



Australian Government

Fair Work OMBUDSMAN

ENFORCEABLE UNDERTAKING

dated 2011

Given by

CFC Retail Pty Ltd (ACN 107 470 888)

to

The Commonwealth of Australia

(as represented by the Office of the Fair Work Ombudsman)

concerning contraventions of Commonwealth workplace laws

Details

Parties	FWO and CFC Retail Pty Ltd	
FWO	Name	Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman)
	ABN	43 884 188 232
	Address	The Fair Work Ombudsman GPO Box 9887 Melbourne VIC 3000
	Telephone	(03) 9954 2527
	Fax	(02) 6276 9169
	Attention	Robert Price Director, Regional Services and Targeting - Victoria
	CFC Retail Pty Ltd	Name
ABN		60 107 470 888
Incorporated in		Victoria
Address		Level 2/520 Swift Street, Albury NSW 2640
Telephone		03 9530 4356 (Chadstone Store)
Fax		03 9568 0894 (Chadstone Store)
Attention		The Directors
Recitals	A	The FWO commenced an investigation into allegations that CFC Retail Pty Ltd had breached Commonwealth workplace laws.
	B	By reason of the matters set out in Attachment "A" (Background), the FWO has determined, and CFC Retail Pty Ltd acknowledges, that CFC Retail Pty Ltd contravened Commonwealth workplace laws.
	C	The parties have agreed to resolve the contraventions without the need to resort to civil penalty litigation by way of this Enforceable Undertaking ("EU") made pursuant to section 715 of the <i>Fair Work Act 2009</i> (FW Act).
Governing law	Victoria	
Date of agreement	See Signing page	

General terms

1 Admission of contravention

By reason of the matters described in Attachment "A" (Background), which are admitted without demur by CFC Retail Pty Ltd, CFC Retail Pty Ltd contravened Commonwealth workplace laws in the respects set out in Attachment "B" ("Contraventions").

2 Limit of admission

2.1 The FWO acknowledges that the terms of this EU:

- (a) are solely for the purposes of resolving the FWO investigation into the Contraventions; and
- (b) deed must not be interpreted as an admission by CFC Retail Pty Ltd of liability for any matter, other than as expressly provided in this EU.

2.2 No assertion or matter in this EU may be relied upon as an admission by any person to support a cause of action in any other civil penalty proceeding.

2.3 However, this term does not prevent any matter in this EU being relied upon in future proceedings in order to inform a relevant Court or tribunal of the details of the conduct that was the evidentiary foundation for CFC Retail Pty Ltd entering into this EU.

2.4 This means that the FWO reserves the right to rely on the terms of this EU and the admissions in respect of any future proceedings brought by the FWO against CFC Retail Pty Ltd in relation to any future contraventions of Commonwealth workplace laws.

3 Enforceable undertakings

CFC Retail Pty Ltd **NOW UNDERTAKES** that, in consideration of the FWO agreeing not to apply for any orders under Part 14 of the *Workplace Relations Act 1996 (WR Act)* in relation to the Contraventions (as evidenced by the FWO's acceptance of this EU endorsed below), CFC Retail Pty Ltd must do all those activities and things set out in Attachment "C" (Undertakings).

4 Commencement of enforceable undertaking

This EU comes into effect when:

- (a) the EU is executed by CFC Retail Pty Ltd; and
- (b) the FWO accepts the EU executed by CFC Retail Pty Ltd (as evidenced by the FWO's acceptance of this EU endorsed below).

