



Australian Government

# Fair Work

## OMBUDSMAN

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### **ENFORCEABLE UNDERTAKING**

dated November 2010

Given by

**Irvine's Transport (Pt. Pirie) Pty Ltd [ABN 17 067 318 521]**

to

**The Commonwealth of Australia**

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

concerning

- breaches of clauses 6.1.2.1, 6.3.2.1, 6.6, 6.7.2, and 4.4.4.2 of the Notional Agreement Preserving the Transport Workers' (South Australia) Award ("the **NAPSA**").

## Details

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<b>Parties</b>	<b>FWO and Irvine's Transport (Pt. Pirie) Pty Ltd</b>	
<b>FWO</b>	Name	Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman)
	ABN	17 067 318 521
	Address	The Fair Work Ombudsman GPO Box 9887 Adelaide SA 5001
	Telephone	08 82258289
	Fax	02 62753010
	Attention	Monica Toonen
	<b>Irvine's Transport</b>	Name
ABN		17 067 318 521
Incorporated in		South Australia
Address		5 Mercowie Road Crystal Brook SA 5523
Telephone		08 86334577
Fax		08 86334588
Attention		Gregory John Irvine
<b>Recitals</b>	<b>A</b>	The FWO conducted a national campaign of audits for employers in the Road Transport industry ( <b>Campaign</b> ), which commenced in August 2008. The FWO conducted an audit of Irvine's Transport (Pt. Pirie) Pty Ltd (" <b>Irvine's Transport</b> ") as part of the Campaign. In doing so, the FWO identified breaches by Irvine's Transport of the Notional Agreement Preserving State awards derived from the former Transport Workers' (South Australia) Award (" <b>the NAPSA</b> "). In consequence, the FWO conducted an investigation of Irvine's Transport.
	<b>B</b>	By reason of the matters set out in Attachment "A" ( <b>Background</b> ), the FWO has determined, and Irvine's Transport acknowledges, that Irvine's Transport breached the NAPSA.
	<b>C</b>	The parties have agreed that 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 <i>Fair Work Act 2009</i> (Cth) (" <b>FW Act</b> ").
<b>Governing law</b>	South Australia	

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**Date of  
agreement**

See Signing page

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## General terms

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### 1 Admission and contraventions

By reason of the matters described in Attachment "A" (**Background**) to this EU, which are admitted without dispute by Irvine's Transport, Irvine's Transport contravened Commonwealth workplace laws in the respects set out in Attachment "B" (**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) deed must not be interpreted as an admission by Irvine's Transport 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 Irvine's Transport entering into this EU.
- 2.4 This means that the FWU 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 Irvine's Transport in relation to any future contraventions of Commonwealth workplace laws.

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### 3 Enforceable undertakings

**IRVINE'S TRANSPORT NOW UNDERTAKES** that, 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 Contraventions (as evidenced by the FWO's acceptance of this EU endorsed below), Irvine's Transport 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 Irvine's Transport; and
- (b) the FWO accepts the EU executed by Irvine's Transport (as evidenced by the FWO's acceptance of this EU endorsed below).

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### 5 Acknowledgements

Irvine's Transport 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](http://www.fwo.gov.au) (subject to the FWO taking any necessary steps to the suppression 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 Irvine's Transport in clause 1 above in respect of any future decision about enforcement action to be taken in respect of any future non-compliance by Irvine's Transport 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 Irvine's Transport 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 Irvine's Transport in clause 1, and also in respect of the question of costs; and
  - (iii) this EU is to be taken as having been withdrawn by Irvine's Transport 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 Irvine's Transport under Division 2 of Part 4-1 of the FW Act).

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## **6 No inconsistent statements**

Irvine's Transport:

- (a) must not; and
- (b) must make all reasonable efforts to 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 Irvine's Transport commits, in the opinion of the FWO, a deliberate 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, Irvine's Transport 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 Irvine's Transport or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal from by Irvine's Transport) remains in full force and effect and is binding on the Irvine's Transport 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 Irvine's Transport):

- (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).

