

NOTICE OF FILING

This document was lodged electronically in the FEDERAL CIRCUIT COURT OF AUSTRALIA (FCC) on 10/11/2014 1:54:25 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Statement of claim
File Number: BRG558/2014
File Title: Brenton Larcombe v Raymond Mackereth
Registry: BRISBANE REGISTRY- FEDERAL CIRCUIT COURT - FEDERAL LAW



Dated: 11/11/2014 11:15:21 AM AEST

A handwritten signature in blue ink, appearing to read 'Adele Byrne'.

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Brenton Larcombe
Applicant

Raymond Mackereth
Respondent

Form 4

Fair Work Division
Rule 45.08(b)

**Further Amended Claim under the Fair
Work Act 2009 alleging contraventions of
general protection civil remedy provisions**

Is discrimination contrary to s.351 of the Fair Work Act alleged? (see Q 19 below) Yes No

Part A – Details of person affected by the contravention	
1. Name	<p>If an individual: Mr <input checked="" type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other <input type="checkbox"/> (give details):</p> <p>Family name: Larcombe Given names: Brenton</p> <p>If a company: Name and ABN:</p>
2. Address or registered office	<p><u>188 Heal Street</u> New Farm Postcode: 4005</p>
3. Phone	<p>Business hours: (07) 3252 3115 After hours: (0421) 761 561 Mobile:</p>
4. First language <i>(if an individual)</i>	<p><input checked="" type="checkbox"/> English <input type="checkbox"/> Other (specify):</p>

	Fax: (.....)
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Part E – Details of lawyer	
14. Is a lawyer representing you?	<input checked="" type="checkbox"/> No - go to 18 <input type="checkbox"/> Yes - go to 15
15. Lawyer's name	
16. Name of lawyer's firm	
17. Address Postcode: DX: Phone: (.....) Fax: (.....)

Part F – Notices from the Court	
18. Where do you want notices from the Court sent?	<input checked="" type="checkbox"/> address in 2 <input type="checkbox"/> organisation in 8-10 <input type="checkbox"/> address in 12-13 <input type="checkbox"/> lawyer in 15-17 <input type="checkbox"/> other (give details):

Part G – Contravention(s) alleged	
19. What are the grounds for the claim that adverse action against the applicant has been taken, threatened or organised contrary to the Fair Work Act? (Set out in numbered paragraphs the facts relied on and the provisions of the Fair Work Act relevant to the	<p><u>The Parties</u></p> <p>1. <u>The Applicant ("the Employee"):</u></p> <p>(a) <u>is and was at all material times a natural person capable of suing and being sued;</u></p> <p>(b) <u>was employed by Klub Kruise Pty Ltd ABN 59 100 879 098 (in Liquidation) ("the Employer") as its Manager from on or about 7 July 2002 until on or about 15 August 2012 ("the Employment");</u></p>

<p>claim)</p> <ol style="list-style-type: none"> 1. Specify the 'adverse action' 2. If relying on s.340 specify the workplace right 3. If relying on s.351 specify the attribute in s.351(1) 	<ol style="list-style-type: none"> (c) <u>was at all material times a national system employee pursuant to section 13 of the FW Act;</u> (d) <u>is a person with standing and authority to bring this application pursuant to section 539 of the <i>Fair Work Act 2009</i> (Cth) ("FW Act") for orders, including penalties and compensation, in relation to contraventions of the FW Act.</u> <p>2. <u>The Employer:</u></p> <ol style="list-style-type: none"> (a) <u>is and was at all material times a corporation capable of suing and being sued;</u> (b) <u>was at all material times carrying on the business of a men's sex on premises venue;</u> (c) <u>was at all material times a national system employer pursuant to section 14 of the FW Act;</u> (d) <u>voluntarily entered into liquidation on or about 17 August 2012.</u> <p>3. <u>The Respondent:</u></p> <ol style="list-style-type: none"> (a) <u>is and was at all material times a natural person capable of suing and being sued;</u> (b) <u>was at all material times the sole Director of the Employer;</u> (c) <u>was at all material times the Secretary of the Employer;</u> (d) <u>was at all material times a majority shareholder of the Employer.</u> (e) <u>was at all material times the public officer of the Employer;</u> (f) <u>was at all material times the operative controlling mind of the Employer;</u> (g) <u>was at all material times responsible for the corporate behaviour of the Employer;</u> (h) <u>was at all material times responsible for the overall direction, supervision and management of the Employer's operations;</u> (i) <u>was at all material times responsible for determining the Applicant's employment conditions;</u> (j) <u>was at all material times the representative the Applicant primarily dealt with on behalf of the Employer.</u>
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The Employment