5 Acknowledgements

CFC Retail Pty Ltd acknowledges that:

- (a) the undertakings it has given in this EU are reasonable in the circumstances;
- (b) this EU is given to and accepted by the FWO pursuant to section 715 of the FW Act;
- (c) the FWO may:
 - (i) make this EU (and any of the Attachments) available for public inspection, including by posting it on the FWO internet site at www.fwo.gov.au (subject to the FWO taking any necessary steps to the redaction of the names of any person affected by the Contraventions);
 - (ii) release a copy of this EU (and any of the Attachments to it) pursuant to any relevant request under the *Freedom of Information Act 1982 (Cth)*;
 - (iii) issue a media release in relation to this EU;
 - (iv) from time to time, publicly refer to the EU (and any of the Attachments to it) and its terms;
 - (v) rely upon the admissions made by CFC Retail Pty Ltd in paragraph 1 above in respect of any future decision about enforcement action to be taken in respect

of any future non-compliance by CFC Retail Pty Ltd with Commonwealth workplace relations obligations.

- (d) consistent with the Note to section 715(4) of the FW Act, this EU in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this EU; and
- (e) if CFC Retail Pty Ltd contravenes any of the terms of this EU:
 - (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 EU may be provided to the Court as evidence of the admissions made by CFC Retail Pty Ltd in paragraph 1, and also in respect of the question of costs; and
 - (iii) this EU is to be taken as having been withdrawn from by CFC Retail Pty Ltd for the purposes of section 715(3) of the FW Act if the FWO gives its written consent (in which case the FWO may apply for orders against CFC Retail Pty Ltd under Part 14 of the WR Act).

6 No inconsistent statements

CFC Retail Pty Ltd:

- (a) must not; and
- (b) must ensure that each of its 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 admission or acknowledgements contained in this EU.

7 Termination by the FWO

At any time, the FWO may, by notice in writing, terminate this EU (that is, immediately and without notice) if CFC Retail Pty Ltd commits, in the opinion of the FWO, a serious or persistent breach or non-observance of a term or terms of this EU.

8 Withdrawal from or variation to this EU

Consistent with section 715(3) of the FW Act, CFC Retail Pty Ltd may withdraw from or vary this EU at any time, but only with the consent of the FWO.

9 Continuing obligations

9.1 General survival

Any provision of this EU remaining to be performed or observed by CFC Retail Pty Ltd or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal from by CFC Retail Pty Ltd) remains in full force and effect and is binding on CFC Retail Pty Ltd after this EU ends.

9.2 Survival

Without limiting the generality of clause 9.1 ("General survival"), the following clauses survive termination of this EU for whatever reason (including termination by the FWO or withdrawal from by CFC Retail Pty Ltd):

- (a) Clause 1 (Admissions and contraventions); and
- (b) Clause 6 (No inconsistent statements).

10 Legally binding agreement

These terms are intended to have immediate effect on all parties upon acceptance by the FWO of this EU (as evidenced by the FWO's acceptance of this EU endorsed below).

11 Entire agreement

This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter. No oral explanation or information provided by either party to the other:

- (a) affects the meaning or interpretation of this EU; or

- (b) constitutes any collateral agreement, warranty or understanding between the FWO and CFC Retail Pty Ltd.

12 No representations or warranties

The Executive acknowledges that in entering into this EU they have not relied on any representations or warranties about the subject matter of this EU except as provided in this EU.

13 Construction

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of, or seeks to rely on, this EU or any part of it.

14 Costs

The parties must pay their own legal and other costs and expenses in connection with the preparation, execution and completion of this EU and other related documentation.

15 Severance

If the whole or any part of a provision of this EU is void, unenforceable or illegal in a jurisdiction it is severed for that jurisdiction. The remainder of the agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This clause has no effect if the severance alters the basic nature of this EU or is contrary to public policy.

16 Competency

CFC Retail Pty Ltd acknowledges that:

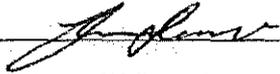
- (a) before executing this EU, CFC Retail Pty Ltd was given the opportunity to seek independent legal and other advice of their choice;
- (b) in the light of any advice provided to CFC Retail Pty Ltd, they considered their position;
- (c) if CFC Retail Pty Ltd has been advised by their solicitors, they have been advised by them as to the terms of this EU; and
- (d) CFC Retail Pty Ltd fully understands the effect of this EU.

