



Australian Government

# Fair Work OMBUDSMAN

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## ENFORCEABLE UNDERTAKING

dated [ *15 February* ] 2011

Given by

**Coles Supermarkets Australia Pty Ltd (ACN 004 189 708)**

to

**The Commonwealth of Australia**

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

Details

<b>Parties</b>	<b>FWO and Coles Supermarkets Australia Pty Ltd</b>	
<b>FWO</b>	Name	Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman)
	ACN	004 189 708
	Address	The Fair Work Ombudsman
		GPO Box 9887
		Sydney
	Telephone	02 8255 6040
	Fax	02 6204 2099
Attention	Karsten Lehn, Executive Director CII, Fair Work Ombudsman	
<b>Coles Supermarkets Australia Pty Ltd</b>	Name	Coles Supermarkets Australia Pty Ltd
	ABN	45004189708
	Incorporated in	Victoria
	Address	Westfarmers House
		11 <sup>th</sup> Floor Level 40
		The Esplanade
		Perth
		WA 6000
	Telephone	(03) 9829 3050
Fax	(03) 9829 3172	
Attention	Jeff Wilson, Director Human Resources	
<b>Recitals</b>	<b>A</b>	On 2 November 2009 the Fair Work Ombudsman ( <b>FWO</b> ) commenced an investigation into allegations that Coles Supermarkets Australia Pty Ltd ( <b>Coles</b> ) had breached the <i>Fair Work Act 2009</i> (Cth) ( <b>FW Act</b> ) and the <i>Workplace Relations Act 1996</i> (Cth) (repealed) ( <b>WR Act</b> ).
	<b>B</b>	By reason of the matters set out in Attachment "A" ( <b>Background</b> ), the FWO has determined, and Coles admits, that Coles breached the FW Act and the WR Act in relation to an employee.
	<b>C</b>	The parties have agreed to resolve the contraventions without the need to resort to civil penalty litigation by way of this Enforceable Undertaking ( <b>EU</b> ) made pursuant to section 715 of the FW Act.
<b>Governing law</b>	Victoria	
<b>Date of agreement</b>	See Signing page	

## General terms

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### 1 Admission and contraventions

By reason of the matters set out in Attachment "A" (**Background**) to this EU, Coles and the FWO agrees that Coles contravened Commonwealth workplace laws as set out in Attachment "B" to this EU (**Contraventions**).

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### 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) must not be interpreted as an admission by Coles 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 Coles 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 the Coles in relation to any future contraventions of Commonwealth workplace laws.

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### 3 Enforceable undertakings

In consideration of FWO agreeing not to apply for any orders under Division 2 of Part 4-1 of the FW Act in relation to the Contraventions, Coles **UNDERTAKES** that, it must do and perform the agreed matters set out in Attachment "C" (**Enforceable Undertakings**).

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### 4 Commencement of enforceable undertaking

This EU comes into effect when this document is executed by Coles and the FWO. The FWO is taken to have accepted the EU for the purposes of subsection 715(2) of the FW Act when it executes this document.

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### 5 Acknowledgements

Coles acknowledges that the undertakings it has given in this EU are reasonable in the circumstances:

- (a) this EU is given to and accepted by the FWO pursuant to section 715 of the FW Act;
- (b) 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](http://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 upon providing Coles with two business days' notice of the release;

(iv) from time to time, publicly refer to the EU (and any of the Attachments to it) and its terms; and

(c) 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

(d) if Coles 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 Coles in Part 1 above, and also in respect of the question of costs; and

(iii) this EU is to be taken as having been withdrawn from by Coles 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 Coles under Division 2 of Part 4-1 of the FW Act).

FWO is advised by Coles and accepts that since 12 January 2010 Coles has,

(e) taken steps to communicate the impact of the National Employment Standards (**NES**) to the management team within its stores and to other relevant personnel, including reinforcing that the provisions of the NES prevail over any inconsistencies with the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Limited Retail Agreement 2008*;

(f) Completed a review of the company policy in relation to transferring pregnant employees to safe jobs and ensured that this policy complies with the NES;

(g) In March 2010, conveyed a verbal apology to the Employee;

(h) Since 22 June 2010, spoken with its supermarket teams nationally about the company's obligations in relation to transferring pregnant employees to safe jobs;

(i) On 26 July 2010, launched online training for all its Line Managers regarding the company's obligations when transferring pregnant employees to safe jobs;

(j) In July 2010, commenced a payroll system audit in order to determine whether any pregnant employees were transferred to safe jobs and, as a consequence, had their pay reduced; and

(k) In September 2010, sent a written letter of apology to the Employee.

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**6 No Inconsistent statements**

Coles

(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.

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**7 Termination by the FWO**

At any time, the FWO may, with seven days written notice, terminate this EU (that is, immediately and without notice) if Coles commits, in the opinion of the FWO, a serious or persistent breach or non-observance of a term or terms of this EU.

