



Australian Government

# Fair Work OMBUDSMAN

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## **ENFORCEABLE UNDERTAKING**

dated 15<sup>th</sup> DEC 2011

Given by

BPL Adelaide Proprietary Limited (ABN 40 108 037 798)

**The Commonwealth of Australia**

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

concerning contraventions of Commonwealth workplace laws

# Details

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<b>Parties</b>	<b>FWO, BPL Adelaide Proprietary Limited</b>	
<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 Sydney NSW 2000
	Telephone	(02) 8255 6040
	Fax	(02) 6204 2099
	Attention	Karsten Lehn, Executive Director, Complex Investigations and Innovation, FWO
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<b>BPL Adelaide Proprietary Limited</b>	Name	BPL Adelaide Pty Limited (Trading as Adelaide Poultry)
	ABN	40 108 037 798
	Incorporated in	New South Wales
	Address	642 Western Highway Pendle Hill NSW
	Telephone	(02) 9842 1000
	Fax	(02) 9668 4818
	Attention	Grant Onley, National Human Resources Manager

<b>Recitals</b>	<b>A</b>	On 23 September 2010, the Office of the Fair Work Ombudsman ( <b>FWO</b> ) commenced an investigation into allegations that BPL Adelaide Proprietary Limited had contravened Commonwealth workplace laws.
	<b>B</b>	By reason of the matters set out in Attachment "A" ( <b>Background</b> ), the FWO has determined, and BPL Adelaide Proprietary Limited acknowledges, that BPL Adelaide Proprietary Limited contravened Commonwealth workplace laws.
	<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 <i>Fair Work Act 2009</i> ( <b>Fair Work Act</b> ).

<b>Governing law</b>	Commonwealth
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<b>Date of agreement</b>	The dates the parties execute this EU. See Signing page
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## General terms

### 1 Admission of contravention

By reason of the matters described in Attachment "A" (**Background**) to this EU, which are admitted without demur by BPL Adelaide Proprietary Limited that BPL Adelaide Proprietary Limited contravened Commonwealth workplace laws in the respects set out in Attachment "B" (**Contraventions**).

### 2 Limit of admission

2.1 The FWO acknowledges that the terms of this EU:

- (a) are solely for the purposes of resolving the FWO investigation into the Contraventions; and
- (b) must not be interpreted as an admission by BPL Adelaide Proprietary Limited 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 by the FWO in order to inform a relevant Court or tribunal of the details of the conduct that was the evidentiary foundation for BPL Adelaide Proprietary Limited 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 BPL Adelaide Proprietary Limited in relation to any future contraventions of Commonwealth workplace laws.

### 3 Enforceable undertakings

BPL Adelaide Proprietary Limited **NOW UNDERTAKES** that, in consideration of the FWO agreeing not to apply for any orders under Commonwealth workplace laws in relation to the Contraventions (as evidenced by the FWO's acceptance of this EU endorsed below), BPL Adelaide Proprietary Limited 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 BPL Adelaide Proprietary Limited; and
- (b) the FWO accepts the EU executed by BPL Adelaide Proprietary Limited (as evidenced by the FWO's acceptance of this EU endorsed below).

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## 5 Acknowledgements

BPL Adelaide Proprietary Limited 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 Fair Work 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 retraction 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. The FWO agrees to provide BPL Adelaide Proprietary Limited with at least 24 hours notice prior to issuing a media release;
  - (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 BPL Adelaide Proprietary Limited in paragraph 1 above in respect of any future decision about enforcement action to be taken in respect of any future non-compliance by BPL Adelaide Proprietary Limited with Commonwealth workplace relations obligations.
- (d) consistent with the Note to section 715(4) of the Fair Work 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 BPL Adelaide Proprietary Limited contravene 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 Fair Work Act, for orders under section 715(7) of the Fair Work Act; and
  - (ii) this EU may be provided to the Court as evidence of the admissions made by BPL Adelaide Proprietary Limited in paragraph 1, and also in respect of the question of costs; and
  - (iii) this EU is to be taken as having been withdrawn by BPL Adelaide Proprietary Limited for the purposes of section 715(3) of the Fair Work Act if the FWO gives its written consent (in which case the FWO may apply for orders against BPL Adelaide Proprietary Limited and/or related parties under Division 2 of Part 4-1 of the Fair Work Act).

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## 6 No inconsistent statements

BPL Adelaide Proprietary Limited:

- (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 the 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 with 7 days written notice if

BPL Adelaide Proprietary Limited, commit, in the opinion of the FWO, a serious or persistent breach or non-observance of a term or terms of this EU provided that such breach or non-observance is referred to in the notice.

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

Consistent with section 715(3) of the Fair Work Act, BPL Adelaide Proprietary Limited 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 BPL Adelaide Proprietary Limited or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal from this EU by BPL Adelaide Proprietary Limited) remains in full force and effect and is binding on BPL Adelaide Proprietary Limited 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 this EU by BPL Adelaide Proprietary Limited):

- (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 BPL Adelaide Proprietary Limited.