17 Governing law

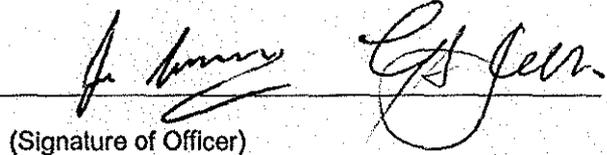
This EU is governed by the law in force in the place specified in the Details. Each party submits to the non-exclusive jurisdiction of the courts of that place.

Signing page

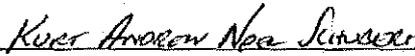
SIGNED on 1 March 2011 by
CFC Retail Pty Ltd ACN 107 470 888 in
accordance with section 127(1) of the
Corporations Act 2001, in the presence of:



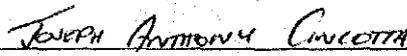
(Signature of Witness)



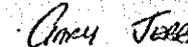
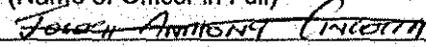
(Signature of Officer)



(Name of Witness in Full)



(Name of Officer in Full)



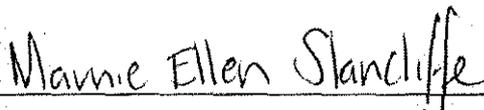
SIGNED on _____ for
the **COMMONWEALTH OF AUSTRALIA**
(**FAIR WORK OMBUDSMAN**), by its duly
authorised officer in the presence of:



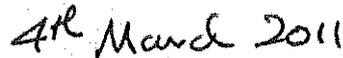
(Signature of Witness)



(Signature of Officer)



(Name of Witness in Full)



NICHOLAS PAUL WILSON
FAIR WORK OMBUDSMAN

or by his Delegate subject to the instrument of
delegation made pursuant to section 683 of the FW
Act and executed by Nicholas Paul Wilson on 2
July 2009.

ATTACHMENT "A" (BACKGROUND)

1. CFC Retail Pty Ltd (ACN 107 470 888) operates retail stores selling fruit and vegetable produce under the trading name Colonial Fruit Co. and Colonial Fresh Markets. The stores are located in Metropolitan Melbourne at Doncaster, Malvern, Chadstone, Eastland and Forest Hill Shopping Centres in the State of Victoria.
2. From 19 July 2007 to 25 June 2009 (relevant period), CFC Retail Pty Ltd paid 265 employees under the terms of a document known as the Colonial Fruit Co Collective Agreement (the Agreement). The Agreement was not approved or lodged with the Workplace Authority in accordance with sections 340 and 344 of the WR Act.
3. At all material times, CFC Retail Pty Ltd was bound by the *Shop, Distributive and Allied Employees Association – Victoria Shops Interim Award 2000 (Award)*, the *Shop Distributive and Allied Employees Association – Victorian Shops Interim (Roping In No 1) Award 2003 (Roping In Award)* and the Australian Fair Pay and Conditions Standard (AFPCS), which included a preserved Australian Pay and Classifications Scale (APCS) derived from the Award.
4. During the relevant period, CFC Retail Pty Ltd failed to pay its employees in accordance with the Award, the Roping In Award and the AFPCS.
5. By contravening the provisions of the Award, the Roping In Award and the AFPCS as specified in Attachment "B" of this enforceable undertaking, CFC Retail Pty Ltd underpaid its employees a total of \$464,289.21 plus superannuation, payroll tax and workcover – totalling \$544,239.82.
6. CFC Retail Pty Ltd admits the contraventions set out in Attachment "B" and has agreed to repay the total outstanding underpayment to all of the affected employees in accordance with the repayment schedule set out in Attachment "F" to commence in February 2011 and to be finalised by 30 April 2014.

