



Australian Government

# Fair Work

## OMBUDSMAN

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### **ENFORCEABLE UNDERTAKING**

Given by

**Fueltown Motors Pty Ltd (ACN 111 208 023)**

**Arthur Nestor**

**Tom Nestor**

**Brooke Nestor**

**Jennifer Tomkinson**

to

**The Commonwealth of Australia**

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

concerning contraventions of Commonwealth workplace laws

## Details

Parties	Fair Work Omubdsman (FWO), Fueltown Motors Pty Ltd, Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson	
<b>FWO</b>	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
	<b>Fueltown Motors Pty Ltd</b>	Name
ABN		49 111 208 023
Incorporated in		Victoria
Address		[REDACTED]
Telephone		03 9553 5171
Fax		03 9553 5141
Attention		The Director
<b>Arthur Nestor</b>	Name	Arthur Nestor
	Position with Fueltown Motors Pty Ltd	Director
	Address	[REDACTED]
	Telephone	03 9553 5171
	Fax	03 9553 5141
<b>Tom Nestor</b>	Name	Tom Nestor
	Position with Fueltown Motors Pty Ltd	Senior Mechanic

Address [REDACTED]  
Telephone 03 9553 5171  
Fax 03 9553 5141

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**Brooke Nestor**

Name Brooke Nestor  
Position with Fueltown Motors Pty Ltd Administration Assistant  
Address [REDACTED]  
Telephone 03 9553 5171  
Fax 03 9553 5141

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**Jennifer Tomkinson**

Name Jennifer Tomkinson  
Position with Fueltown Motors Pty Ltd Administration Assistant  
Address [REDACTED]  
Telephone 03 9553 5171  
Fax 03 9553 5141

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**Recitals**

- A** The FWO commenced an investigation following an audit of Fueltown Motors Pty Ltd to establish if Fueltown Motors Pty Ltd had contravened Commonwealth workplace laws.
- B** By reason of the matters set out in Attachment "A" (**Background**), the FWO has determined, and Fueltown Motors Pty Ltd acknowledges, that Fueltown Motors Pty Ltd contravened Commonwealth workplace laws.
- D** By reason of the matters set out in Attachment "A" (**Background**), the FWO has determined, and Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson (the **individuals**) acknowledge, that the individuals were involved in the contraventions of Commonwealth workplace laws within the meaning of section 728 of the *Workplace Relations Act 1996* (**WR Act**).
- 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 *Fair Work Act 2009* (**FW Act**).
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**Governing law**

Victoria

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**Date of agreement**

See Signing page

# General terms

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## 1 Admission of contravention

By reason of the matters described in Attachment "A" (**Background**), which are admitted without demur by Fueltown Motors Pty Ltd and the individuals, Fueltown Motors Pty Ltd contravened Commonwealth workplace laws in the respects set out in Attachment "B" (**Contraventions**), and the individuals were involved in these contraventions within the meaning of section 728 of the *Workplace Relations Act 1996 (WR Act)*.

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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) deed must not be interpreted as an admission by Fueltown Motors Pty Ltd or the individuals 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 Fueltown Motors Pty Ltd and the individuals 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 Fueltown Motors Pty Ltd and/or the individuals in relation to any future contraventions of Commonwealth workplace laws.

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## 3 Enforceable undertakings

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

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## 4 Commencement of enforceable undertaking

This EU comes into effect when:

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

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## 5 Acknowledgements

Fueltown Motors Pty Ltd and the individuals acknowledge that:

- (a) the undertakings they have 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](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;
  - (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 Fueltown Motors Pty Ltd and the individuals in paragraph 1 above in respect of any future decision about enforcement action to be taken in respect of any future non-compliance by Fueltown Motors Pty Ltd and/or the individuals 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 Fueltown Motors Pty Ltd and/or any or all of the individuals 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 Fueltown Motors Pty Ltd and the individuals 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 Fueltown Motors Pty Ltd and the individuals 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 Fueltown Motors Pty Ltd and/or the individuals under Part 14 of the WR Act.

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## **6 No inconsistent statements**

Fueltown Motors Pty Ltd and the individuals:

- (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, by notice in writing, terminate this EU (that is, immediately and without notice) if Fueltown Motors Pty Ltd and/or any or all of the individuals 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 section 715(3) of the FW Act, Fueltown Motors Pty Ltd and the individuals 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 Fueltown Motors Pty Ltd and/or the individuals or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal from by Fueltown Motors Pty Ltd and the individuals) remains in full force and effect and is binding on Fueltown Motors Pty Ltd and the individuals 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 Fueltown Motors Pty Ltd and the individuals):

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

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## **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).

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**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 Fueltown Motors Pty Ltd and the individuals.

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**12 No representations or warranties**

The parties 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 Competency**

Fueltown Motors Pty Ltd and the individuals acknowledge that:

- (a) before executing this EU, Fueltown Motors Pty Ltd and each of the individuals were given the opportunity to seek independent legal and other advice of their choice;
- (b) in the light of any advice provided to Fueltown Motors Pty Ltd and/or the individuals, they considered their position;
- (c) if Fueltown Motors Pty Ltd and/or any or all of the individuals has been advised by their solicitors, they have been advised by them as to the terms of this EU; and
- (d) Fueltown Motors Pty Ltd and the individuals fully understand the effect of this EU.

