. In answer to paragraph 47, Sydney Trains:
- a. repeats paragraphs 6 and 9 of this Defence;
 - b. will rely on the terms of cl 115.6 of the 2018 Agreement and the 2022 Agreement for their full force and effect;
 - c. admits that cl 115.6 of the 2018 Agreement provided that and the 2022 Agreement provides that operational wages employees, which included the Applicant, whose ordinary hours of labour are 76 hours per fortnight or less shall not be rostered to work more than 9 hours on any one shift unless agreement is reached in accordance with cl 25; and
 - d. otherwise denies the allegations in paragraph 47.
48. In answer to paragraph 48, Sydney Trains:
- a. admits that the Applicant and Sydney Trains did not enter into any agreement of the kind contemplated by cl 25 of the Agreement;
 - b. does not know and therefore cannot admit the allegation insofar as it relates to the Group Members; and
 - c. otherwise denies the allegations in paragraph 48.
49. In answer to paragraph 49, Sydney Trains:
- a. repeats paragraphs 37, 38, 47 and 48 of this Defence;
 - b. says that the allegation that Sydney Trains “regularly failed” to roster the Applicant and Group Members in accordance with the Maximum Shift Duration has not been properly pleaded or particularised and is therefore vague and embarrassing; and
 - c. otherwise denies the allegations in paragraph 49.

G-2.4. ‘Public Holiday Penalty Entitlement’

50. In answer to paragraph 50, Sydney Trains:

- a. repeats paragraphs 6 and 9 of this Defence;
- b. will rely on the terms of cl 29 of the 2018 Agreement and the 2022 Agreement for their full force and effect;
- c. says that cll 29.1 and 29.2 of the 2018 Agreement and the 2022 Agreement relate to employees, other than casual employees; and
- d. otherwise denies the allegations in paragraph 50.

51. In answer to paragraph 51, Sydney Trains:

- a. repeats paragraphs 6, 9 and 50 of this Defence;
- b. will rely on the terms of cl 29.5 of the 2018 Agreement and the 2022 Agreement for their full force and effect; and
- c. otherwise denies the allegations in paragraph 51.

52. In answer to paragraph 52, Sydney Trains:

- a. repeats paragraphs 50 and 51 of this Defence; and
- b. otherwise denies the allegations in paragraph 52.

G-2.5. 'Saturday Penalty Entitlement'

53. In answer to paragraph 53, Sydney Trains:

- a. repeats paragraphs 6 and 9 of this Defence;
- b. will rely on the terms of cl 43.1 of the 2018 Agreement and the 2022 Agreement, cl 118.6 and 118.7 of the Agreement, cl 118.13 of the 2018 Agreement and cl 118.14 of the 2022 Agreement for their full force and effect;
- c. says that cl 43.1 of the 2018 Agreement provided that and the 2022 Agreement provides that all ordinary hours worked on a Saturday shall be paid at the rate of time and one half; and
- d. otherwise denies the allegations in paragraph 53.

54. In answer to paragraph 54, Sydney Trains:

- a. repeats paragraph 53 of this Defence; and
- b. otherwise denies the allegations in paragraph 54.

G-2.6. 'Sunday Penalty Entitlement'

55. In answer to paragraph 55, Sydney Trains:

- a. repeats paragraph 6 and 9 of this Defence;
- b. will rely on the terms of cl 43.2 for their full force and effect;

- c. says that cl 43.2 of the 2018 Agreement provided the 2022 Agreement provides that all ordinary hours worked on a Sunday shall be paid at the rate of double time; and
- d. otherwise denies the allegations in paragraph 55.

56. In answer to paragraph 56, Sydney Trains:

- a. repeats paragraph 55 of this Defence; and
- b. otherwise denies the allegations in paragraph 56.

