



Australian Government

# Fair Work

## OMBUDSMAN

*Fair Work Act 2009*

### Section 715 ENFORCEABLE UNDERTAKING

#### PARTIES

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:
  - (a) Telco Services Australia Pty Ltd (ACN 106 527 422) (**TSA**);
  - (b) Trimatic Contract Services Pty Ltd (ACN 107 003 627) (**TCS**);
  - (c) Peter William Jones (**Mr Jones**); and
  - (d) Timothy Mark Ungar (**Mr Ungar**),for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).
2. This Undertaking comes into effect when:
  - (a) the Undertaking is executed by TSA, TCS, Mr Jones and Mr Ungar; and
  - (b) the FWO accepts the Undertaking so executed (as evidenced by the FWO's endorsement below).

#### SCOPE OF THIS UNDERTAKING

3. For the purposes of this Undertaking:
  - (a) '**Contractor Services**' means the sale of products and services on behalf of TSA in the form of teleappointing or telemarketing in TCS' telecommunications sales business streams in all States and territories of Australia (**Contractor Services**); and
  - (b) '**Affected Persons**' means any individual engaged by TCS pursuant to a 'Contractor Agreement' to undertake the Contractor Services at any time in the 12 month period from 1 July 2012 to 30 June 2013.
4. For the purposes of section 715 of the FW Act the FWO accepts the Undertaking as being given by TSA, TCS, Mr Jones and Mr Ungar in relation to:

- (a) the contraventions alleged in the Federal Court of Australia proceedings VID311/2011 (**Proceedings**); and
- (b) contraventions alleged arising out of the engagement of any Affected Persons by TCS.

## **BACKGROUND**

- 5. TSA and TCS, together with a number of other companies, form part of the "TSA Telco Group". TSA Telco Group is a national provider of outsourced sales and sales support to third party businesses in respect of outbound telemarketing, sales consultancy and face-to-face marketing operations.
- 6. In March 1999, Telecommunications Services Australia Pty Ltd, another company in the TSA Telco Group, entered into a commercial agreement with a national telecommunications provider to provide direct marketing and sales services, including the Contractor Services.
- 7. From approximately November 2002 to November 2003, Telecommunications Services Australia Pty Ltd undertook a review of its corporate structure and determined to establish two separate corporate entities within the TSA Telco Group that would operate as service companies to Telecommunications Services Australia Pty Ltd. One of the service companies would engage employees, and the other would be used to engage independent contractors.
- 8. On 1 October 2003 TSA was incorporated. On 11 November 2003 TCS was incorporated. Since TSA and TCS were incorporated, Mr Jones and Mr Ungar have been directors and beneficiaries of shareholdings in TSA and TCS, and each hold offices within the TSA Telco Group.
- 9. In undertaking the Contractor Services, TSA operates call centres in Western Australia, Victoria, New South Wales, Northern Territory, Queensland and South Australia.
- 10. From about May 2006, TSA engaged TCS to supply labour to TSA for the performance of the Contractor Services. The commercial agreements between TSA and TCS required TCS to engage independent contractors pursuant to a 'Contractor Agreement'.
- 11. In around March 2009 the predecessor to the FWO, the Workplace Ombudsman (**WO**) (a statutory office pursuant to the *Workplace Relations Act 1996 (WR Act)*), commenced an investigation of the TSA Telco Group following a number of complaints from persons who had performed sales and marketing work for the TSA Telco Group.