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## **12 No representations or warranties**

BPL Adelaide Proprietary Limited 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.

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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**

BPL Adelaide Proprietary Limited acknowledges that:

- (a) before executing this EU, BPL Adelaide Proprietary Limited were given the opportunity to seek independent legal and other advice of their choice;

- (b) in the light of any advice provided to BPL Adelaide Proprietary Limited, they considered their position;
- (c) if BPL Adelaide Proprietary Limited has been advised by their solicitors, they have been advised by them as to the terms of this EU; and
- (d) BPL Adelaide Proprietary Limited fully 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.

# Signing page

Dated: 15 DEC 2011

EXECUTED by BPL Adelaide Proprietary Limited in accordance with section 127(1) of the Corporations Law:


(Signature of Secretary/Director)

(Signature of Director)

(Name of Secretary/Director in Full)

(Name of Director in Full)

Executed for and on behalf of BPL Adelaide Pty Limited by its duly constituted attorney under power of attorney dated 25th June 2009 (PA 11223330 and PA 11223331) in the presence of:

 15.12.2011  
GEORGE TSEKOURAS  
Attorney

  
Witness

Name of witness : GRANT ONLEY

ACCEPTED by the FAIR WORK OMBUDSMAN

Dated:

NICHOLAS PAUL WILSON  
FAIR WORK OMBUDSMAN

or by his Delegate subject to the instrument of delegation made pursuant to section 683 of the Fair Work Act and executed by Nicholas Paul Wilson on

## ATTACHMENT "A" (BACKGROUND)

1. BPL Adelaide Proprietary Limited (**BPLA**) is a poultry product supplier and operates a poultry processing and distribution facility in Wingfield, South Australia. BPLA is part of the Baiada Group of Companies.
2. BPLA pays in excess of 209 employees weekly, of which over 178 workers are directly engaged in the poultry processing and distribution function.
3. At all material times, BPLA was bound by the Poultry Processing Award 2010 (**the Award**), and the Notional Agreement Preserving the Chicken Meat Producers & Distributors Award (SA) (**the NAPSA**),
4. The Fair Work Ombudsman (**FWO**) initiated an investigation on 23 September 2010 after public comments were made alleging underpayment of workers at BPLA's poultry processing plants in Wingfield, South Australia. On 4<sup>th</sup> November 2010 FWO conducted unannounced audits on Baiada sites in Wingfield South Australia, Laverton Victoria, Ipswich Queensland and Beresfield and Tamworth New South Wales.
5. From 1 July 2010 to 30 October 2010, (**the Relevant Period**), BPLA paid the affected employees a base rate of pay for all hours worked, with payment of penalties for work performed on weekends, at nights or in excess of ordinary hours.
6. The FWO audited the following entitlements:
  - The applicable hourly rates of pay;
  - Overtime payments for all overtime hours worked by shift workers;
  - The applicable overtime rates for hours worked in excess of 38 hours for full-time process workers;
  - Weekend penalty rates;
  - Applicable shift loadings;
  - Applicable meal allowances;
  - Applicable special allowances.
7. The FWO audit revealed that during the Relevant Period, BPLA had underpaid 5 employees at the Wingfield South Australia a total of \$404.37. As a result of the FWO investigation, between September and December 2010 BPLA conducted a full audit across its payroll systems. BPLA advised FWO that it had identified a total of \$57,940.38 in underpayments to employees at the BPLA site in Wingfield South Australia.
8. Upon becoming aware of the identified underpayments BPLA cooperated with the FWO and acted to rectify the underpayments.
9. The underpayments arose from BPLA not updating the payroll systems to accurately accord with the change from the transitional arrangements to the Poultry Processing Award 2010.
10. By contravening the provisions of the Award and Acts as specified in Attachment "B" of this enforceable undertaking, BPLA employees were underpaid their entitlements.
11. BPLA has since rectified all of the underpayments.
12. BPLA admits the contraventions set out in Attachment "B".



## ATTACHMENT "B" (CONTRAVENTIONS)

- 1) Between 1 January 2010 and 31 December 2010 BPL Adelaide Proprietary Limited failed to pay employees the correct rates of pay and meal allowance where applicable and as such has contravened the following:
  - a) Section 45 of the *Fair Work Act 2009* contravening a modern award specifically:
    - Clause A.2.3 of the Poultry Processing Award 2010 (Minimum Rate of Pay).
    - Clause 20.2(b) of the Poultry Processing Award 2010 (Meal Allowance).
    - Clause 24.4(c)(ii) of the Poultry Processing Award 2010 (Shift Rates (afternoon and night shift)).
    - Clause 24.4(d)(ii) of the Poultry Processing Award 2010 (Overtime (for shift workers)).
    - Clause 24.5(c) of the Poultry Processing Award 2010 (Weekend and Public Holiday Rates (public holiday rates for shift workers)).
    - Clause 6.5.7.2 of the Notional Agreement Preserving a State Award (NAPSA) – namely the Chicken Meat Producers & Distributors Award (Shift Work Allowance (Early Morning Shift)).