4. There was no written contract of employment regarding the Employment

Relevant Industrial Instrument

5. On and from 1 January 2010 the Employer and the Employee were covered in relation to the Employment by the Amusement, Events and Recreation Award (the Award) because:

(a) Clause 4.1 of the Award provides that the Award covers employers in Australia engaged in the amusement, events and recreation industry in respect to their employees engaged in classifications in Schedule B to the exclusion of any other modern award;

(b) The leisure, recreation facilities and centres and amusement complexes is defined in clause 4.2 of the Award as being:

(i) leisure and recreation facilities and centres; or

(ii) sporting, exhibition, convention and amusement complexes.

(c) The Employer undertook the business of men's recreational club where men can negotiate with other men for encounters, of a recreational nature, sexual or otherwise;

(d) The work undertaken by the Employee was properly classified under the classification listed in clause Schedule B 8, of the Award as a Level 7 earning \$40 per hour as an annualised salary of \$79,040.

Underpayment Contraventions

Failure to pay the Employee Accrued Annual Leave on Termination

6. Pursuant to clause 24 the Award annual leave is provided for in the National Employment Standards ("the NES") which are contained in the FW Act.

7. Pursuant to s.87(2) of the FW Act (which is contained in the NES), an employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work.

8. Pursuant to s.90(2) of the FW Act, if where the employment of the

employee ends, the employee has a period of untaken annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

9. Section 44 of the FW Act provides that an employer must not contravene a provision of the NES.
10. At all times during the employment the Employee was neither paid, nor permitted to take, any annual leave, by the Employer, as it relates to the unpaid hours pleaded in clause 11.
11. The Employee had accrued 311.78 hours of annual leave at the time of termination of his employment.
12. At the time of termination the Employee was entitled to be paid \$12,471.20 in lieu of his 311.78 hours, plus annual leave loading of 17.5% \$2,182.46, totalling \$14,653.66 of accrued but untaken annual leave (“the Annual Leave Liability”).
13. At the time of termination the Employer did not pay the Employee an amount in lieu of annual leave accrued but not taken.
14. By reason of the matters pleaded in paragraphs 6 to 13 the Employer contravened s.90(2) of the FW Act by failing to pay the Employee his accrued annual leave.
15. By reason of the matters in the preceding paragraph, in failing to comply with s.90(2) of the FW Act, the Employer contravened s.44 of the FW Act, which is a civil remedy provision under s.539(2) of the FW Act.

Failure to Pay the Employee In Lieu of Notice of Termination

16. On 15 August 2012 the Employee emailed the Employer (and the Respondent) with notice of the resignation of his employment (“the Resignation”).

Particulars

The Resignation was sent by email from the Employee to the Respondent on 14 August 2012 and was on the following terms:

“Dear Ray
As the company is liquidating I resign.
Giving whatever notice is legally required.
Upon termination you are reminded that you owe me my long service leave, and 5 months holidays that you should not deduct whilst on sick leave.

If this is not already paid, I foreshadow that i will claim against you personally, as well as the company {or GEERS} regards”

17. Subsequent to the Resignation the Employer neither permitted the Employee to work out his four (4) week notice period nor provided him with payment in lieu of notice.
18. Pursuant to clause 11.1 of the Award notice of termination is provided for in the National Employment Standards (“the NES”) which are contained in the FW Act.
19. Pursuant to s.117 of the FW Act (which is contained in the NES), an employee is entitled to notice, or payment in lieu, of termination.
20. Section 44 of the FW Act provides that an employer must not contravene a provision of the NES.
21. Pursuant to s.117(2) of the FW Act the Employee was entitled to payment of four (4) weeks’ at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice, in lieu of notice, in the amount of \$6,080 (“the Notice Liability”).
22. At the time of termination the Employer did not pay the Employee the Notice Liability.
23. By reason of the matters pleaded in paragraphs 16 to 22 the Employer contravened s.90(2) of the FW Act by failing to pay the Employee the Notice Liability.
24. By reason of the matters in the preceding paragraph, in failing to comply with s.117 of the FW Act, the Employer contravened s.44 of the FW Act, which is a civil remedy provision under s.539(2) of the FW Act.