12. The WO formed the view that independent contractors engaged by TCS to perform the Contractor Services for TSA in call centres and as door-to-door sales people were in fact, and at law, properly characterised as employees of TCS.
13. As a result of its investigation and the matters set out in paragraphs 5 to 12 above, on 20 April 2011, the FWO commenced the Proceedings. On 27 June 2011, Mr Jones and Mr Ungar were joined as Respondents to the proceedings as persons involved in the alleged contraventions of the WR Act.
14. In its Second Further Amended Statement of Claim filed in the Proceedings on 9 December 2011, the FWO sought declarations and orders, and the imposition of penalties in relation to alleged contraventions by TCS of:
  - (a) section 901(1) of the WR Act, by misrepresenting a proposed employment relationship as a proposed independent contract arrangement in respect of two workers engaged by TCS to perform the Contractor Services [REDACTED] and one worker engaged to sell products and services for TSA in New South Wales and the Australian Capital Territory on a door to door basis, [REDACTED] and
  - (b) section 235(2) of the WR Act, by failing to pay accrued untaken annual leave on termination of employment to [REDACTED]
15. The FWO also sought declarations, and the imposition of penalties under section 904(1) of the WR Act, in respect of TSA, Mr Jones and Mr Ungar as persons involved in the alleged contraventions of section 901(1) of the WR Act by TCS.
16. TSA, TCS, Mr Jones and Mr Ungar denied the FWO's allegations, including those set out in the Second Further Amended Statement of Claim. Specifically, in their Defence filed 25 May 2012, among other things:
  - (a) TCS denied that [REDACTED] were employees and not independent contractors and set out the basis for its belief that the defence under section 901(2) of the WR Act applied to the alleged contraventions of section 901(1) of the WR Act; and
  - (b) TSA, Mr Jones and Mr Ungar denied they were persons involved in any alleged contraventions of section 901(1) of the WR Act by TCS.
17. Since on or around February 2012, and for reasons that include the Proceedings brought by the FWO, TSA and TCS have implemented changes to the nature of activities involved in its business model and the basis of engagement of resources in relation to the Contractor Services.

18. In accordance with paragraphs 20(a) and (b) below, individuals performing the Contractor Services will be engaged as employees. TSA and TCS commenced implementation of these changes to their operations prior to the commencement of this Undertaking.
19. The parties have now agreed to resolve the Proceedings by way of this Undertaking made pursuant to the FW Act.

## **UNDERTAKINGS**

20. Upon the commencement of this Undertaking and for the purposes of section 715 of the FW Act, TSA, TCS, Mr Jones and Mr Ungar undertake to:

### **Changes to labour engagement practices**

- (a) by 31 March 2014, TSA and TCS will change their operations so that all individuals who perform the Contractor Services will be employed in the TSA Telco Group as employees and not engaged as independent contractors, and will be paid pursuant to the relevant industrial instrument applicable to the work performed by such employees;
- (b) provide to the FWO written confirmation that the changes in paragraph 20(a) above have been completed, by the earlier of 1 April 2014, or seven days after the completion of the changes in paragraph 20(a) occurring;

### **Future workplace relations compliance**

- (c) commit to ongoing compliance with applicable Commonwealth workplace laws and instruments, including the FW Act, by developing systems and processes to promote ongoing compliance with those requirements;
- (d) provide to the FWO, within 90 days of the execution of this Undertaking, written details of the systems and processes implemented in satisfaction of the undertaking in paragraph 20(c) above;

### **Designated enquiry line**

- (e) for a period of 12 months after the commencement of this Undertaking, maintain a telephone hotline and designated email address for all persons engaged by TSA and/or TCS to make complaints regarding underpayment of amounts to which they may be entitled in relation to the performance of work;
- (f) ensure that the access details and purpose of the telephone hotline and email address are made known and accessible to all persons engaged by TSA and/or TCS and that such complaints will be referred to the relevant entity for investigation by it;

### Resolution of new complaints

- (g) within 28 days after execution of this Undertaking, and from time to time in the event of personnel changes, provide the FWO with the name and contact details of the designated personnel appointed to liaise with the FWO in relation to any new workplace complaints referred by the FWO for initial assessment in accordance with paragraph 21;
- (h) within 14 days of a new workplace complaint being referred by the FWO in accordance with paragraph 21, provide a written response to the officer nominated by the FWO as the liaison officer for the purposes of this Undertaking, on the outcome of the initial assessment, including any voluntary resolution of the workplace complaint and/or the basis for any dispute of the workplace complaint;

### Payments to [REDACTED]

- (i) within 28 days after execution of this Undertaking, either jointly or severally:
- (i) pay [REDACTED] a sum of \$4,154.94 (gross) calculated by reference to the amount [REDACTED] would have been entitled to if he was an employee of TCS, being payment for 271.21 hours based on a calculation of accrued untaken annual leave for the period from 11 November 2006 to 28 October 2008;
- (ii) undertake an assessment of the minimum monetary entitlements [REDACTED] [REDACTED] (collectively, the **Complainants**) would have been entitled to if they were employees of TCS, based on the following industrial instruments and legislation in operation during the period of the Complainants' engagement, to identify any underpayments that would have been owed to them had they been employees of TCS:

Complainant	Instrument(s)
[REDACTED]	<ul style="list-style-type: none"><li>the hourly rate of pay in the Australian Pay and Classification Scale (<b>APCS</b>) derived from the <i>Contract Call Centre Industry Award 2003</i> [AP827785CRV] in the classification of Customer Contact Officer Level 1; and</li><li>the applicable terms of the <i>Contract Call Centre Industry Award 2003</i> (AP827785CRV), as in operation under the WR Act.</li></ul>
[REDACTED]	<ul style="list-style-type: none"><li>the hourly rate of pay and casual loading in the</li></ul>

	<p>APCS derived from the <i>Clerks' (South Australia) Award</i> [AN150039], in the classification of Level 2; and</p> <ul style="list-style-type: none"> <li>• the applicable terms of the NAPSA derived from the <i>Clerks' (South Australia) Award</i> [AN150039], as in operation under the WR Act.</li> </ul>
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- (j) within 28 days after execution of this Undertaking:
  - (i) provide the FWO with a copy of the methodology to be used to conduct the assessment referred to in paragraph 20(i)(ii) directly above; and
  - (ii) pay to the Complainants the amounts identified in the assessment referred to in paragraph 20(i)(ii) above;
- (k) provide proof of payment of any amounts identified in paragraph 20(i)(i) and (j)(ii) to the FWO within seven days of the payment(s) being made;

**Rectification for Affected Persons**

- (l) undertake an assessment of the minimum monetary entitlements of any Affected Persons calculated as if the Affected Persons were employees of TCS, such assessment to:
  - (i) apply the following Modern Award and legislation, as in operation during the period of the Affected Person's engagement, as the source of the minimum monetary entitlements:
    - A. wages and work-related entitlements under the *Contract Call Centres Award 2010* [MA000023] applicable to the classification of Customer Contact Officer Level 1 and the category of work that would be most appropriate based on the Affected Person's pattern of work; and
    - B. annual leave entitlements in accordance with section 87 of the FW Act if the Affected Person worked part time or full time;
  - (ii) compare, on an overall basis, the amounts each of the Affected Persons would have received under the instruments referred to in (i) for performing the Contractor Services at any time in the period from 1 July 2012 to 30 June 2013, with the net monetary amount the Affected Persons were in fact paid by TCS in respect of work performed in that period, to identify any underpayment owed to them, had they been employees of TCS;

- (m) within 28 days after the execution of this Undertaking, provide the FWO with a copy of the specific details of methodology to be used to conduct the assessment in the manner referred to in paragraph 20(l) above;
- (n) within 90 days after providing the FWO with the proposed methodology for the assessment:
  - (i) complete the assessment of the Affected Persons referred to in paragraph 20(l) above;
  - (ii) pay all amounts owed to any Affected Persons identified in the assessment;
- (o) provide proof of payment of any amounts paid in accordance with paragraph 20(n)(ii) to the FWO within seven days of the payment(s) being made;
- (p) for the period of 12 months after the execution of this Undertaking:
  - (i) take reasonable steps to locate Affected Persons who could not be located within the specified period, including attempting to contact the Affected Persons by telephone or in writing on existing or any new contact details obtained to:
    - (i) advise them they are owed money; and
    - (ii) explain the process for claiming the money owed to them;
  - (ii) report to the FWO after each four months on the attempts to locate Affected Persons, and the payments made to any Affected Persons located and paid, in the preceding four month period;
- (q) within 7 days after the end of the period referred to in paragraph 20(p):
  - (i) pay to the Commonwealth of Australia (through the Office of the Fair Work Ombudsman) pursuant to section 559(1) of the FW Act, and in discharge of any liability to make further payments to the Affected Persons pursuant to this Undertaking, any amounts owed to Affected Persons who could not be located and paid within the specified period, to be held on trust for the Affected Persons; and
  - (ii) provide the FWO with a report on any Affected Persons who could not be located, together with details of the amount owed to them and their last known contact details;