## ATTACHMENT "A" (BACKGROUND)

1. Irvine's Transport (Pt. Pirie) Pty Ltd (ACN 067 318 521) ("Irvine's Transport") was carrying on business as a transport company, providing general freighting services throughout South Australia.
2. The employees listed within "Attachment D" of this EU ("the employees") were respectively employed by Irvine's Transport in various positions during the period March 2006 to January 2009 ("the relevant period").
3. During the relevant period, each employee's employment with Irvine's Transport was regulated by the NAPSA and a preserved Australian Pay and Classifications Scale ("the Transport Workers Pay Scale") which derived rates of pay (and associated provisions) from the Transport Workers (SA) Award. Those rates of pay were subject to increases determined periodically by the Australian Fair Pay Commission.
4. The NAPSA also provides for (amongst other things) the payment of penalty rates in particular circumstances to employees. The NAPSA also prescribes that casual employees working ordinary time are to be paid a minimum payment of 4 hours.
5. Irvine's Transport did not pay penalty rates specified in paragraph 8(a) to (d) below as and when required to the employees during the relevant period. Rather, Irvine's Transport paid a flat hourly rate of pay to employees for all hours worked.
6. Irvine's Transport did not pay a minimum payment of four hours to casual employees working ordinary time as specified in paragraph 8(e) below.
7. By reason of matters in paragraphs 4 and 6, Irvine's Transport underpaid the employees a collective amount of **\$144,464.96** during the relevant period.
8. By reason of matters in paragraphs 3 to 6 above, Irvine's Transport contravened:
  - (a) clause 6.1.2.1 of the NAPSA in that it failed to pay penalty rates for work performed on a Saturday to employees;
  - (b) clause 6.3.2.1 of the NAPSA in that it failed to pay penalty rates for work performed outside of ordinary hours to employees;
  - (c) clause 6.6 of the NAPSA in that it failed to pay penalty rates for work performed on Sundays to employees;
  - (d) clause 6.7.2 of the NAPSA in that it failed to pay penalty rates for work on public holidays to employees; and
  - (e) clause 4.4.4.2 of the NAPSA in that it failed to pay a minimum payment for four hours for casual employees working ordinary hours.
9. On or about 16 January 2007 Irvine's Transport made a payment to former employee David Morris, bringing the collective amount owing to employees to **\$142,609.96** as shown in Attachment D. This amount remains outstanding.

10. Irvine's Transport admits the contraventions set out in paragraph 7 above, and gives this Enforceable Undertaking to the FWO in relation to those contraventions.

11. The FWO accepts Irvine's Transport's submission that:

11.1. the contraventions were inadvertent and occurred due to ignorance rather than deliberate non-compliance;

11.2. Irvine's Transport facilitated the FWO's investigation in a candid manner;

11.3. Irvine's Transport implemented some of the arrangements which led to the contraventions in an effort to accommodate its employees' preferred working arrangements.

## ATTACHMENT "B" (CONTRAVENTIONS)

Irvine's Transport contravened the following clauses of the Notional Agreement Preserving the Transport Workers' (South Australia) Award ("the NAPSA"):

- (f) clause 6.1.2.1 in that it failed to pay penalty rates for work performed on a Saturday to employees;
- (g) clause 6.3.2.1 in that it failed to pay penalty rates for work performed outside of ordinary hours to employees;
- (h) clause 6.6 in that it failed to pay penalty rates for work performed on Sundays to employees;
- (i) clause 6.7.2 in that it failed to pay penalty rates for work on public holidays to employees; and
- (j) clause 4.4.4.2 in that it failed to pay a minimum payment for four hours for casual employees working ordinary hours.

## ATTACHMENT "C" (UNDERTAKINGS)

IRVINE'S TRANSPORT undertakes to:

### *Future workplace relations compliance*

- (a) ensure that it complies at all times and in all respects with the FW Act and the NAPSA by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws.
- (b) 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*

- (c) pay an outstanding amount of \$142,609.94 owed in underpayments to the employees no later than by 1 December 2011. These payments are to be made in the form of regular monthly payments to the employees as per the payment plan at Attachment "G". Default in any payments detailed in Attachment "G" will result in the entire amount being due and payable immediately.
- (d) provide proof of such payments to the FWO no later than 7 days after the payment is made.
- (e) 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.

### *Apology*

- (f) write and send to each employee at their respective places of residence within 14 days of executing this document, a letter of apology in the form of Attachment "E" to this EU, signed the Directors of Irvine's Transport Pty Ltd.

### *Paid meeting of affected employees*

- (g) conduct a paid meeting for existing employees who were affected by the underpayment. At the meeting Irvine's Transport Pty Ltd must explain the rectification of the underpayment. Irvine's Transport Pty Ltd must invite a representative of the FWO to attend the meeting to explain this EU.