Failure to pay the Employee Superannuation

25. Pursuant to clause 20.2 of the Award superannuation legislation, including the *Superannuation Guarantee (Administration) Act 1992 (Cth)*, the *Superannuation Guarantee Charge Act 1992 (Cth)*, the *Superannuation Industry (Supervision) Act 1993 (Cth)* and the *Superannuation (Resolution of Complaints) Act 1993 (Cth)*, deals with the superannuation rights and obligations of employers and employees.
26. An employer must make a superannuation contribution to a superannuation fund for the benefit of the employee based upon a

specified percentage of the Employee's ordinary time earnings.

27. During the period 1 January 2010 to 15 August 2012 the Employer did not make all legally required superannuation contributions on behalf of the Employee in respect of the Employee's ordinary time earnings.

28. During the period 1 January 2010 to 15 August 2012 the Employee should have paid an additional amount of \$7,235.96 by way of superannuation contributions for the Employee ("the Superannuation Liability").

29. By reason of the matters pleaded in paragraphs 25 to 28 the Employer contravened clause 22.1 of the Award and thereby contravened section 45 of the FW Act, which is a civil remedy provision under s.539 of the FW Act.

Total Underpayments

30. As a result of the contraventions by the Employer referred to in paragraphs 1 to 37, the Employer underpaid the Employee:

- (a) annual leave in the amount of \$14,653.66;
- (b) payment in lieu of notice in the amount of \$6,080; and
- (c) superannuation in the amount of \$7,235.96.

Total Underpayments: \$27,970.07.

The Respondent's Involvement

31. The Respondent:

- (a) aided, abetted, counselled or procured the Employer's contraventions of the FW Act pleaded in paragraphs 1 to 37; and/or
- (b) was directly or indirectly knowingly concerned in, or a party to, the said contraventions.
- (c) by operation of s.550 of the FW Act, the respondent is taken to have undertaken the said contraventions.

Relief sought

32. See Schedule A

1. On or around 7 2 July 2002, the Applicant was employed as a manager of a men's sex on premises venue by Klub Kruiise Pty Limited ABN 59 100 879 098 (in Liquidation).
2. Klub Kruiise Pty Limited was placed in voluntary administration on 17 August 2012.

3. ~~The Applicant has never been given notice of termination. Despite Klub Kruise making a post on Facebook on 8 August 2012 about it now being closed, the Respondent never spoke to the Applicant about this, whether verbally or in writing causing the Applicant to resign after his employment contract was repudiated on or before 11 August 2012.~~
4. ~~The Applicant has not been paid his annual leave, long service leave or notice period on termination in contravention of the National Employment Standards, being a Core Provision pursuant to s44(1) of the Fair Work Act as relates to:~~
 - a. ~~Division 6 Annual Leave;~~
 - b. ~~Division 9 Long Service Leave;~~
 - c. ~~Division 11 Notice of Termination; and in addition to the FWA.~~
 - d. ~~And in addition to FWA obligations, the Applicant's superannuation of \$7,235.96 remains unpaid.~~
5. ~~Mr Ray Mackereth, the Respondent, was the sole director and company secretary and the major shareholder of Klub Kruise, holding 80 per cent of the shares.~~
6. ~~On 17 August 2012 the Respondent in his capacity as company director, appointed a liquidator, listing over \$80,000 \$73,000 in liabilities, the precise amount of the remaining taxation liabilities once voidable transactions are factored in, which was then crossed out and replaced with the figure \$87,966.10 in liabilities, and Nil income, suggesting the company was trading insolvent.~~
 - a. ~~The Liquidators report to creditors dated 8 October 2013 would show that Mr Mackereth grossly underestimated the total liabilities, which were actually \$189,822.83.~~
 - b. ~~The Report as to Affairs and the Presentation of Summary Affairs of a Company, both ASIC forms that come with penalties for false disclosures, signed by Mr Mackereth on 13 August 2012 lists company assets as "NIL" meaning that two days after he directed the removal of all fixtures, fittings and equipment, he valued the totality of these items as zero, including cash at bank leaving unexplained where the revenue of one additional month's trade went~~
7. ~~The Applicant alleges that the Respondent is an accessory to the contraventions pursuant to s550 of the Fair Work Act 2009 (Cth) by him:~~
 - a. ~~has aided, abetted, counselled or procured the contravention; or~~
 - b. ~~has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention. The Applicant notes that the Respondent:~~
 - i. ~~was the sole director of Klub Kruise.~~
 - ii. ~~was company secretary of Klub Kruise;~~