### **Website notice**

- (r) cause to be placed, within 28 days of the execution of this Undertaking, a notice on the website of the TSA Telco Group at [www.tsatelco.com.au](http://www.tsatelco.com.au) (**Website Notice**) in the form of Attachment A to this Undertaking and which:
  - (i) is displayed on the homepage of the website in at least size 10 font;
  - (ii) remains on the website for a period of at least 28 days; and
  - (iii) contains a html link to the executed Undertaking;
- (s) provide a copy of the Website Notice to the FWO within seven days of publication;

### **Workplace notices**

- (t) cause to be displayed, within 28 days of the execution of this Undertaking, a notice in the form of Attachment A to this Undertaking (**Workplace Notice**):
  - (i) for a period of at least 28 days in locations owned or controlled by TSA Telco Group at which all persons engaged by TSA and TCS have access; and
  - (ii) in a manner which is reasonably capable of drawing the notice to the general attention of all persons engaged by TSA and TCS (for example, by placement on a staff noticeboard at each workplace in at least A3 size);
- (u) for persons who are not based at an office location, or who work at premises not owned or controlled by TSA and TCS, ensure that a copy of the Workplace Notice is made available to those persons;
- (v) provide written details of the method/s of displaying or providing the Workplace Notice, to the FWO within seven days of it first being displayed;

### **Workplace relations training**

- (w) within six months of the execution of this Undertaking, organise and ensure training for Mr Jones and Mr Ungar and all other persons engaged by TSA and TCS who have managerial responsibility for, or involvement in, the making of business decisions regarding the model of engagement of the workforce (**Training**);
- (x) ensure the Training:
  - (i) addresses compliance with the FW Act;
  - (ii) is conducted by a practitioner with expertise in employment law, paid for by TSA and/or TCS;



- (y) provide the name and qualification of the person or organisation to conduct the training and copies of the proposed training materials to the FWO no later than seven days before the Training is to be conducted;
- (z) provide evidence of attendance at the Training to the FWO within seven days of the Training being provided (including the name and position of all attendees and the date on which the Training was attended);
- (aa) for a period of three years from the execution of this Undertaking, ensure that Training is conducted in the manner prescribed in paragraphs 20(w) to (z) in relation to any new or existing employees or contractors who, after the commencement of this Undertaking, acquire managerial responsibilities in relation to the making of business decisions regarding the model of engagement of the workforce on behalf of TSA and TCS.

#### **REFERRAL OF NEW COMPLAINTS**

21. To assist TSA, TCS, Mr Jones and/or Mr Ungar to meet the obligation in paragraph 20(h) above, the FWO agrees:
- (a) that new workplace complaints received on or after the commencement of this Undertaking by a person who undertook the Contractor Services, but who is not an Affected Person within the meaning of paragraph 3(b), will be referred to TCS for initial assessment and resolution prior to the FWO referring the matter to a resolution process facilitated by the FWO or commencing an investigation; and
  - (b) within 14 days of the commencement of this Undertaking (and from time to time in the event of a change in personnel), to nominate a liaison officer for the purposes of any new complaints referred to in paragraph 21(a) above.

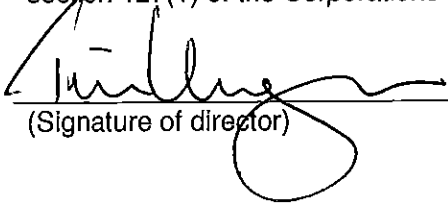
#### **ACKNOWLEDGEMENTS**

22. TSA, TCS, Mr Jones and Mr Ungar acknowledge that:
- (a) the FWO may:
    - (i) make this Undertaking (including any attachments) available for public inspection, including by posting it on the FWO internet site at [www.fwo.gov.au](http://www.fwo.gov.au) (subject to the FWO taking any necessary steps to redact the names of individuals not party to the Undertaking);
    - (ii) release a copy of this Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
    - (iii) issue a media release in relation to this Undertaking;

