



Australian Government

Fair Work OMBUDSMAN

ENFORCEABLE UNDERTAKING

Given by

Signature Portrait Studios Pty Ltd [ABN 75132237499]

and

Lynne Brabban

to

The Commonwealth of Australia

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

Details

Parties	FWO, Signature Portrait Studios Pty Ltd and Lynne Brabban	
FWO	Name	Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman)
	ABN	43884188232
	Address	The Fair Work Ombudsman GPO Box 9887 Sydney NSW 2001
	Telephone	[REDACTED]
	Fax	[REDACTED]
	Attention	Karsten Lehn, Executive Director Complex Investigations and Innovation
Signature Portrait Studios	Name	Signature Portrait Studios Pty Ltd
	ACN	132 237 499
	Incorporated in	NSW
	Address	Shop 2 51 Ethel Street Seaforth NSW 2092
	Telephone	[REDACTED]
	Attention	Lynne Brabban, Director
Lynne Brabban	Name	Lynne Brabban
	Address	[REDACTED]

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- Recitals**
- A On 22 July 2009 the FWO commenced an investigation into allegations that Signature Portrait Studios Pty Ltd and Lynne Brabban had breached Commonwealth workplace laws.
 - B By reason of the matters set out in Attachment "A" (**Background**), the FWO has determined, and Signature Portrait Studios Pty Ltd and Lynne Brabban agree, that Signature Portrait Studios Pty Ltd and Lynne Brabban 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 *Fair Work Act 2009 (FW Act)*.

Governing law NSW

Date of EU

The date the parties execute this EU or, if it is executed on different dates, the date of the last execution. See the Signing Page of this EU. See signing page.

General terms

1 Admission of contravention

By reason of the matters described in Attachment "A" (**Background**), which are admitted by Signature Portrait Studios Pty Ltd and Lynne Brabban, the FWO and Signature Portrait Studios Pty Ltd and Lynne Brabban agree that Signature Portrait Studios Pty Ltd and Lynne Brabban contravened Commonwealth workplace laws in the respects set out in Attachment "B" to this EU ("**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) must not be interpreted as an admission by Signature Portrait Studios Pty Ltd and Lynne Brabban 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 Signature Portrait Studios Pty Ltd and Lynne Brabban 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 Signature Portrait Studios Pty Ltd and Lynne Brabban in relation to any future contraventions of Commonwealth workplace laws.

3 Enforceable undertakings

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, Signature Portrait Studios Pty Ltd and Lynne Brabban **UNDERTAKES** to do all those activities and things set out in Attachment "C" (**Enforceable Undertakings**).

4 Commencement of enforceable undertaking

This EU comes into effect when it is executed by Signature Portrait Studios Pty Ltd and Lynne Brabban and the FWO. The FWO is taken to have accepted the Enforceable Undertaking for the purposes of section 715(2) of the FW Act when it executes this document.

5 Acknowledgements

Signature Portrait Studios Pty Ltd and Lynne Brabban 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 Signature Portrait Studios Pty Ltd and Lynne Brabban in paragraph 1 above in respect of any future decision about enforcement action to be taken in respect of any future non-compliance by Signature Portrait Studios Pty Ltd and Lynne Brabban 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 Signature Portrait Studios Pty Ltd and Lynne Brabban 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 Signature Portrait Studios Pty Ltd and Lynne Brabban 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 Signature Portrait Studios Pty Ltd and Lynne Brabban 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 Signature Portrait Studios Pty Ltd and Lynne Brabban under Division 2 of Part 4-1 of the FW Act).

6 No inconsistent statements

Signature Portrait Studios Pty Ltd and Lynne Brabban:

- (a) must not; and
- (b) must ensure that each of its officers, employees or agents, do not, make any statement, orally, in writing, or otherwise which conveys or implies or reasonably conveys or implies anything inconsistent with admissions 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 the Signature Portrait Studios Pty Ltd and Lynne Brabban 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, Signature Portrait Studios Pty Ltd and Lynne Brabban 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 Signature Portrait Studios Pty Ltd and Lynne Brabban or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal from by Signature Portrait Studios Pty Ltd and Lynne Brabban) remains in full force and effect and is binding on the Signature Portrait Studios Pty Ltd and Lynne Brabban 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 Signature Portrait Studios Pty Ltd and Lynne Brabban):

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

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.

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 the Signature Portrait Studios Pty Ltd and Lynne Brabban.