- ~~iii. was the public officer of Klub Kruise;~~
- ~~iv. held 80% of shares of Klub Kruise;~~
- ~~v. was responsible for the overall direction, supervision and management of the Klub Kruise's operations;~~
- ~~vi. was responsible for determining the Applicant's employment conditions, including as he admitted unilaterally changing them;~~
- ~~vii. was, as admitted, the sole operative controlling mind of Klub Kruise Pty Limited;~~
- ~~viii. was the representative that the Applicant primarily dealt with;~~

~~e. The following are some examples of commercial conduct that show some related but many unrelated and multiple acts that been in any way, by act or omission, directly or indirectly, the Respondent is knowingly concerned in or party to the various contraventions:~~

Business Systems and Practices Entitlements, Super, PAYG & GST

- ~~i. Klub Kruise had a poor approach to corporate governance, especially where compliance would limit Klub Kruise exploiting funds owed to others whether by accrual, or collection;~~
- ~~ii. The Respondent failed to have Klub Kruise Pty Limited accrue annual leave on an ongoing basis and long service leave after seven continuous years of~~
- ~~iii. The Respondent admits to cashing out of annual leave in a way prohibited by the FWA;~~
- ~~iv. Both actions show Mr Mackereth processes around annual leave accrual and long service leave accrual were at the direct benefit of his business and direct impact of the employees;~~
- ~~v. At all times Klub Kruise on paper accrued the liabilities for annual leave and long service leave;~~
- ~~vi. Even the Klub Kruise was a small business which would be less reliant on business systems, the Respondent demonstrated poor corporate behaviour in the undisciplined way he directed his employee's accruals to be used to fund day to day business activity;~~
- ~~vii. This additional cash was used in part to fund the Respondent's salary, motor vehicle and corporate hospitality all in priority of the worker that earned it;~~

- viii. Similarly the same happened with compulsory superannuation which was not accrued and paid when due from at least 2009, despite the strict compliance requirements. The first complaint being made by Rodney Ibell before 2009 and remained an issue until the end.
- ix. At the time of the Respondent placed Klub Kruiise into voluntary liquidation, excluding voidable priority payments, the company would have owed the ATO over \$123,000, made up of PAYG Withholding, GST Collection and possibly unpaid superannuation suggesting that the company was using other people's money fund it and not repaying it over an extended period of time.
1. The full extent of how long the Respondent ran up debts to the ATO and how it is made up between PAYG, GST and Superannuation will not be known until after the discovery process has been finalised.
- x. The business practice that was adopted by Klub Kruiise by Mr Mackereth's design and delivery was that only the net amount that went to the employee of each week's pay was protected from being used on other business expenses, but everything else was, in practice, operating cash, despite these accruals being recorded and compounded each pay period.
- xi. However at the same time, the Respondent drew a salary of around \$80,000, plus other benefits including a fully maintained late model Jeep, despite, no need for a company vehicle as Mr Mackereth was not operational and the company could not afford those luxuries as it owed employees and the ATO and diverting cash away from employee entitlements.
- xii. By doing this Mr Mackereth breached his obligations as a company director to put the business interests ahead of his own.
- xiii. Not only did the Respondent facilitate and interest free loan from his employees and the ATO, he then went further and misappropriated these funds for the commercial gain of the company he owns 80 per cent of by not paying it back.

Modern Award Transition

- xiv. Mr Mackereth also created payment structure that was linked loosely to the base rate of the Modern Award by not the other condictions.
- xv. Despite him seeking and receiving advice before and after the staff transitioned to the Amusement, Events and Recreation Award 2010, there was no budgeting of forecasting of actual entitlements., including Saturday rates, Sunday rates and overtime rates.
- xvi. Again the biggest winner for this approach was Mr Mackereth as the 80 per cent shareholder, who now also had an unfair edge compared to competitors that approached the award as the absolute minimum conditions.

Other Business Planning and Practices around Expenditure

- xvii. Despite significant outstanding debts to employees and the ATO did not impede the purchases of items that did not seem to have an immediate gain for the business, but included non-essential items like motor vehicles that were fully financed, and generous hospitality.
- xviii. By the time Mr Mackereth placed the company into voluntary liquidation, discretionary expenditure on non-business essentials was preventing payment on core items including electricity.
- xix. The cash at bank was treated as cash at hand, and directly contributed to the company trading while insolvent including many purchases that were indulgences and added little to the business.
- xx. The business spent more than it earned and did not plan for regular, future and known ad hoc expenses and this resulted in poor use of company funds and this was all in the control of the Respondent.
 - 1. An example of waste was that Mr Mackereth required weekly staff meeting to be a lunch including wines, all charged to the company while business critical expenses were not being paid, including basic entitlements and compulsory superannuation.
- xxi. The company blurred its relationship with the company

and the director feeding a culture of personal expenditure being paid for by the company.