ATTACHMENT "B" (CONTRAVENTIONS)

1. CFC Retail Ply Ltd contravened the Award, the Roping In Award and the AFPCS by:
 - a. Failing to pay the guaranteed basic periodic rates of pay contained in the APCS derived from the Award in accordance with section 182(1) of the WR Act;
 - b. Failing to pay its casual employees a 25% casual loading contained in the APCS derived from the Award in accordance with section 185(2) of the WR Act.
 - c. Failing to pay the applicable penalty rate for work performed by a casual employee on a Saturday (clause 6(e)(ii) of the Roping In Award);
 - d. Failing to pay the applicable penalty rate for work performed by a casual employee on a Sunday (clause 6(d)(iii) of the Roping In Award);
 - e. Failing to pay the applicable penalty rate for work performed by a casual employee on a public holiday (clause 10.4.2(d)(iv) of the Award);
 - f. Failing to pay full-time and part-time employees an additional amount for work performed between 6:00 pm and 9:00 pm Monday to Friday (clause 18.1 of the Award);
 - g. Failing to pay full-time and part-time employees an additional amount for work performed on a Saturday (clause 6(g) of the Roping In Award);
 - h. Failing to pay full-time and part-time employees the applicable penalty rate for work performed on a Sunday (clause 6(i) of the Roping In Award); and
 - i. Failing to pay full-time and part-time employees the applicable penalty rate for work performed on a public holiday (clause 6(k) of the Roping In Award).

ATTACHMENT "C" (UNDERTAKINGS)

CFC Retail Pty Ltd undertakes to:

Future workplace relations compliance

1. ensure that it complies at all times and in all respects with the FW Act and the *General Retail Industry Award 2010 (Retail Award)* by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws.
2. provide, within 28 days of the date of this EU, the FWO with details of the implementation of systems and processes designed to ensure ongoing compliance with Commonwealth workplace laws.

Make good underpayment

3. pay an outstanding amount of \$464,289.21 owed in underpayments to 265 current and former employees in accordance with the repayment schedule set out in Attachment "F" to commence in February 2011 and to be finalised by 30 April 2014.
4. if the underpaid employee/employees cannot be located, pay any outstanding amount into the consolidated revenue of the Commonwealth of Australia (through the FWO) to be held on trust for the relevant underpaid employee/employees.

Public notice

5. cause to be placed in Saturday's edition of the Melbourne Herald Sun newspaper within 28 days of executing this document (or so soon afterwards as is available), a notice which:
 - (a) bears the company name of CFC Retail Pty Ltd;
 - (b) bears the company logo (if any) of Colonial Fruit Co. and Colonial Fresh Markets;
 - (c) appears on either of pages 3, 5 or 7 of the relevant edition;
 - (d) measures at least 15cms high x 7.4cms wide; and
 - (e) is in the form of Attachment "D" to this EU;

Paid meeting of affected employees

6. conduct paid meetings for existing employees who were affected by the underpayment. At the meeting CFC Retail Pty Ltd must explain the rectification of the underpayment. CFC Retail Pty Ltd must invite a representative of the FWO to attend the meeting to explain this EU.

Workplace notice

7. provide to all CFC Retail Pty Ltd business premises within 28 days of executing this EU, a letter in the form of Attachment "E" to this EU signed by its Chief Executive Officer.
8. ensure the letter is printed in at least A3 size and clearly displayed at each business premises of CFC Retail Pty Ltd for a period of at least 30 days:
 - (a) in a location to which all staff at each business location have access; and
 - (b) in a manner which is reasonably capable of drawing the letter to the general attention of all staff (for example, by placement on a staff noticeboard).

Future workplace relations compliance audit activity

9. cause to have performed by an accounting professional (e.g. Certified Practising Accountant) or audit specialist (at its own expense), for the next 3 years after the date of this EU, an audit of its compliance with Commonwealth workplace laws, in particular compliance with:
 - (a) the FW Act; and
 - (b) the Retail Award.
10. provide to the FWO evidence of the audit and its results within 7 days of the audit being finalised.