## ATTACHMENT "C" (UNDERTAKINGS)

BPL Adelaide Proprietary Limited undertakes to:

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

1. Ensure that it complies at all times and in all respects with the Fair Work Act, industrial agreements and/or workplace laws which apply to it by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws.
2. Provide the FWO within 28 days of the date of this EU, details of the implementation of systems and processes designed to ensure ongoing compliance with Commonwealth workplace laws.

### ***Workplace Apology Notice***

3. Display at all BPLA business premises in Wingfield South Australia within 28 days of executing this EU, the notice in the form of Attachment "D" to this EU signed by the National Human Resources Manager (**the notice**).
4. Ensure the notice is printed in at least A4 size and clearly displayed at the premises of BPL Adelaide Proprietary Limited for a period of at least 30 days:
  - (a) in a location to which all staff at each business location have access; and
  - (b) in a manner which is reasonably capable of drawing the letter to the general attention of all staff (for example, by placement on a staff noticeboard).

### ***Public notice***

5. Within 28 days of executing this EU (or so soon afterwards as is available), cause a notice to be placed in the Saturday edition of the Adelaide Advertiser Newspaper which:
  - (a) bears the company name of BPL Adelaide Proprietary Limited;
  - (b) bears the company logo (if any) of BPL Adelaide Proprietary Limited;
  - (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.

### ***Preparation of workplace relations compliance manual***

6. Unless otherwise advised by FWO upon receipt and consideration of any current workplace compliance policy, must 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 relevant officers and employees. A copy of this manual must be made available to all employees who wish to access it, and BPLA must take reasonable steps to ensure that employees are aware of its existence and how to access it.

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

7. Within two months of executing this EU, organise and ensure all employees with human resource and payroll responsibilities along with site managers attend a training course (**the training course**) which provides an overview of the rights and responsibilities of employers under the Fair Work Act.
8. The training course must be conducted by an accredited workplace trainer (not being anyone who has advised BPLA in relation to the subject matter of the Contraventions) who is approved by the FWO and paid for by BPLA.
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 FWO within 7 days of the training being delivered with evidence of the names and designation of who attended the training course and proof of payment of the training course.

### ***Future workplace relations compliance audit activity and reporting to FWO***

11. Cause to have performed by an accounting professional (e.g. Certified Practising Accountant) or audit specialist (at its own expense), on an annual basis for the next 3 years after the date of this EU (the reporting period), an audit of its compliance with Commonwealth workplace laws, in particular compliance relating to pay and conditions of the employees. The first audit is to be

completed within 2 months of the execution of this EU. The remaining audits are to be completed by 31 August 2012 and 31 August 2013.

12. Provide to FWO the audit report within 7 days of the audit report being finalised.
13. Ensure that the audit findings, in particular report on compliance with:
  - (a) the wage rates and entitlements paid to each employee employed over the reporting period;
  - (b) the classification (under the Poultry Processing Award 2010) and engagement status (for example casual, part-time, full-time, contractor or trainee) of each worker engaged 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.

**ATTACHMENT "D"**  
**(FORM OF WORKPLACE NOTICE)**  
**(FORM OF PUBLIC NOTICE)**

**Underpayment of employees of BPL Adelaide Proprietary Limited**

The Office of the Fair Work Ombudsman (FWO) has investigated allegations that BPL Adelaide Proprietary Limited contravened the *Fair Work Act 2009* during the period 1 July 2010 to 30 October 2010.

The FWO investigation and subsequent internal audit by BPL Adelaide Proprietary Limited revealed we failed to pay a significant number of current and former employees the correct meal allowance entitlements due to them under the relevant Award.

The underpayments arose because BPL Adelaide Proprietary Limited did not fully update its payroll systems in the transition from the Notional Agreement Preserving the Chicken Meat Producers & Distributors Award (SA) (the **NAPSA**) to the Poultry Processing Award 2010 (the **Award**).

BPL Adelaide Proprietary Limited cooperated fully with the FWO during this process and has since rectified all of the underpayments.

BPL Adelaide Proprietary Limited has formally admitted to the FWO that it contravened workplace laws by failing to pay the affected employees.

An Enforceable Undertaking has been given by BPL Adelaide Proprietary Limited to the FWO to reflect these formal admissions (that Enforceable Undertaking is available at [www.fwo.gov.au](http://www.fwo.gov.au)).

BPL Adelaide Proprietary Limited expresses its sincere regret and apologises to employees for failing to comply with their lawful obligations. Furthermore, BPL Adelaide Proprietary Limited gives its employees our commitment that such conduct will not occur again and that it will comply with Commonwealth workplace relations laws in the future.

Grant Onley  
National Human Resources Manager  
BPL Adelaide Pty Limited