1. For example in around 2010, while accruing liabilities, Mr Mackereth directed the points accrued from frequent flyer points purchases earned from company credit card expenses to go on an overseas trip with Mr Longhurst and his partner, rather than redeem the points for vouchers or products the company could use directly putting his interest ahead of the company.
2. Mr Mackereth also frequently charged lunches, social outings, travel, entertainment and dinners to the company, including alcohol when they were not related to company operations, or the when they were related, it was not the primary reason for the expense, which could include Mr Mackereth's friends (including Mr Longhurst) and his partner.
3. Mr Mackereth charged other personal expenses to Klub Kruiise or was reimbursed on transactions on one of his personal credit cards including:
4. The removalists and other relocation costs for at least two private residence relocations including into Cutters Landing at Newstead and 36 Crescent Road in Hamilton.
5. The true extent of this will not be known until after the discovery process has been finalised.

xxii. Both Klub Kruiise Pty Limited and Q News Pty Limited, Mr Mackereth's other business, have a long history and certainly dating back to before 2009 where they simple did not pay the staff' superannuation, or GST and PAYG Withholding, requiring arrangements to be entered into with the ATO which Mr Mackereth was a principal beneficiary of these unlawful acts.

Mr Mackereth's Response to revenue decline from 2010

xxiii. The Respondent did not take any real step until around 22 May 2012 to reduce the Respondent's own burden to the company, including his own salary and car, when

not working operationally, despite turnover dropping by 25% representing more than the total profit margin when the business was performing at its best and that had he done so, there would have been sufficient funds to accrue for employee entitlements and to meet most of the bills when due.

xxiv. Despite the extended period of growing debt, Mr Mackereth appears to have done nothing to try and get to the bottom of the problem and to reverse it, nor did he communicate to Mr Larcombe that there was a problem, thereby denying the person most able to help at an operational level the opportunity to get things better.

xxv. He took no obvious step to intervene in the business until May 2012 to help stem the bleeding, by which time there was nearly no cash and creditors being owed nearly \$189,822.83 that was immediately due and payable indicated the insolvent trading had been occurring for at least twelve months.

xxvi. Upon directing funds owing to others to Klub Kruiise's operations, the Respondent had to of known that his company was rushing toward insolvency if not arrested, yet he failed to change the business practices or even try and secure finance, investors or other capital raising so the company would be able to pay the debts when due with his first real efforts being somewhere between March and May 2012 when it was all too late.

xxvii. The Respondent acted with negligence or with deliberation by entering into, or remaining on trading arrangements with suppliers, or commercial finance, that the company could not afford, or no longer afford, including a total of \$119,654.56 unpaid for unsecured creditors, \$73,000 of which is for outstanding GST and PAYG installments at time of the company being placed into voluntary liquidation.

xxviii. The Respondent did not discharge his duty as a company director to diligently assess the business needs of a potential purchase, especially in the context of unsustainable liabilities from the misuse of entitlements, GST and PAYG thereby allowing his

business to be sustained by his employee's assets without their consent.

~~xxix. The Respondent also failed to take reasonable steps in the form of timely corporate recovery initiatives including potentially placing the company into administration should this have helped.~~

~~xxx. Despite the extensive use of employee funds in day to day operations, the Respondent directed Klub Kruise Pty Limited in its last six months of trading to pay \$50,573 to the ATO as priority payments (voidable transactions) at the expense of employees entitlements and superannuation to help convince the ATO to not hold Mr Mackereth liable for the taxation (both GST and PAYG) from 13 February 2012 to 13 August 2012 which directly deprived Mr Larcombe from being able to access his entitlements and the other employees from their superannuation, in a self serving act of cruelty.~~

~~xxxi. The Respondent also failed to take reasonable steps in placing the company into voluntary administration in a timely manner, trading for so long with the benefit of his employee's entitlements, superannuation and underpaid wages in addition to the GST and PAYG from the tax payer.~~

~~1. The full extent of the Response spending to the detriment of employee entitlement accrual will not be known until after the discovery process has been finalised.~~

The Respondent's Planning and Conduct for Lease Renewal or Relocation

~~xxxii. The Respondent blames his business failure on the landlord of the premises where Klub Kruise operated.~~

~~xxxiii. The Respondent failed to stay compliant with the existing lease obligations to have a security deposit for three month's rent, eroding his negotiable position risking early termination.~~

~~xxxiv. Yet Mr Mackereth failed to make appropriate planning and cash reserves to secure alternate premises, despite clear availability in the marketplace based on his own statements and did not sign any agreement to lease offer to him by the current landlord, despite verbal~~

agreements.