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**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.

## ATTACHMENT "A" (BACKGROUND)

1. Fueltown Motors Pty Ltd (ACN 111 208 023) operated a service station, convenience store, motor mechanic repair shop and car wash business under the trading name 'Fueltown' between 13 April 2005 and 13 January 2009. The business was located at 1150-1154 Nepean Highway, Highett in the State of Victoria.
2. Arthur Nestor was and is the Director of Fueltown Motors Pty Ltd. He was involved in the management of the business and was responsible for employing staff and determining wages.
3. Tom Nestor worked within Fueltown Motors Pty Ltd as a senior mechanic. He was involved in the management of the business and was responsible for employing staff and determining wages.
4. Brooke Nestor worked within Fueltown Motors Pty Ltd as an administration assistant. She was involved in the management of the business and was responsible for determining wage rates and payment of wages.
5. Jennifer Tomkinson worked within Fueltown Motors Pty Ltd in a management position. She was involved in the management of the business and was responsible for employing staff, determining rates of pay and providing information regarding wage rates and hours of work to an external payroll provider.
6. From 13 April 2005 and 13 January 2009 (**relevant period**), Fueltown Motors Pty Ltd paid all employees a base rate of pay for all hours of work, without payment of penalties for work performed on weekends, at nights or in excess of ordinary hours. The rates of pay were determined by Fueltown Motors Pty Ltd without reference to relevant industrial instruments.
7. At all material times, Fueltown Motors Pty Ltd was bound by *The Vehicle Industry – Repair, Services and Retail – Award 2002 (Award)* and, from the 27 March 2006, the Australian Fair Pay and Conditions Standard (**AFPCS**), which included a preserved Australian Pay and Classifications Scale (**APCS**) derived from the Award.
8. During the relevant period, Fueltown Motors Pty Ltd failed to pay its employees in accordance with the Award and the AFPCS.
9. By contravening the provisions of the Award and the AFPCS as specified in Attachment "B" of this enforceable undertaking, Fueltown Motors Pty Ltd underpaid 53 of its employees a total of \$175,266.21 gross. In October 2010, Fueltown Motors Pty Ltd and the individuals made payments to affected employees totalling \$23,027.71 gross. In December 2010, Fueltown Motors Pty Ltd and the individuals made payments to affected employees totalling \$20,481.65 gross. In March 2011, Fueltown Motors Pty Ltd and the individuals made payments to affected employees totalling \$23,601.86 gross. In April 2011, Fueltown Motors Pty Ltd and the individuals made payments to affected employees totalling \$21,521.72 gross. An amount of \$86,633.27 gross remains outstanding.
10. Fueltown Motors Pty Ltd and the individuals admit the contraventions set out in Attachment "B" and have agreed to repay the total outstanding underpayment to all of the affected employees over a four month period to commence May 2011, with all underpayments to be rectified by 31 August 2011.

## ATTACHMENT "B" (CONTRAVENTIONS)

- 1) Fueltown Motors Pty Ltd and the individuals contravened the Award and the AFPCS by:
  - a) Failing to pay the required weekly or hourly minimum rates of pay in accordance with clause 8(a) of the Award and on and from 27 March 2006, failed to pay the basic periodic rate of pay pursuant to the APCS derived and preserved from the Award pursuant to section 182(1) of the WR Act.
  - b) Failing to pay casual employees (other than console operators) 1/38<sup>th</sup> of the weekly wage prescribed by clause 8 of the Award per hour and the casual loadings set out in clause 6(f)(ii)(2) of the Award and/or a casual loading at least equal to the guaranteed casual loading percentage of the appropriate basic periodic rate of pay pursuant to section 185(2) of the WR Act.
  - c) Failing to pay casual employees principally performing the duties of a console operator the penalty rates set out in clause 6(f)(iv)(3) of the Award for working on Saturdays, Sundays, Holidays and overtime.
  - d) Failing to pay full-time employees double time for working outside an employee's ordinary hours as overtime in accordance with clause 24(b) of the Award.
  - e) Failing to pay to full-time employees accrued and untaken annual leave on termination of employment in accordance with clause 27 of the Award or section 235(2) of the WR Act.
- 2) The individuals were involved, within the meaning of section 728 of the WR Act, in contravening the above provisions of the Award and the AFPCS.



## ATTACHMENT "C" (UNDERTAKINGS)

Fueltown Motors Pty Ltd, Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson undertake to:

### ***Future workplace relations compliance***

1. ensure that all businesses managed by any or all of Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson comply at all times and in all respects with the FW Act and other applicable industrial instruments including, but not limited to, the *Vehicle Manufacturing, Repair, Services and Retail Award 2010 (the modern Award)* by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws.
2. provide, within 60 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 \$86,633.27 gross owed in underpayments to the employees in accordance with the attached repayment schedule (Attachment "F") by making payments each month for four months, no later than by the last business day of each month and provide proof of such payments to the FWO no later than 7 days after the payment is made. These payments are made in addition to repayments made prior to this undertaking coming into force.
4. if the underpaid 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 employees.