G-2.7. 'One Off Payment Entitlement'

57. In answer to paragraph 57, Sydney Trains:

- a. Repeats paragraphs 8(c), 8(d) and 9 of this Defence;
- b. says that cl 11.6 of the 2022 Agreement provides that each employee will receive a one-off payment of \$4,500 in the first full pay period commencing on or after the 2022 Agreement is made; and
- c. otherwise denies the allegations in paragraph 57.

58. In answer to paragraph 58, Sydney Trains:

- a. repeats paragraph 57 of this Defence;
- b. denies that it failed to remunerate the Applicant in accordance with the One-Off Payment Entitlement;
- c. says that it paid the Applicant the One-Off Payment Entitlement on 23 February 2023; and
- d. otherwise denies the allegations in paragraph 58.

Particulars

Pay Advice for Mr Ritchie White with payment date 23 February 2023

G-2.8. 'Back Pay Entitlements'

59. In answer to paragraph 59, Sydney Trains:

- a. repeats paragraph 9 of this Defence;
- b. will rely on the terms of cl 11 of the 2022 Agreement for their full force and effect;
- c. says that cl 11.1 of the 2022 Agreement provides that wages and salary adjustments are as follows (where such amounts are cumulative):
 - i. a 2.53% pay rise with effect from the first pay period commencing on or after 1 May 2022;

- ii. a 3.03% pay rise with effect from the first pay period commencing on or after 1 May 2023;
 - iii. such additional pay rises as set out in the Wages Order; and
 - d. otherwise denies the allegations in paragraph 59.
60. In answer to paragraph 60, Sydney Trains:
- a. repeats paragraphs 8(c), 8(d) and 9 of this Defence; and
 - b. otherwise denies the allegations in paragraph 60.
61. In answer to paragraph 61, Sydney Trains:
- a. repeats paragraphs 59 and 60 of this Defence;
 - b. will rely on the terms of cl 11.2 of the 2022 Agreement for their full force and effect;
 - c. says that cl 11.2 provided that the applicable allowances listed in Schedule 4B including industry, expenses, wage and work related allowances will be adjusted in accordance with the percentage increases in sub-clause 11.1; and
 - d. otherwise denies the allegations in paragraph 61.
62. In answer to paragraph 62, Sydney Trains:
- a. repeats paragraphs 59, 60 and 61 of this Defence; and
 - b. otherwise denies the allegations in paragraph 62.
63. In answer to paragraph 63, Sydney Trains:
- a. repeats paragraphs 59, 60, 61 and 62 of this Defence; and
 - b. otherwise denies the allegations in paragraph 63.
64. In answer to paragraph 64, Sydney Trains:
- a. repeats paragraphs 36 to 63 of this Defence; and
 - b. otherwise denies the allegations in paragraph 64.
65. In answer to paragraph 65, Sydney Trains admits that by operation of s 539, s 50 of the FWA is a civil remedy provision.
66. In answer to paragraph 66, Sydney Trains:
- a. repeats paragraph 25, 26 and 34 of this Defence;
 - b. says that the allegations that the alleged contraventions of s 50 were “expressly authorised” and “part of a systemic pattern of conduct” have not been properly pleaded or particularised and are therefore vague and embarrassing; and