~~xxxv. Mr Mackereth made no allowance for a move from the premises, and no funds were set aside for the three months security deposit plus moving charges.~~

~~xxxvi. However Mr Mackereth's conduct from March 2012 to June 2012 also demonstrates he was the architect of the final nail in the coffin of his company, despite a very flexible landlord.~~

~~1. Mr Mackereth failed to return the Agreement to Lease provided, three times, with amendments in his favour and at least twice agreed by Mr Mackereth and Josef Senisin, with less than 6 weeks to go and no alternate premises and then blaming the landlord for his own inaction to formally accept the offers as required to secure the lease renewal making it untenable for the landlord as he had just under six weeks to find a new tenant.~~

~~2. He chose not to take up three different offers and thus left himself with no options because he had not cash in the company~~

The Respondent's other conduct that prevented entitlements being paid to staff near the time of liquidation

~~xxxvii. Mr Mackereth failed to vote with the Applicant on 22 June 2012 Extraordinary General Meeting to place the company into voluntary liquidation, using his 80% share voting bloc to make a resolution that the company could continue to trade, with the additional trading grossly harming the employee entitlements.~~

~~xxxviii. Mr Mackereth also paid or placed advertisements in Q News in June and July 2012 misleading the market claiming that the club was moving when he had no money to do so and had not secured any premises.~~

~~xxxix. Mr Mackereth also used Klub Kruiise as means to support his other business Q News as one of its biggest advertisers which at times conflicted with his directorial obligations to Klub Kruiise.~~

~~1. Yet according the documents Q News was not owed any money from Klub Kruiise when it closed.~~

~~2. The true extent of the Respondent's personal benefit from the Q News & Klub Kruise commercial dealings will not be known until after the discovery process has been finalised.~~

~~xi. Mr Mackereth failed to accept a \$9,000 offer for assets, and acting in breach of the lease meaning he lost the entire security deposit of (after deductions for some outgoings) of \$16,000 meaning \$25,000 was redirected to repair that could have been used for staff entitlements.~~

~~xli. By Mr Mackereth directing the removal of fixtures, fittings and equipment from 29 McLachlan Street, and twice on ASIC forms claiming there were 'nil' assets, he has misled the liquidators and ASIC and the Applicant alleges that he intended to keep these items to potentially open a similar venue in the future.~~

~~xlii. Mr Mackereth oversaw a change in the banking practices of Klub Kruise between 11 July 2012 and 10 August 2012, meaning far less bank deposits were made, and for far lesser value suggesting a potential misappropriation of funds.~~

~~1. There was zero cash at bank at time of liquidation according to what Mr Mackereth declared to ASIC twice, despite a full month's trading that was only permitted as an extension of the lease by the landlord to help raise money for employee entitlements.~~

~~2. The revenue takings are alleged to be considerably less than the previous month, even after reduced trading hours are factored in.~~

~~3. By October 2013 the liquidators had recovered through a "collection of bank balances" the sum of \$1,500.90 and "Contributions" of \$2,000.~~

~~4. The true extent of this will not be known until after the discovery process has been finalised.~~

~~xliii. From around 7 August 2012 the Respondent was unlawfully and/or recklessly divesting fixtures fitting and equipment basically as a fire sale with no or~~

~~limited regard for market value or whether the goods were more value as individual parts or as a sum and this was done without the knowledge of the liquidators or the revenues from those sales surrendered which occurred only after the creditors informed the liquidators and formally complained.~~

~~1. One example of the Respondent's reckless, negligent and deceptive conduct was between 8 & 11 June 2012, he facilitated the sale of 12 seat spa to Mr Richard Bakker for \$500, who immediately placed it on EBay and sold it for \$1,500, and this transaction or revenue was never disclosed on two separate ASIC documents, being the Report to Company Affairs and the Presentation of Summary of Affairs of the company signed on or around 13 August 2012 and 17 August 2012.;~~

~~2. The liquidator's report to creditors of 8 October 2013 shows that only \$390 was recovered from "plant and equipment".~~

~~3. Most items of value remain unexplained or poorly explained and this directly arises from Mr Maekereth removing the fit out and not disclosing it as an asset and denying potential sales to cover unpaid entitlements and superannuation.~~