### ***Public notice***

5. cause to be placed in a Saturday edition of the Age newspaper within 28 days of executing this document (or so soon afterwards as is available), a notice which:
  - (a) bears the company name of Fueltown Motors Pty Ltd;
  - (b) bears the company logo (if any) of Fueltown Motors Pty Ltd;
  - (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;

### ***Notice to affected employees***

6. provide by post to the last known address of all affected employees within 28 days of executing this EU, a letter in the form of Attachment "E" to this EU, signed by Arthur Nestor.

### ***Workplace relations compliance training***

7. within 90 days of the signing of this EU, organise and ensure Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson attend a training course ("**the training course**") which deals with:
  - (a) Part 2-2 of the FW Act - the National Employment Standards; and
  - (b) Compliance with the modern Award.
8. ensure the training course must be conducted by an accredited workplace trainer (not being anyone who has advised Fueltown Motors Pty Ltd or any of the individuals in relation to the subject matter of the Contraventions) who is approved by the FWO and paid for by Fueltown Motors Pty Ltd and/or the individuals.
9. provide the training materials used in the training course to the FWO no later than 14 days before the training is to be conducted and the training materials must be approved by the FWO.
10. provide evidence of attendance at the training course and payment of the training course to FWO within 7 days of the training being provided.

### ***Future reporting to the FWO***

11. report to the FWO within 60 days at the end of each financial year, for the next 3 years after the date of this EU ("**reporting period**"), regarding the following matters in relation to any business

either trading as Fueltown or of a similar nature to the business currently trading as Fueltown, where any or all of Arthur Nestor, Tom Nestor, Brooke Nestor or Jennifer Tomkinson are involved in managing the business and/or employing staff within the business:

- (a) the wage rates and entitlements paid to each employee employed over the reporting period;
- (b) the classification under the modern Award and employment status (casual, part-time, fulltime, trainee) of each employee employed over the reporting period; and
- (c) details of any proactive compliance measures implemented over the reporting period (for example attendance at relevant training or self auditing activities) aimed at ensuring improved compliance with Commonwealth workplace laws.

***Future workplace relations compliance audit activity***

12. 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 the compliance with Commonwealth workplace laws of any business either trading as Fueltown or of a similar nature to the business currently trading as Fueltown, where any or all of Arthur Nestor, Tom Nestor, Brooke Nestor or Jennifer Tomkinson are involved in managing the business and/or employing staff within the business, in particular compliance with:

- (a) the FW Act; and
- (b) any relevant award or industrial instrument.

13. provide to the FWO evidence of the audit and its results within 7 days of the audit being finalised.

***Attempts to locate previous employees***

14. take all reasonable steps to locate former employees of Fueltown Motors 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) request details for making payment of this money (either via cheque or direct transfer to their nominated bank account);
- (c) provide them with a payslip specifying the payments made; and
- (d) provide the contact details for the FWO office in Melbourne.

12. For 12 months from the date of execution of this enforceable undertaking Fueltown Motors Pty Ltd and/or the individuals 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 Fueltown Motors Pty Ltd**

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that Fueltown Motors Pty Ltd contravened the *Workplace Relations Act 1996* and *The Vehicle Industry – Repair, Services and Retail – Award 2002* by underpaying some of their former employees.

We advise that Fueltown Motors Pty Ltd, Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson will pay a total amount of \$175,266.21 gross to the affected employees to rectify underpayments owing to the employees of Fueltown Motors Pty Ltd located at 1150-1154 Nepean Highway, Highett. The underpayments arose in the period 13 April 2005 and 13 January 2009.

Fueltown Motors Pty Ltd, Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson express their sincere regret and apologise to all past employees for failing to comply with their lawful obligations.

If you worked at Fueltown Motors at the address listed above during this period, please contact [insert contact at Fueltown details] on [insert contact number] to find out if any outstanding monies are owed to you.

ATTACHMENT "E" (FORM OF LETTER)

Dear [former employee]

**Underpayment of employees of Fueltown Motors Pty Ltd**

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that Fueltown Motors Pty Ltd contravened the *Workplace Relations Act 1996* and *The Vehicle Industry – Repair, Services and Retail – Award 2002* by failing to pay its employees employed from 13 April 2005 and 13 January 2009 the correct rates of pay.

Fueltown Motors Pty Ltd, Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson have formally admitted that staff were underpaid which is reflected in an Enforceable Undertaking that can be viewed at [www.fwo.gov.au](http://www.fwo.gov.au).

We advise that Fueltown Motors Pty Ltd, Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson #have/will pay [insert details of approved payment plan] an amount of [insert amount] to you to rectify outstanding underpayments owing to you in relation to your employment/former employment with Fueltown Motors Pty Ltd located at 1150-1154 Nepean Highway, Highett.

Fueltown Motors Pty Ltd, Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson express their sincere regret and apologise to all employees for failing to comply with their lawful obligations. They give their commitment that the proscribed conduct will not occur again.

Signed

Mr Arthur Nestor on behalf of  
Fueltown Motors Pty Ltd