12 No representations or warranties

The Signature Portrait Studios Pty Ltd and Lynne Brabban 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

Signature Portrait Studios Pty Ltd and Lynne Brabban acknowledges that:

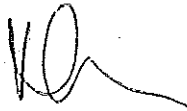
- (a) before executing this EU, Signature Portrait Studios Pty Ltd and Lynne Brabban were given the opportunity to seek independent legal and other advice of their choice;
- (b) in the light of any advice provided to Signature Portrait Studios Pty Ltd and Lynne Brabban, they considered their position;
- (c) if Signature Portrait Studios Pty Ltd and Lynne Brabban has been advised by their solicitors, they have been advised by them as to the terms of this EU; and
- (d) Signature Portrait Studios Pty Ltd and Lynne Brabban 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 [28 March 2011] by
Signature Portrait Studios Pty Ltd by its
duly authorised officer, in the presence of:



(Signature of Witness)

DAVID LEWIS

(Name of Witness in Full)



(Signature of Officer)

Lynne Brabban

(Name of Officer in Full)

SIGNED on [28 March 2011] by
Lynne Brabban:



(Signature of Witness)

DAVID LEWIS

(Name of Witness in Full)

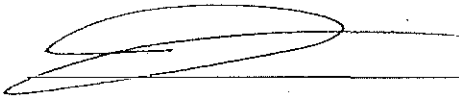


(Signature of Officer)

Lynne Brabban

(Name of Officer in Full)

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



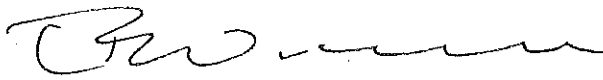
(Signature of Witness)

Janine Webster

(Name of Witness in Full)

Janine Cui Webster

(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.

ATTACHMENT "A" (BACKGROUND)

1. Signature Portrait Studios is in the business of portrait and wedding photography.
2. On 31 March 2009, ██████████ commenced employment with Signature Portrait Studios as a part time studio sales consultant being paid \$20 per hour plus commissions. ██████████ did not have a guaranteed number of ordinary hours of work, however had a consistent pattern of days worked.
3. On 3 April 2009, ██████████ commenced an on-going employment trial with Signature Portrait Studios as a Photographer on a casual basis.
4. On 15 April 2009, ██████████ received payment from Signature Portrait Studios for work conducted on 3 April 2009.
5. On or about 20 June 2009, ██████████ advised Lynne Brabban that she was 12 weeks pregnant with an expected due date of 29 December 2009.
6. On 28 June 2009, ██████████ sent an email to Lynne Brabban advising the details of the hours she has worked and her bank details to receive payment for the hours worked.
7. On or about 29 June 2009, ██████████ received a phone call from Lynne Brabban at work advising that she had received advice from her accountant, Sam Lamprinos from Alexander & Partners, regarding maternity leave and that she would be employing ██████████ as an independent contractor at \$22 per hour inclusive of GST.
8. On 1 July 2009, ██████████ received an email from Lynne Brabban advising that she was trialling for the position and if successful then discussions on salary would occur.
9. On or about 2 July 2009, ██████████ was advised by Lynne Brabban that her employment from 1 July 2009 was as an independent contractor. The employment relationship was terminated by Lynne Brabban for the purpose of engaging ██████████ as an independent contractor.
10. On 7 July 2009, ██████████ sent an email to Lynne Brabban advising that she should be paid for the trial and the work done.
11. On 8 July 2009, ██████████ received an email from Lynne Brabban advising that she had spoken to Industrial Relations and she would only be paid a trial where a position had been offered. The correspondence advised that no offer has been made and wishing her the best for the future.
12. On or about 23 September 2009, ██████████ was notified by text message from Lynne Brabban that she would not be required for work on 24 September 2009 but to present for work on 28 September 2009.
13. On 2 October 2009, ██████████ received an email from Lynne Brabban advising disappointment with her sales, leaving work and not being available for work. Lynne Brabban further advised that her employment was terminated.
14. On 7 October 2009, ██████████ an email to Lynne Brabban in response to her email of 2 October 2009 and requesting a written response in regards to her termination.
15. On 7 October 2009, ██████████ received an email from Lynne Brabban requesting her to call.
16. On 8 October 2009, ██████████ sent an email to Lynne Brabban seeking a written response to her email of 7 October 2009.
17. On 10 October 2009, ██████████ sent an email to Lynne Brabban seeking a written response and providing an overdue invoice.