Attempts to locate previous employees

11. take all reasonable steps to locate former employees of CFC Retail Pty Ltd who have been underpaid, including but not limited to contacting the former employees by telephone or in writing to:

- (a) advise them that they are owed money;
 - (b) explain the process for claiming the money;
 - (c) provide them with claim forms (to be provided by the FWO);
 - (d) provide the contact details for the FWO office in Melbourne.
12. For 12 months from the date of execution of this enforceable undertaking CFC Retail Pty Ltd will report to the FWO three times per year on the attempts taken to locate the former employees in the preceding four month period.

ATTACHMENT "D" (FORM OF PUBLIC NOTICE)

Underpayment of employees of Colonial Fruit Co. and Colonial Fresh Markets

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that CFC Retail Pty Ltd contravened the *Workplace Relations Act 1996*, the *Shop, Distributive and Allied Employees Association – Victoria Shops Interim Award 2000* and the *Shop Distributive and Allied Employees Association – Victorian Shops Interim (Roping In No 1) Award 2003* by underpaying some of their current and former employees.

We advise that CFC Retail Pty Ltd will pay a total amount of \$464,289.21 to all affected employees to rectify outstanding underpayments owing to 265 employees of Colonial Fruit Co. and Colonial Fresh Markets located at Chadstone, Forest Hill, Doncaster, Eastland and Malvern. The underpayments arose in the period 19 July 2007 to 25 June 2009.

CFC Retail Pty Ltd and its directors express their sincere regret and apologise to all past and present employees for failing to comply with its lawful obligations. Furthermore, CFC Retail Pty Ltd gives its employees our commitment that the proscribed conduct will not occur again.

If you worked at any of the Colonial Fruit Co. or Colonial Fresh Markets locations listed above during this period, please contact Mr Joe Cincotta, PO Box 558 Chadstone Shopping Centre, Chadstone VIC 3145 to find out if any outstanding monies are owed to you.

ATTACHMENT "E" (FORM OF LETTER)

Underpayment of employees of Colonial Fruit Co. and Colonial Fresh Markets

Attention all staff:

Colonial Fruit Company and Colonial Fresh Markets (CFC Retail Pty Ltd) commenced business in 2004 and has grown rapidly to its current business size of 5 stores. During this rapid expansion the business appointed an accredited consultant to prepare and lodge a Collective Agreement with the then Workplace Authority. In July 2007 the consultant advised CFC Retail Pty Ltd that this Agreement had been lodged and that we could commence employing staff in accordance with it.

In July 2009 following a Fair Work Ombudsman enquiry and audit it was discovered that the Agreement had not been lodged or approved with the Workplace Authority and was therefore invalid.

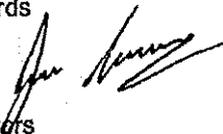
As a result of this, many staff were paid below the applicable legal minimum rates of pay in the period 19 July 2007 to 25 June 2009. Since July 2009 CFC Retail Pty Ltd and its Directors have been actively working with the Fair Work Ombudsman's Office to calculate all the relevant underpayments and have put into place a repayment plan to ensure all affected employees are reimbursed their full entitlements.

CFC Retail Pty Ltd has formally admitted that it did underpay 265 employees which is reflected in an Enforceable Undertaking that can be viewed at www.fwo.gov.au.

If you worked at any of the Colonial Fruit Co. or Colonial Fresh Markets locations from 19 July 2007 to 25 June 2009 you will be contacted over the next 12 months and advised of when a back payment will be made to you in accordance with our repayment plan. We request your patience and understanding in the meantime as there are many employees affected and a large amount of money is involved.

CFC Retail Pty Ltd and its Directors, express their sincere regret and apologise to all employees for the underpayments. Furthermore, CFC Retail Pty Ltd gives its employees our commitment that this will not occur again.

Regards



Directors

CFC Retail Pty Ltd trading as Colonial Fruit Company and Colonial Fresh Markets

ATTACHMENT "F" (Repayment Schedule)

See attached spreadsheet.