- c. otherwise denies the allegations in paragraph 66.
67. In answer to paragraph 67, Sydney Trains:
- a. repeats paragraphs 36 to 64 and 66 of this Defence;
 - b. says that the allegation that the alleged contraventions of s 50 of the FWA are “serious contraventions” within the meaning of s 557A of the FWA has not been properly pleaded or particularised and is therefore vague and embarrassing; and
 - c. otherwise denies the allegations in paragraph 67.
68. In answer to paragraph 68, Sydney Trains:
- a. repeats paragraphs 36 to 64, 66 and 67 of this Defence; and
 - b. otherwise denies the allegations in paragraph 68.
- G-3. S 323 FWA – failure to rectify**
69. In answer to paragraph 69, Sydney Trains:
- a. repeats paragraphs 36 to 68 of this Defence; and
 - b. otherwise denies the allegations in paragraph 69.
70. In answer to paragraph 70, Sydney Trains:
- a. repeats paragraph 69 of this Defence;
 - b. will rely on s 323(1) of the FWA for its full terms and effect; and
 - c. otherwise denies the allegations in paragraph 70.
71. In answer to paragraph 71, Sydney Trains:
- a. repeats paragraphs 25, 26, 34, 66 and 67 above;
 - b. says that the allegations that the alleged contraventions of s 323 of the FWA were “expressly authorised” and “part of a systemic pattern of conduct” have not been properly pleaded or particularised and is therefore vague and embarrassing; and
 - c. otherwise denies the allegations in paragraph 71.
72. In answer to paragraph 72, Sydney Trains:
- a. repeats paragraphs 69 to 71 of this Defence;
 - b. says that the allegation that the alleged contraventions of s 323 of the FWA are “serious contraventions” within the meaning of s 557A of the FWA has not been properly pleaded or particularised and is therefore vague and embarrassing; and
 - c. otherwise denies the allegations in paragraph 72.

G-4. S 50 FWA – Break Entitlements

73. In answer to paragraph 73, Sydney Trains:
- a. will rely on the terms of cl 54.1 of the 2018 Agreement and the 2022 Agreement for their full force and effect;
 - b. says that cl 54.1 of the 2018 Agreement and the 2022 Agreement falls within section 2 of those agreements which relates to Salaried Employees;
 - c. denies that the terms of section 2 of the 2018 Agreement or the 2022 Agreement applied to the Applicant's employment as a Signaller or Area Controller;
 - d. repeats paragraph 25(h) of this Defence; and
 - e. otherwise denies the allegations in paragraph 73.
74. In answer to paragraph 74, Sydney Trains:
- a. repeats sub-paragraph 25(h) and paragraph 73 of this Defence; and
 - b. otherwise denies the allegations in paragraph 74.
75. In answer to paragraph 75, Sydney Trains:
- a. repeats paragraphs 6 and 9 of this Defence;
 - b. will rely on the terms of cl 110.2 of the 2022 Agreement for their full force and effect; and
 - c. otherwise denies the allegations in paragraph 75.
76. In answer to paragraph 76, Sydney Trains says that the allegations in that paragraph are not capable of being pleaded to and otherwise does not know and cannot admit the allegations.
77. In answer to paragraph 77, Sydney Trains:
- a. repeats paragraphs 25(h), 73 and 74 of this Defence; and
 - b. otherwise denies the allegations in paragraph 77.
78. In answer to paragraph 78, Sydney Trains:
- a. repeats paragraphs 25(h), 73, 74 and 77 of this Defence; and
 - b. otherwise denies the allegations in paragraph 78.
79. In answer to paragraph 79, Sydney Trains admits that by operation of s 539, s 50 of the FWA is a civil remedy provision.
80. In answer to paragraph 80, Sydney Trains:
- a. repeats paragraphs 25(h), 73, 74, 77 and 78 of this Defence;

- b. says that the allegation that the alleged contraventions of s 50 of the FWA are “serious contraventions” within the meaning of s 557A of the FWA has not been properly pleaded or particularised and is therefore vague and embarrassing; and
- c. otherwise denies the allegations in paragraph 80.

81. In answer to paragraph 81, Sydney Trains:

- a. repeats paragraphs 73 to 80 of this Defence; and
- b. otherwise denies the allegations in paragraph 81.

H. RELIEF CLAIMED

82. Sydney Trains denies that the Applicant and Group Members are entitled to the relief claimed in paragraph 82 or any relief at all.

Date: 12 June 2024



Signed by Jason Betts
Lawyer for the Respondent

This pleading was prepared by Ms Sera Mirzabegian SC, Mr Michael Seck of counsel and Herbert Smith Freehills.

Certificate of lawyer

I Jason Betts certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 12 June 2024



Signed by Jason Betts
Lawyer for the Respondent