18. On 10 October 2009, [REDACTED] received an email from Lynne Brabban confirming her employment as terminated and advising her invoice would be paid when the office keys are returned.
19. On 21 October 2009, [REDACTED] received payment from Signature Portrait Studios as per her invoice.
20. From April 2010 Lynne Brabban has been unfit for work due to a serious illness and has not carried out work as a photographer at Signature Portrait Studios.
21. On 27 September 2010 the FWO issued a contravention letter to Signature Portrait Studios advising of the contraventions and action required.
22. On 2 October 2010 Signature Portrait Studios made payments of \$357.70 to [REDACTED] and \$145.20 to [REDACTED].
23. On the 3 February 2011 Lynne Brabban took steps to wind up Signature Portrait Studios.

ATTACHMENT "B" (CONTRAVENTIONS)

1. Between 31 March 2009 and 21 October 2010 Signature Portrait Studios and Lynne Brabban contravened the following provisions of Commonwealth workplace laws:

(a) Workplace Relations Act 1996

Part 7 – The Australian Fair Pay and Conditions Standard
Division 2 – Wages
Subdivision B – Guarantee of basic rates of pay
Section 182 - The guarantee

Failure to pay [REDACTED], a casual employee, the basic periodic rate of pay as specified under the terms of Australian Fair Pay and Classification Scale ("APCS") derived from the terms of the *Photographic Industry (State) Award* for hours worked.

(b) Workplace Relations Act 1996

Part 7 – The Australian Fair Pay and Conditions Standard
Division 2 – Wages
Subdivision C – Guarantee of casual loadings
Section 185 - The guarantee

Failure to pay [REDACTED], a casual employee, an amount representing casual loading as specified under the terms of Australian Fair Pay and Classification Scale ("APCS") derived from the terms of the *Photographic Industry (State) Award* for each hour worked.

(c) Workplace Relations Act 1996

Part 7 – The Australian Fair Pay and Conditions Standard
Division 2 – Wages
Subdivision D – Guarantee of frequency of payment
Section 189 - The guarantee

Failure by Signature Portrait Studios Pty Ltd to pay [REDACTED], a part time employee, on a weekly basis as specified under the terms of Australian Fair Pay and Classification Scale ("APCS") derived from the terms of the *Photographic Industry (State) Award* for hours worked.

(d) Workplace Relations Act 1996

Part 7 – The Australian Fair Pay and Conditions Standard
Division 4 – Annual Leave
Subdivision C – Annual Leave Rules
Section 234 – Annual leave – accrual, crediting and accumulation rules

Failure to accrue, credit and accumulate annual leave for [REDACTED], a part time employee, on a pro rata basis.

(e) Workplace Relations Act 1996

Part 7 – The Australian Fair Pay and Conditions Standard
Division 4 – Annual Leave
Subdivision C – Annual Leave Rules
Section 235 – Annual leave – payment rules

Failure to pay [REDACTED], a part time employee, accrued annual leave entitlements on the termination of her employment.

(f) Workplace Relations Act 1996

Part 7 – The Australian Fair Pay and Conditions Standard

(g) Division 5 – Personal Leave

Subdivision B – Guarantee of paid personal/carer's leave
Section 246 – Paid personal/carer's leave – accrual, crediting and accumulation rules

Failure to accrue, credit and accumulate personal/carers leave on behalf of [REDACTED], a part time employee, on a pro rata basis.

(h) Workplace Relations Act 1996

Part 22 – Sham arrangements

Section 902 – Dismissal etc. for purpose of engaging certain persons as independent contractors

Failure in dismissing [REDACTED] a part time employee, for the sole or dominant purpose of engaging [REDACTED] as an independent contractor to perform the same work, or substantially the same work, under a contract for services.

(i) Workplace Relations Regulations 2006

Chapter 2 – General Regulations for the Workplace Relations Act 1996

Part 19 – Records relating to employees and pay slips

Division 3 – Contents of records

Regulation 19.12 – Contents of records – leave

Failure to keep records that detail the accrual of leave, any leave taken and the balance of an entitlement to leave relating to [REDACTED] a part time employee.

(j) Workplace Relations Regulations 2006

Chapter 2 – General Regulations for the Workplace Relations Act 1996

Part 19 – Records relating to employees and pay slips

Division 3 – Contents of records

Regulation 19.13 – Contents of records – superannuation contributions

Failure to make and keep records that detail superannuation contributions made, over the period in which superannuation contributions was made, the dates on which the superannuation contribution was made and the name of any fund to which a contribution was made relating to [REDACTED] a part time employee.