~~xliv. The Respondent's damage to the building was obvious to the naked eye, including rubbish being left behind, exposed electrical cabling, plumbing damage, wall damage, some items not removed, a broken window and gardens trampled.~~

~~xlv. The Respondent did not even contact the landlord to discuss, let alone consult and he certainly made no attempt to see if he left the property in a satisfactory way, rather he told the landlord this was the case and in breach of the lease as clause 7.5 of the Lease, only allows for removal of the fit out:~~

~~1. "at the expiration of the term", when he took the actions to gut the club before the expiration, despite having up to 14 days following the expiration to remove the fit out~~

~~without risk of the property being abandoned;~~

~~2. The “tenant will make good for the satisfaction of the landlord” “any damage done” including “unsightliness occasioned”; and~~

~~3. Clause 19.2 gave the Respondent up to 14 days after the expiration to have this work done.~~

~~xlvi. By the Respondent failing to give the prescribed notice, having the effect that this month’s rent was still due to be paid.~~

~~xlvii. The extension to the lease was granted to assist raise funds for employee entitlements, because of Mr Mackereth’s own conduct, more than \$25,000 of available cash was reallocated to repair the damage and pay for the notice period and the Respondent was the primary beneficiary and the staff and the landlord significantly harmed because of it.~~

~~xlviii. Mr Mackereth failed to release intellectual property such as branding and websites back to the liquidator preventing them being purchased.~~

~~d. Jointly and severally the Applicant argues that Mr Mackereth’s accessorial liability has been established well beyond the balance of probabilities that he is involved in repeated contraventions of the Fair Work Act 2009 (Cth) arising out of multiple courses of conduct.~~

~~8. As the sole director, the Respondent controlled the company finances, engaged company accountants, provided appropriate reports for annual reporting and had principal responsibility for the day to day management of the company.~~

~~9. This included cash flow management, including reducing company overheads to ensure Klub Kruise was not trading while insolvent or at risk of it, however Mr Mackereth’s multiple decisions to burden the company with unnecessary costs and luxuries continued even when debts could not be paid off on payment plans that extended past twelve months.~~

~~10. The Respondent was remunerated around \$80,000 per annum but seldom worked in an operational capacity, and referred to himself as the ‘managing director’.~~

~~11. The Respondent had sole responsibility of the corporate behaviour of Klub Kruise and he was knowingly concerned in the company’s failure comply with the National Employment Standards.~~

- ~~12. The Applicant was only made aware of the dire financial nature of the Klub Kruise by the Respondent in around March 2012 21 May 2012 where he told the Applicant he would have to work longer hours for less money.~~
- ~~13. The Respondent terminated the Applicant for a temporary illness or absence in soon after this meeting by means of a hand delivered letter on the evening of Friday 8 June 2012.~~
- ~~14. But the Respondent two days later on 10 July 2012 withdrew this Notice of termination acknowledging later in a mediation agreement that this was because he “did not discuss with (the Applicant) in accordance with the Fair Work Act”.~~
- ~~15. The Respondent also withdrew the termination because Klub Kruise did not have the funds to pay the Applicant, as it related to annual leave, notice and long service leaving showing clear knowledge of his non-conformance and trying to avoid his responsibilities under the FWA.~~
- ~~16. The Respondent went on a deliberate plan to divert the cost of the Applicant’s unpaid entitlements to GEERS.~~
- ~~17. As the accruals for annual was nearing 300 hours, it was not possible for the Respondent to not have those funds accrued as per the time and wages record without breaching the NES, given the liquidity of Klub Kruise.~~
- ~~18. The documents provided to the liquidator the Respondent also show the Applicant to be owed \$41,000 \$41,501.22.~~
- ~~19. The Respondent conspired with various parties who against the terms of the lease gutted the fit out, which if left the money would have gone to pay for some of the entitlements to the staff including:
 - ~~i. Conspiring with Toby Longhurst who was aware of the efforts to save the employee entitlements to destroy Klub Kruise being able to realise any value of the fit out and Mr Longhurst assisted in the Klub’s destruction in breach of the lease.~~
 - ~~ii. The Respondent further conspired with an existing employee Peter Robinson in destroying the fit out knowingly, or it was reasonable in the circumstances that he ought to have known he was authorising a course of conduct that was in direct breach of the premises lease.~~
 - ~~iii. Paying removalists and those that assisted with the gutting of Klub Kruise’s internal fit out with what little cash was left for employee entitlements of by gifting in kind or reduced rates company assets, all expenses that never should have been incurred, as the actions were in breach of the lease, and these persons were paid as priority creditors of the employees.~~~~
- ~~20. The Respondent gifted or sold without transparency to the liquidators items that were seized from the fit out gutting of 29 McLachlan Street, to other parties, in breach of the lease denying surrender to the liquidator to~~