### *Public notice*

- (h) Cause to be placed in a Saturday edition of "The Recorder" within 28 days of executing this document (or so soon afterwards as is available), a notice which:
  - (i) bears the company name of Irvine's Transport;
  - (ii) bears the company logo (if any) of Irvine's Transport;
  - (iii) appears on either of pages 3, 5 or 7 of the relevant edition;
  - (iv) measures at least 15cms high x 7.4cms wide; and
  - (v) is in the form of Attachment "F" to this EU;

### *Preparation of Workplace relations compliance manual*

- (i) commission the preparation, by a suitably qualified legal practitioner with expertise in workplace relations law, of a workplace relations compliance manual for distribution to each of its officers and employees.

### *Workplace relations compliance training*

- (j) within 8 weeks of the signing of this EU, Irvine's Transport organises and Gregory John Irvine and/or Scott David Irvine must attend a training course, and within 12 weeks the other of these named individual must attend a training course, (collectively, "the training courses"), which deal with:
  - (i) the rights and responsibilities of employers and employees under the FW Act.
- (k) ensure the training courses must be conducted by an accredited workplace trainer

(not being anyone who has advised Irvine's Transport in relation to the subject matter of the Contraventions) who is approved by the FWO and paid for by Irvine's Transport.

- (l) provide the training materials used in the training courses 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.
- (m) provide evidence of attendance at the training courses and payment of the training courses to FWO within 7 days of the respective training being provided.

*Future reporting to FWO*

- (n) report to the FWO at the end of each financial year, for the next 3 years after the date of this EU ("**reporting period**"), regarding the following matters:
  - (i) the wage rates and entitlements paid to each employee employed over the reporting period;
  - (ii) the classification and employment status (casual, part-time, fulltime, trainee) of each employee employed over the reporting period; and
  - (iii) 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.

**ATTACHMENT "D"**

<b>Name</b>	<b>Status of Employment</b>	<b>Underpayment</b>
Gary Beyer	Casual	\$16,075.14
John Brine	Casual and Full time (during different periods)	\$14,218.18
Darren Buck	Casual	\$2,434.32
Stephen Clarke	Casual	\$9,069.51
Desmond Coffey	Casual	\$1,794.62
Ian Davies	Casual	\$1,724.88
Colin Dunn	Casual	\$45.75
Donald Ferme	Full time	\$7,925.84
Paul Gum	Casual	\$9,764.47
Wayne Haynes	Casual	\$1,117.75
Kerry Head	Full time	\$5,992.41
Warren Kerr	Casual	\$5,932.85
Todd Marshall	Casual	\$323.57
Andrew Mathews	Casual	\$2,466.48
James Melville	Casual	\$2,616.78
Eugene Pavletich	Casual	\$982.14
Nigel Roberts	Casual	\$6,024.42
David Rohrlach	Casual	\$3,308.86
Tony Rowe	Casual	\$6,657.44
Greg Ryan	Casual	\$4,838.92
Mark Salt	Casual	\$422.35
Dennis Smart	Casual	\$29,174.72
Glen Solomon	Casual	\$3,086.69
Glen Spark	Casual	\$1,117.80
George Spry	Casual	\$1,303.63
Trevor Wright	Casual	\$4,190.44
<b>TOTAL</b>		<b>\$142,609.96</b>

## ATTACHMENT "E"

**Letterhead [the company]**

**Address & Date**

Dear Sir/Madam

**Apology – Non-payment of wages and non-payment annual leave entitlements upon termination**

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 Irvine's Transport (Pt. Pirie) Pty Ltd (**Irvine's Transport**) was involved the following breaches of the Notional Agreement Preserving the Transport Workers' (South Australia) Award (**the NAPSA**):

- (a) clause 6.1.2.1 of the NAPSA in that it failed to pay penalty rates for work performed on a Saturday to employees;
- (b) clause 6.3.2.1 of the NAPSA in that it failed to pay penalty rates for work performed outside of ordinary hours to employees;
- (c) clause 6.6 of the NAPSA in that it failed to pay penalty rates for work performed on Sundays to employees;
- (d) clause 6.7.2 of the NAPSA in that it failed to pay penalty rates for work on public holidays to employees; and
- (e) clause 4.4.4.2 of the NAPSA in that it failed to pay a minimum payment for four hours for casual employees working ordinary hours.

Irvine's Transport has formally admitted that they breached the NAPSA and that you were affected by those breaches, 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 has also agreed to back pay you [\$XX] which is owed to you as a result of the company's failure to pay you the correct rate of pay. This amount will be paid to you on [date].

As Director and Secretary of Irvine's Transport, I wish to express my sincere regret and apology for the breaches of the NAPSA which have affected you. Furthermore, Irvine's Transport gives you the commitment that it will not breach Commonwealth workplace laws again.

Irvine's Transport wishes you well in your future endeavours.