(k) Workplace Relations Regulations 2006

Chapter 2 – General Regulations for the Workplace Relations Act 1996

Part 19 – Records relating to employees and pay slips

Division 6 – Pay slips

Regulation 19.20 – Pay slips

Failure to issue written payslips in relation to each payment of remuneration made to employees.

(l) Fair Work Act 2009

Chapter 3 – Rights and responsibilities of employees, employers, organisations etc.

Part 3-1 – General Protections

Division 3 – Workplace rights

Section 340 - Protection

Failure in taking adverse action against [REDACTED] in dismissing her from employment because she was entitled to the benefit of a workplace law or workplace instrument, being the right to be paid for all hours worked.

(m) Fair Work Act 2009

Chapter 3 – Rights and responsibilities of employees, employers, organisations etc.

Part 3-1 – General Protections

Division 6 – Sham arrangements

Section 357 – Misrepresenting employment as independent contracting arrangement

Failure in misrepresenting to [REDACTED] that her contract for employment with Signature Portrait Studios Pty Ltd was one of a contract for services under which she would perform work as an independent contractor.

ATTACHMENT "C" (ENFORCEABLE UNDERTAKINGS)

Signature Portrait Studios Pty Ltd and Lynne Brabban undertakes to:

Payments

1. pay an amount of \$3950 gross to [REDACTED] as payment for wages she would have received had her employment not been terminated for the sole or dominant purpose of engaging her as an independent contractor no later than 14 days after execution of this Enforceable Undertaking and provide proof of such payment to the FWO no later than 7 days after the payment is made.
2. pay an amount of \$250 to [REDACTED] as compensation no later than 14 days after execution of this Enforceable Undertaking and provide proof of such payment to the FWO no later than 7 days after the payment is made.
3. make a payment or payments totalling \$250 within one month of this Enforceable Undertaking being executed, to Kingsford Community Legal Centre for the purpose of advice and education on general protections under the FW Act.

Apology

4. write and send to [REDACTED] and [REDACTED] care of the Fair Work Ombudsman, GPO Box 9887 Sydney NSW 2001 within 14 days of executing this document, a letter of apology in the form of Attachment D to this EU, signed by Lynne Brabban, Director of Signature Portrait Studios Pty Ltd.
5. Lynne Brabban within 3 years of the EU being signed undertakes to:
 - 5.1. contact FWO within 14 days of registering a new company (business);
 - 5.2. the following undertakings within 60 days if she employs any employees or engages any independent contractor;
 - 5.2.1. develops systems and processes to ensure ongoing compliance with Commonwealth workplace laws.
 - 5.2.2. provides the FWO with details of the implementation of systems and processes designed to ensure ongoing compliance with Commonwealth workplace laws.
 - 5.2.3. attends a training course ("the training course") which deals with;
 - Employer obligations under the FW Act;
 - General Protections under the FW Act; and
 - Sham contracting under the FW Act.
 - 5.2.4. the training course is to be conducted by an accredited workplace trainer (not being anyone who has advised Signature Portrait Studios Pty Ltd and Lynne Brabban in relation to the subject matter of the Contraventions) who is approved by the FWO and paid for by Lynne Brabban.
 - 5.3. 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.

ATTACHMENT "D" (APOLOGY)

Address & Date

Dear (employee's name)

Apology – Failure to pay correct wages and/or entitlements

By now you should have received further payments of wages and/or annual leave and superannuation entitlements. The amount was paid to you in (state month and year).

The FWO investigation examined Signature Portraits Studios Pty Ltd failure to comply with the Fair Work Act 2009 and the Workplace Relations Act 2006. I offer my sincere apology to you for the unfortunate situation which was the subject of the FWO Investigation and commit that the proscribed conduct will not occur again.

Signature Portraits Studios Pty Ltd and I have formally admitted to the FWO that it breached the provisions listed in the Enforceable Undertaking that I provide to you.

Yours sincerely

Lynne Brabban

ATTACHMENT "D" (APOLOGY)

Address & Date

Dear (employee's name)

Apology – Failure to pay correct wages and/or entitlements

By now you should have received further payments of wages and/or annual leave and superannuation entitlements. The amount was paid to you in (state month and year).

The FWO investigation examined Signature Portraits Studios Pty Ltd failure to comply with the Fair Work Act 2009 and the Workplace Relations Act 2006. I offer my sincere apology to you for the unfortunate situation which was the subject of the FWO Investigation and commit that the proscribed conduct will not occur again.

Signature Portraits Studios Pty Ltd and I have formally admitted to the FWO that it breached the provisions listed in the Enforceable Undertaking that I provide to you.

Yours sincerely

Lynne Brabban