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**8 Withdrawal from or variation to this EU**

Consistent with subsection 715(3) of the FW Act, Coles may withdraw from or vary this EU at any time, but only with the consent of the FWO.

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**9 Continuing obligations**

**9.1 General survival**

Any provision of this EU remaining to be performed or observed by Coles or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal from by Coles) remains in full force and effect and is binding on Coles 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 if Coles withdraws pursuant to clause 8):

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

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**10 Legally binding agreement**

The terms of this document are intended to have immediate effect on all parties upon acceptance by the FWO of this EU.

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**11 Entire agreement**

This EU 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 Coles.

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**12 No representations or warranties**

Coles and FWO acknowledge 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.

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**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.

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**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.

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**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.

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**16 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**

Dated: 15 February 2011

SIGNED by COLES SUPERMARKETS AUSTRALIA PTY LTD by its duly authorised officer, the presence of:

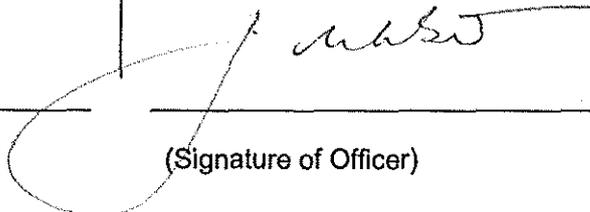


(Signature of Witness)

WILLIAM RICHARD CLANCY

(Name of Witness in Full)

STATE HR ADVISORY SERVICES MANAGER



(Signature of Officer)

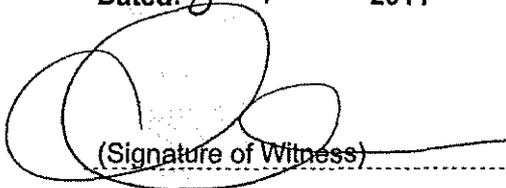
Jeffrey Roy Wilson

(Name of Officer in Full)

Director Human Resources

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

Dated: 3rd March 2011



(Signature of Witness)

Marnie Ellen Standliffe

(Name of Witness in Full)



(Signature of Officer)

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.

I disclose that an entity associated with my family owns shares in Wesfarmers Ltd.

NPW 3.3.2011

## ATTACHMENT "A" (BACKGROUND)

1. The Employee was employed by Coles as Fresh Produce Manager pursuant to the terms of the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Limited Retail Agreement 2008 (Coles Workplace Agreement)*.
2. The Employee was pregnant and produced medical evidence regarding lifting restrictions associated with her pregnancy. Initially, these restrictions were accommodated by Coles. Eventually, Coles formed the view that the lifting restrictions were such that the Employee's duties needed to be changed to those of a Service Assistant.
3. On 12 October 2009, the Employee was transferred to the role of Service Assistant. This role is a lower paid classification under the Coles Workplace Agreement. The difference in the rate of pay from Fresh Produce Manager to Service Assistant is \$67.40 per week.
4. Coles reduced the Employee's pay to that of a Service Assistant pursuant to clause 6.7.4(f)(i) of the Coles Workplace Agreement. This clause provides that a pregnant employee who is transferred to a safe job will be paid the rate of pay attached to that new role.
5. The Employee had also been receiving an additional \$60 per week. Coles stopped making this payment when the Employee was transferred to the Service Assistant role because Coles incorrectly thought that this additional payment was tied to her role as Fresh Produce Manager.
6. The Employee worked for approximately 12 weeks as a Service Assistant. However, during this time she took two periods of annual leave during which she was paid her original (Fresh Produce Manager) rates of pay including the additional payment referred to in paragraph 5 above.
7. The Employee commenced leave on 11 January 2010, taking consecutive periods of leave comprising of annual leave, long service leave and maternity leave. For the duration of her paid leave period, the Employee has and will receive her original rates of pay including the additional payment referred to in paragraph 5 above.
8. Coles has admitted that it did not comply with section 268 of the *Workplace Relations Act 1996* and contravened section 351 of the *Fair Work Act 2009* when it reduced the Employee's rate of pay to that of a Service Assistant and stopped making the additional payment. Coles has voluntarily rectified the contravention.
9. The total loss in remuneration by the Employee for that 12 week period was approximately \$1,205.24. Coles has made the payments which were due to the Employee, and apologised and explained to her the reasons why the mistake was made.

## ATTACHMENT "B" (CONTRAVENTIONS)

On 12 October 2009, Coles contravened:

- ii. section 268(2)(a) of the *Workplace Relations Act 1996*; and
- iii. section 351 of the *Fair Work Act 2009*,

by transferring the Employee to a safe job, when she was pregnant, in a role with a lower classification and reducing her terms and conditions of employment during a 12 week period.