Yours sincerely,

**Signature – Director and Secretary Irvine's Transport**

## ATTACHMENT "F"

The Office of the Fair Work Ombudsman ("FWO"), (formerly, the Office of the Workplace Ombudsman) investigated allegations that Irvine's Transport (Pt. Pirie) Pty Ltd ("Irvine's Transport") breached workplace laws. The allegations were that Irvine's Transport failed to pay a number of its current and former employees the correct penalty rates during the period March 2006 to January 2009.

Irvine's Transport admits that it did in fact breach workplace laws during the period March 2006 to January 2009 by:

- failing to pay 27 of its current and former employees the correct penalty rates that were prescribed by the Notional Agreement Preserving the Transport Workers' (South Australia) Award ("the NAPSA"); and
- failing to pay a minimum payment of four hours for casual employees working ordinary time as prescribed by the NAPSA.

Irvine's Transport has formally admitted these breaches, in an Enforceable Undertaking given by Irvine's Transport to the FWO that is available at [www.fwo.gov.au](http://www.fwo.gov.au).

As Director and Secretary of Irvine's Transport, I express my sincere regret and apologies for these breaches. Irvine's Transport also gives its commitment that breaches like these will not occur again and that in the future it will comply with Commonwealth workplace relations laws, including the *Fair Work Act 2009*.

**ATTACHMENT "G"**

<b>Name</b>	<b>Underpayment Amount</b>	<b>Regular amount to be paid by the 1st of the Month for 12 months commencing 1st of January 2011</b>
Gary Beyer	\$16,075.14	\$1339.60
John Brine	\$14,218.18	\$1184.85
Darren Buck	\$2,434.32	\$202.86
Stephen Clarke	\$9,069.51	\$755.79
Desmond Coffey	\$1,794.62	\$149.55
Ian Davies	\$1,724.88	\$143.74
Colin Dunn	\$45.75	\$3.81
Donald Ferme	\$7,925.84	\$660.49
Paul Gum	\$9,764.47	\$813.71
Wayne Haynes	\$1,117.75	\$93.15
Kerry Head	\$5,992.41	\$499.37
Warren Kerr	\$5,932.85	\$494.40
Todd Marshall	\$323.57	\$26.96
Andrew Mathews	\$2,466.48	\$205.54
James Melville	\$2,616.78	\$218.07
Eugene Pavletich	\$982.14	\$81.85
Nigel Roberts	\$6,024.42	\$502.04
David Rohrlach	\$3,308.86	\$275.74
Tony Rowe	\$6,657.44	\$554.79
Greg Ryan	\$4,838.92	\$403.24
Mark Salt	\$422.35	\$35.20
Dennis Smart	\$29,174.72	\$2431.23
Glen Solomon	\$3,086.69	\$257.22
Glen Spark	\$1,117.80	\$93.15
George Spry	\$1,303.63	\$108.64
Trevor Wright	\$4,190.44	\$349.20
<b>TOTAL</b>	<b>\$142,609.96</b>	<b>\$11884.19</b>

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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 Irvine's Transport.

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**12 No representations or warranties**

Irvine's Transport acknowledges that in entering into this EU it has 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**

Irvine's Transport acknowledges that:

- (a) before executing this EU, Irvine's Transport was given the opportunity to seek independent legal and other advice of its choice;
- (b) in the light of any advice provided to Irvine's Transport, it considered its position;
- (c) if Irvine's Transport has been advised by its solicitors, it has been advised by them as to the terms of this EU; and
- (d) Irvine's Transport understands 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.

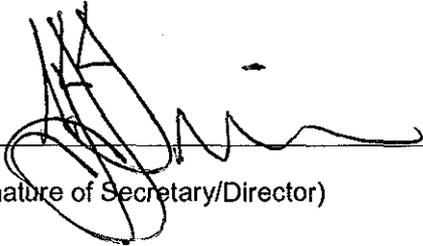
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## Signing page

Dated: [ 18-11- ] 2010

**EXECUTED** by Irvine's Transport (Pt. Pirie)  
Pty Ltd in accordance with section 127(1) of  
the Corporations Law:



(Signature of Secretary/Director)

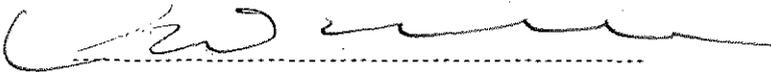
(Signature of Director)

**Gregory John Irvine – Director and  
Secretary  
Irvine's Transport (Pt. Pirie) Pty Ltd**

(Name of Director in Full)

**ACCEPTED** by the **FAIR WORK OMBUDSMAN**

Dated: 13 Dec 2010



**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.