



Fair Work
OMBUDSMAN

ENFORCEABLE UNDERTAKING

dated 7 MAY 2010

Given by

**P&O Automotive and General Stevedoring Pty Ltd
(ACN 123 021 492)**

To

**The Commonwealth of Australia
(as represented by the Fair Work Ombudsman)**

concerning

- a breach of section 507(2) of the *Workplace Relations Act 1996* (as in force after 27 March 2006) (WR Act)
-

ENFORCEABLE UNDERTAKING

THIS ENFORCEABLE UNDERTAKING is given to the Commonwealth of Australia (as represented by the Fair Work Ombudsman (FWO)) by:

- **P&O Automotive and General Stevedoring Pty Ltd** (ACN 123 021 492) (**P&O**) of Level 9, 160 Sussex Street, Sydney, NEW SOUTH WALES 2000

pursuant to section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**).

BACKGROUND:

- A. P&O was carrying on a business within the transport industry operating stevedoring for cargo such as bulk timber and steel.
 - B. On 5 November 2008, six (6) P&O employees (**Employees**) stopped working between 7 pm and 8.50pm (the **Industrial Action**). The Employees were due to discharge 20,000 tonne of mineral sands off a vessel docked in the Bunbury Port.
 - C. The Industrial Action coincided with a dispute between the International Transport Workers Union and the vessel 'The Equator' with respect to an allegation of non-payment of Filipino crew members.
 - D. At the time of the Industrial Action, the Employees were covered by the *P&O Ports Bunbury 2005 Enterprise Agreement* (**Agreement**), which had passed its nominal expiry date. The parties to the Agreement had entered a formal bargaining period.
 - E. The Industrial Action did not meet the criteria set out in section 435(2)(e) and (f) of the *Workplace Relations Act 1996* (Cth) (**WR Act**) and was therefore not "protected action" within the meaning of the WR Act.
 - F. P&O paid the Employees for the shift during which the Industrial Action took place.
 - G. By reason of the matters in paragraph E and F above, P&O contravened section 507(2) of the WR Act.
 - H. P&O admits the contravention set out in paragraph G above, and gives the Enforceable Undertaking set out below to the FWO in relation to that contravention.
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1. ENFORCEABLE UNDERTAKING

In consideration of the FWO agreeing not to apply for any orders under Division 2 of Part 4-1 of the FW Act in relation to the contravention set out above (as evidenced by the FWO's acceptance of this Enforceable Undertaking endorsed at the foot hereof),

P&O NOW UNDERTAKES TO:

- (a) ensure that it complies at all times and in all respects with the FW Act and the *Fair Work Regulations 2009* (Cth);
 - (b) for a period of 1 year from the execution of this Enforceable Undertaking, immediately notify the Office of the FWO in writing of any future unlawful industrial action taken by any of its employees;
 - (c) for a period of 1 year from the execution of this Enforceable Undertaking, provide the Office of the FWO with written evidence of its compliance with section 474 of the FW Act (or a comparable provision in any legislation which may replace it) within 21 days of any industrial action being taken by any of its employees;
 - (d) within 120 days of executing this Enforceable Undertaking, ensure that all management staff and all of its employees located at its Bunbury site attend not less than 2 hours of workplace training which concerns rights and obligations arising under Chapter 3 Part 3-3 Industrial Action and Chapter 3 Part 3-1 General Protections of the FW Act conducted by an accredited workplace trainer (who will submit the training materials to the Office of the FWO not less than 4 weeks prior to the delivery of the training) at the expense of P&O;
 - (e) write to each of the employees located at its Bunbury site, a letter in the form of Annexure A, explaining that:
 - a. it was unlawful for P&O to make payment to the Employees in respect of the Industrial Action;
 - b. P&O will not make payments of that kind again in the future;
 - c. it is unlawful to demand payments of that kind; and
 - d. the employees must attend workplace training conducted by an accredited workplace trainer;
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- (f) write to the Maritime Workers' Union, a letter in the form of Annexure B, explaining that:
 - a. it was unlawful for P&O to make payment to the Employees in respect of the Industrial Action;
 - b. P&O will not make payments of that kind again in the future;
 - c. it is unlawful to demand payments of that kind.

2. NO INCONSISTENT STATEMENTS

- (a) P&O:
 - (i) must not; and
 - (ii) must ensure that each of its officers, employees or agents, do not, make any statement, orally or in writing, or otherwise imply anything that is inconsistent with admission or acknowledgements contained in this agreement.