- (iv) from time to time, publicly refer to the Undertaking and its terms;
  - (v) rely upon the acknowledgments and agreement of TSA, TCS, Mr Jones and Mr Ungar to matters set out in the Undertaking in respect of any future decision about enforcement action to be taken in relation to any future non-compliance with Commonwealth workplace relations obligations by TSA, TCS, Mr Jones and/or Mr Ungar;
- (b) consistent with the Note to section 715(4) of the FW Act, this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this Undertaking;
- (c) if the FWO considers that TSA, TCS, Mr Jones and/or Mr Ungar has contravened any of the terms of this Undertaking:
- (i) the FWO may apply to any of the Courts set out in section 715(6) of the FW Act, for orders under section 715(7) of the FW Act;
  - (ii) this Undertaking may be provided to the Court as evidence of the undertakings given by TSA, TCS, Mr Jones and/or Mr Ungar in paragraph 20 above, and also in respect of the question of costs; and
- (d) this Undertaking may be withdrawn from by TSA, TCS, Mr Jones and/or Mr Ungar for the purposes of section 715(3) of the FW Act only if the FWO gives its written consent (in which case the FWO may apply for orders against TSA, TCS, Mr Jones and/or Mr Ungar in respect of alleged contraventions specified in paragraph 4);
- (e) no assertion or matter in this Undertaking may be relied upon as an admission by any other person to support a cause of action in any other civil penalty proceeding; and
- (f) the FWO reserves the right to refer to this Undertaking and its contents in respect of any future proceedings brought by the FWO against TSA, TCS, Mr Jones and/or Mr Ungar in relation to any future contraventions of Commonwealth workplace laws.
23. TSA, TCS, Mr Jones and Mr Ungar agree that they each will not, and will take reasonable steps to ensure that their respective officers, employees or agents do not, make any statement, orally or in writing, or otherwise which conveys or implies or reasonably conveys or implies anything inconsistent with the terms of this Undertaking.

**Executed as an undertaking**

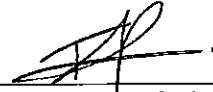
EXECUTED by **Telco Services Australia Pty Ltd (ACN 106 527 422)** in accordance with section 127(1) of the *Corporations Act 2001*:

  
\_\_\_\_\_  
(Signature of director)

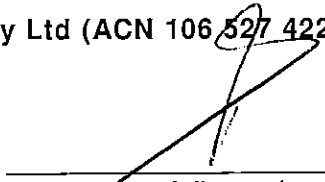
**TIMOTHY MARK UNGAR**  
\_\_\_\_\_  
(Name of director)

**20.12.13**  
\_\_\_\_\_  
(Date)

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)


**TIANNA HUGHES**  
\_\_\_\_\_  
(Name of witness)

  
\_\_\_\_\_  
(Signature of director/company secretary)

**PETER WILLIAM JONES**  
\_\_\_\_\_  
(Name of director/company secretary)

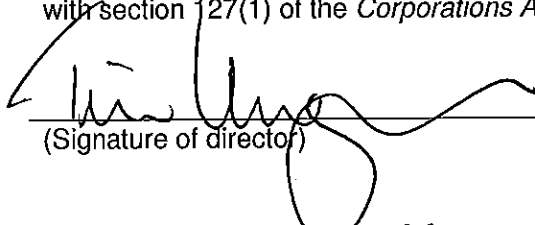
**20.12.13**  
\_\_\_\_\_  
(Date)

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

**Eileen Walker**  
\_\_\_\_\_  
(Name of witness)

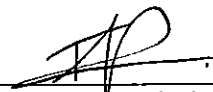
EXECUTED by **Trimatic Contract Services Pty Ltd (ACN 107 003 627)** in accordance with section 127(1) of the *Corporations Act 2001*:

  
\_\_\_\_\_  
(Signature of director)

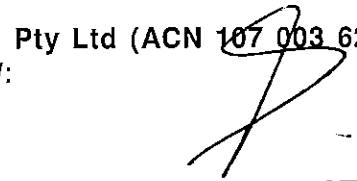
**TIMOTHY MARK UNGAR**  
\_\_\_\_\_  
(Name of director)

**20.12.13**  
\_\_\_\_\_  
(Date)

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)


**TIANNA HUGHES**  
\_\_\_\_\_  
(Name of witness)

  
\_\_\_\_\_  
(Signature of director/company secretary)