## ATTACHMENT "C" (ENFORCEABLE UNDERTAKINGS)

COLES SUPERMARKETS AUSTRALIA PTY LTD undertakes to:

### ***Ensure future workplace relations compliance***

- (a) ensure that it complies at all times and in all respects with sections 81 and 351 of the *Fair Work Act 2009* (Fair Work Act) by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws.

### ***Make good any reductions in payment made to affected employees***

In this section, **affected employee** means an employee who had a change to her terms and conditions of employment inconsistent with either section 268 of the *Workplace Relations Act 1996* (**Workplace Relations Act**) or section 81 of the Fair Work Act.

- (b) complete an audit of affected employees by close of business 1 April 2011, identifying and specifying the outstanding amounts owing to each affected employee going back to 26 March 2006 when the Workplace Relations Act commenced operation.
- (c) pay the outstanding amount owed in under payments to the affected employees including any under payment of accrued entitlements such as superannuation and leave as soon as practicable, and provide proof of such payments to the FWO no later than seven days after all the payments have been made.
- (d) If the underpaid employee/employees can not be located, pay the 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.

### ***Apology***

- (e) send a letter to the affected employees in the form of Attachment D to this EU, signed by the Director of Human Resources.

### ***Ensure there is no future reliance on provisions in an industrial instrument which do not comply with the NES***

- (f) not to rely upon 6.7.4(f)(i) of the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Limited Retail Agreement 2008*.
- (g) not rely on any provision in an enterprise agreement made pursuant to the Workplace Relations Act or the Fair Work Act that is inconsistent with section 81 or section 351 of the Fair Work Act.

### ***Place Workplace notices***

- (h) provide to all its business premises within 28 days of executing this EU, the notice in the form of Attachment E to this EU signed by the Director of Human Resources.
- (i) ensure the notice is printed in at least A3 size and clearly displayed at each business premises of Coles for a period of at least 30 days:
  - (i) in a location to which all staff at each business location have access; and
  - (ii) 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).

### ***Complete workplace training***

- (j) ensure that all line managers with supervisory responsibilities have completed an online training course which deals with the rights of pregnant employees entitled to an appropriate safe job by 31 March 2011.
  - (i) provide the course content to be used in the training course to the FWO within 7 days of entering into this EU.
  - (ii) provide evidence of course completion by all line managers to the FWO no later than 7 days after completion of the training.

### ***Broader industry or community workplace relations compliance education***

- (k) provide \$20 000 to Jobwatch Australia within 28 days of executing this EU to fund educational activities for pregnant employees about their rights under the Fair Work Act, within 28 days of executing this EU.

## ATTACHMENT "D" (APOLOGY)

Dear

Coles has recently conducted a review of team members who had taken maternity leave over the last 3 years and in particular reviewed team members who requested a "safe job" as a result of their pregnancy. The review was specifically designed to establish the impact on team members' pay, if any, as a result of the requested changes.

We note that as a result of your transfer to a safe job prior to commencing maternity leave on [insert] your hourly rate of pay was incorrectly reduced.

This pay change was incorrect and should not have occurred. As a result we have calculated the amount owed to you during this period, and [insert] (which is less any applicable taxation) will be deposited into your bank account on [insert]. Any company superannuation requirements have also been adjusted.

We apologise for any inconvenience this may have caused and should you have any queries please contact the Line Manager Advisory Centre on 1300 726 547.

Your sincerely

Jeff Wilson  
Director – Human Resources

## ATTACHMENT "E" (WORKPLACE NOTICE)

### **Pregnancy – Entitlement to transfer to a safe job**

At Coles, we're passionate about what we do and we value our people. One of our key Ways of Working is to support each other consistently.

Coles is committed to supporting its team members during pregnancy, parental leave and subsequent return to work.

During these important times, we want you to know that we are committed to complying with the 10 National Employment Standards (NES) contained in the *Fair Work Act 2009*. These new minimum standards of employment commenced on 1 January 2010 and contain important rights for employees during pregnancy.

Coles is committed to supporting its pregnant team members and has been working closely with the Fair Work Ombudsman to ensure full compliance with its obligations.

Where Coles team members are fit for work but have medical advice that it is inadvisable for them to continue in their present position, they will either:

- Be transferred to a safe job with no other change to their terms and conditions of employment; or
- Where no safe job is available, have access to paid leave.

In conjunction with the Fair Work Ombudsman, Coles has reviewed its workplace agreements and Company policies to ensure they comply with the NES and the *Fair Work Act 2009*. We have also conducted compliance training for Line Managers so they understand your rights and the Company's obligations.

We want our team members to know that we will do what we can to support them during pregnancy. If you would like to know more about your workplace rights if pregnant, you should contact your Line Manager for assistance.