3. COMMENCEMENT OF ENFORCEABLE UNDERTAKING

This Enforceable Undertaking comes into effect when:

- (a) the Enforceable Undertaking is executed by P&O; and
- (b) the FWO accepts the Enforceable Undertaking so executed, and endorses the Enforceable Undertaking accordingly.

4. ACKNOWLEDGEMENTS

P&O acknowledges that:

- (a) this Enforceable Undertaking is given by it and accepted by the FWO pursuant to section 715 of the FW Act;
- (b) the FWO may:
 - (i) make this Enforceable Undertaking (and any of the Attachments hereto) available for public inspection, including by posting it on the FWO internet site at www.fwo.gov.au;
 - (ii) release a copy of this Enforceable Undertaking (and any of the Attachments hereto) pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
 - (iii) issue a media release in relation to this Enforceable Undertaking;
 - (iv) from time to time, publicly refer to the Enforceable Undertaking (and any of the Attachments hereto) and its terms; and
 - (v) rely upon the admissions made by P&O set out in paragraphs G and H above in respect of decision making concerning any future non-compliance with P&O's workplace relations obligations.
- (c) consistent with the Note to section 715(4) of the FW Act, this Enforceable Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out herein; and
- (d) if P&O contravenes any of the terms of this Enforceable 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; and
 - (ii) this Enforceable Undertaking may be provided to the Court as evidence of the admissions made by P&O in paragraphs G and H above, and also in respect of the question of costs.

Dated: 7 MAY 2010

EXECUTED by P&O Automotive and
General Stevedoring Pty Ltd in
accordance with section 127(1) of the
Corporations Law:



(Signature of Secretary/Director)



(Signature of Director)

ANDREW C. WALKER

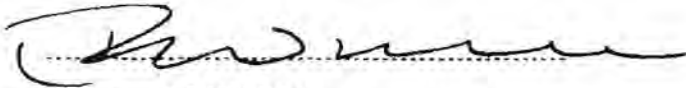
(Name of Secretary/Director in Full)

Donald W Smithwick

(Name of Director in Full)

ACCEPTED by the FAIR WORK OMBUDSMAN

Dated: 28th May 2010



NICHOLAS WILSON
FAIR WORK OMBUDSMAN

ATTACHMENT A

Letterhead P&O Automotive and General Stevedoring Pty Ltd

Address & Date

Dear **Employee Name**,

Unlawful payment for period of industrial action

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (**FWO**), (formerly, the Office of the Workplace Ombudsman) into allegations that P&O Automotive and General Stevedoring Pty Ltd (**the Company**) contravened section 507(2) of the *Workplace Relations Act 1996* by making payment to six employees for a period in which they had taken unlawful industrial action on 5 November 2008.

The Company has formally admitted that it did engage in the proscribed conduct, as reflected in an Enforceable Undertaking given by the Company to the FWO. A copy of that Enforceable Undertaking is enclosed with this letter.

The Company will not make payments of that kind again in the future.

The *Fair Work Act 2009 (Cth)* (**FW Act**) has replaced the WR Act. Section 474 of the FW Act makes it unlawful for an employer to make payments to employees for certain periods of industrial action. Section 475 of the FW Act also makes it unlawful for a person to accept or ask an employer to make a payment for those periods of industrial action.

To promote awareness of rights and obligations arising under the FW Act, you are required to attend two hours of workplace training, which will be conducted at the Company's expense, by an accredited workplace trainer. The Company will notify you of the details of the workplace training closer to the event.

Please contact **specify name & contact details for Company contact person**, or Madeleine Jones, Assistant Director – RST (WA) on (08) 9464 4298 or madeleine.jones@fwo.gov.au

Yours sincerely

Signature - CEO P&O Automotive and General Stevedoring Pty Ltd

ATTACHMENT B

Letterhead P&O Automotive and General Stevedoring Pty Ltd

Branch Secretary
Level 2
2-4 Kwong Alley,
North Fremantle,
Western Australia

Date

Dear Chris Cain,

Unlawful payment for period of industrial action

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (**FWO**), (formerly, the Office of the Workplace Ombudsman) into allegations that P&O Automotive and General Stevedoring Pty Ltd (**the Company**) contravened section 507(2) of the *Workplace Relations Act 1996* by making payment to six employees for a period in which they had taken unlawful industrial action on 5 November 2008.

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Please contact **specify name & contact details for Company contact person**, or Madeleine Jones, Assistant Director – RST (WA) on (08) 9464 4298 or madeleine.jones@fwo.gov.au

Yours sincerely

Signature - CEO P&O Automotive and General Stevedoring Pty Ltd