**PETER WILLIAM JONES**  
\_\_\_\_\_  
(Name of director/company secretary)

**20.12.13**  
\_\_\_\_\_  
(Date)

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

**Eileen Walker**  
\_\_\_\_\_  
(Name of witness)

EXECUTED by Peter William Jones:



Peter William Jones

20.12.13

(Date)

in the presence of:

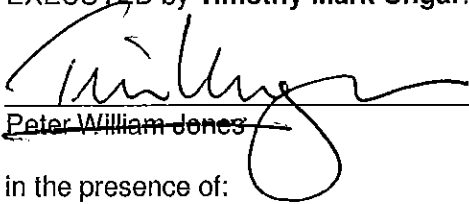


(Signature of witness)

Eileen Walker

(Name of witness)

EXECUTED by Timothy Mark Ungar:

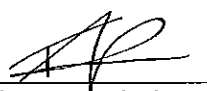


~~Peter William Jones~~

20.12.13

(Date)

in the presence of:

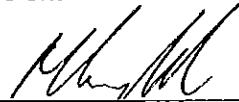


(Signature of witness)

TIANNA HUGHES.

(Name of witness)

ACCEPTED by the Fair Work Ombudsman pursuant to section 715(2) of the Fair Work Act 2009 on:

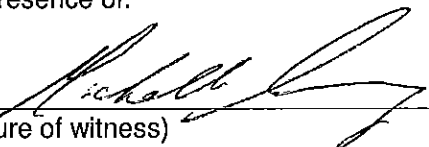


~~NATALIE JAMES~~ MICHAEL CAMPBELL  
FAIR WORK OMBUDSMAN (ACTING)

24 DECEMBER 2013

(Date)

in the presence of:



(Signature of witness)

MICHELLE CARGY

(Name of Witness)

## ATTACHMENT A: FORM OF WEBSITE AND WORKPLACE NOTICE

### Enforceable Undertaking with the Fair Work Ombudsman

In 2011 the Fair Work Ombudsman (**FWO**) commenced proceedings in the Federal Court of Australia against Trimatic Contract Services Pty Ltd (**TCS**), Telco Services Australia Pty Ltd (**TSA**), Mr Peter Jones and Mr Timothy Ungar, alleging contraventions of the *Workplace Relations Act 1996*. TCS and TSA are two companies within the TSA Telco Group.

The proceedings arose out of an investigation by the FWO into TCS' practice of engaging individuals as independent contractors to perform sales of products and services on behalf of TSA in the form of teleappointing or telemarketing in TCS' telecommunications sales business streams (**Contractor Services**). The proceedings included allegations that two individuals engaged as independent contractors to undertake the Contractor Services in TSA's call centres were in fact, and at law, properly characterised as employees of TCS.

TCS, TSA, Mr Jones and Mr Ungar disputed the allegations in the proceedings, but have agreed to re-structure their business operations going forward so that, among other things, the Contractor Services will be organised in such a way and individuals who perform the Contractor Services will be engaged as employees.

TSA, TCS, Mr Jones and Mr Ungar have entered into an Enforceable Undertaking with the FWO (available at [www.fwo.gov.au](http://www.fwo.gov.au)) committing to a number of measures, including:

- completing a change of their business operations and engaging individuals performing Contractor Services as employees of TSA Telco Group. This change will be completed by 31 March 2014;
- making payment of certain amounts to individuals who were the subject of the Court proceedings;
- auditing the entitlements of individuals engaged as independent contractors by TCS to perform the Contractor Services in the period from 1 July 2012 to 30 June 2013, and making payment of any identified underpayments; and
- implementing a telephone hotline and designated email address for persons engaged by TSA and TCS to make complaints and that TSA and/or TCS will investigate the complaints.

TSA, TCS, Mr Peter Jones and Mr Timothy Ungar give a commitment to comply with all requirements of the Commonwealth workplace relations laws.

If you were engaged as an independent contractor by TCS to perform Contractor Services in the period from 1 July 2013 to 30 June 2013 and are unsure if you were paid correctly, please contact Zahra Peggs. Alternatively, anyone can contact the FWO via its website at [www.fairwork.gov.au](http://www.fairwork.gov.au) or the Infoline on 13 13 94.