Signature of applicant, lawyer or authorised representative



Signed by (print name)

- the applicant
- lawyer for the applicant
- authorised representative of the applicant

Date: ~~31 July 2014~~ 10 November 2014

Form approved by the Chief Judge pursuant to Subrule 2.04(1A) for the purpose of Subrule 45.04(2)(a)

FWCFORM4_FCC_0313.V1

SCHEDULE A

Relief sought

The Applicant claims the following relief against the Respondent:

- (a) declarations that the Respondent is liable for contraventions by the Employer of the following provisions of the FW Act:
 - (i) section 44(1) of the FW Act as pleaded in paragraph 38(a) regarding the Annual Leave Liability;
 - (ii) section 44(1) of the FW Act as pleaded in paragraph 38(c) regarding the Notice Liability;
 - (iii) section 45 of the FW Act as pleaded in paragraph 38(d) regarding the Superannuation Liability;
- (b) orders pursuant to sections 546 and 550 of the FW Act that the Respondent pay penalties in the very high range for contraventions in respect to their contraventions of the FW Act;
- (c) an order pursuant to section 546(3) of the FW Act that penalties imposed on the Respondent be paid to the Applicant;
- (d) an order pursuant to section 545(2)(b) that the Respondent pay compensation to the Employee for the loss that the Employee has suffered, including the amount of the total underpayments due to the Employer's contraventions;
- (e) an order pursuant to section 545(2)(b) that the Respondent pay compensation to the Employee for damages Employee for the loss that the Employee has suffered from unpaid compulsory superannuation's return on investments due to the Employer's contraventions;
- (f) an order under section 547(1) of the FW Act for interest (at such rate as the Court thinks fit) on the total underpayments; and
- (g) such further or other orders as the Court deems necessary

NOTES

The Applicant Brenton Larcombe's hourly pay was \$40 per hour

He was over ~~under~~ 45 at the time of the Respondent placed Klub Kruise P/L into Voluntary Administration.

The following is based on the termination taking place on 17 ~~10~~ August 2012

CALCULATIONS

1. Division 6 Annual Leave	ORIGINAL CLAIM	AMENDED
a. 311.78 hours @ \$40 per hour	\$12,471.10	\$12,471.10
2. Division 9 Long Service Leave		
a. 10 weeks 8.6667 weeks @ \$1,520 per week	\$15,200.00	\$13,172.32
3. Division 11 Notice of Termination		

a. 5 4 weeks @ \$1,520	\$ 7,600.00	\$ 6,080.00
4. Filing Fee	\$ 515.00	
5. 4 Corrected Filing fee		\$ 75.00

	\$35,786.10	\$31,798.42

The orders sought by the Applicant for Compensation are that Mr Mackereth pay \$35, 271.10 in accordance with s550 of the Fair Work Act

Additionally the Applicant seeks an orders, as allowable at law, for Compensation of \$7,235.96 to be paid by the Respondent as he was solely responsible for Klub Kruiise Pty Limited failing to accrue and pay on time the compulsory superannuation in accordance with the Superannuation Guarantee legislation

_____ \$ 7,235.96

TOTAL COMPENSATION SOUGHT

\$39,034.38

SCHEDULE B

ORDERS SOUGHT FOR PECUNIARY PENALTY

The Applicant seeks the Respondent to be ordered to pay a pecuniary penalty to the Applicant as follows for contraventions of the National Employment Standards, specifically:

- a. ~~Division 6 a very high range penalty of no less than \$4,000.00 is ordered~~
- b. ~~Division 9 a very high range penalty of no less than \$6,500.00 is ordered~~
- e. ~~Division 11 a very high range penalty of no less than \$3,000.00 is ordered~~

The Applicant further seeks a declaration to the effect that Mr Mackereth failed in his obligations as a Company Director, noting the specific areas including but not limited to trading while insolvent, that he placed his personal interest ahead of Klub Kruiise Pty Limited's and making payments that he was a direct beneficiary in priority of staff entitlements and superannuation and that ASIC is informed of this for investigation.

The Applicant further seeks any other order(s) the Court deems appropriate as it relates to additional pecuniary penalties arising out of any matter but in particular to repeated breaches of the Fair Work Act 2009 (Cth), the Modern Award.