



Fair Work OMBUDSMAN

ENFORCEABLE UNDERTAKING

Dated *22 June* 2011

Given by

Ivanho & Kew Pty Ltd t/as Anglesea Medical Centre

(ABN 57 129 764 969)

and Woon Lan Melissa Kew

to

The Commonwealth of Australia

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

concerning contraventions of Commonwealth workplace laws

Details

Parties	FWO and Ivanho & Kew Pty Ltd t/as Anglesea Medical Centre and Woon Lan Melissa Kew	
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 Melbourne Victoria 3000
	Telephone	03 9954 2649
	Fax	02 6276 7009
	Attention	Executive Director, CII, FWO, Karsten Lehn
Ivanho & Kew Pty Ltd	Name	Ivanho & Kew Pty Ltd t/as Anglesea Medical Centre
	ABN	57 129 764 969
	Incorporated in	Victoria
	Address	63 Great Ocean Road, Anglesea, Victoria 3230
	Telephone	03 5263 3555
	Fax	03 5263 3155
Woon Lan Melissa Kew	Attention	Secretary
	Name	Woon Lan Melissa Kew
	Address	Unit 1/15 Beales Street Torquay VIC 3228
	Telephone	03 5263 3555

Recitals	
A	The FWO commenced an investigation into allegations that Ivanho & Kew Pty Ltd and Ms Woon Lan Melissa Kew had breached Commonwealth workplace laws.
B	By reason of the matters set out in Attachment "A" (Background), the FWO has determined, and Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew acknowledge, that Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew 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 Victoria

Date of agreement See Signing page

General terms

1 Admission of contravention

By reason of the matters described in Attachment "A" (Background), which are admitted without demur by Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew, Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew 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 Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew 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 Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew 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 Ivanho & Kew Pty Ltd and/or Woon Lan Melissa Kew in relation to any future contraventions of Commonwealth workplace laws.
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3 Enforceable undertakings

Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew **NOW JOINTLY AND SEVERALLY UNDERTAKE** 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), Ivanho & Kew Pty Ltd Kew and Woon Lan Melissa Kew must do all those activities and things set out in Attachment "C" (Undertakings).

4 Commencement of enforceable undertaking

This EU comes into effect when:

- (a) the EU is executed by Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew; and
 - (b) the FWO accepts the EU executed by Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew (as evidenced by the FWO's acceptance of this EU endorsed below).
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5 Acknowledgements

Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew both 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 (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 Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew in paragraph 1 above in respect of any future decision about enforcement action to be taken in respect of any future non-compliance by Ivanho & Kew Pty Ltd and/or Woon Lan Melissa Kew 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 Ivanho & Kew Pty Ltd and/or Woon Lan Melissa Kew 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 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 Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew 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 Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew 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 Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew under Division 2 of Part 4-1 of the FW Act).

6 No inconsistent statements

Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew:

- (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.

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 Ivanho & Kew Pty Ltd and/or Woon Lan Melissa Kew commit, 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, Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew 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 Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal from this EU by Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew) remains in full force and effect and is binding on Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew 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 Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew):

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

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).

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 Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew.

12 No representations or warranties

The Executive 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

Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew acknowledge that:

- (a) before executing this EU, Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew were given the opportunity to seek independent legal and other advice of their choice;
- (b) in the light of any advice provided to Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew, they considered their position;
- (c) if Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew has been advised by their solicitors, they have been advised by them as to the terms of this EU; and
- (d) Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew fully understand 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.

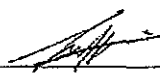
Signing page

Dated: 22 JUNE 2011

EXECUTED by IVANHO & KEW PTY LTD in accordance with section 127(1) of the Corporations Law:

X 

(Signature of Secretary/Director)



(Signature of Director)

WOON LAN MELISSA KEW

(Name of Secretary/Director in Full)

LOKE WAN IVAN HO

(Name of Director in Full)

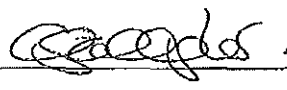
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Dated: 22 JUNE 2011

EXECUTED by WOON LAN MELISSA KEW

X 

(Signature of WOON LAN MELISSA KEW)



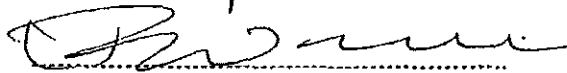
(Signature of Witness)

X WOON LAN MELISSA KEW CHRISTINE GALLAGHER

(Name of Witness in Full)

ACCEPTED by the FAIR WORK OMBUDSMAN

Dated: 2 Sept 2011



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. Between 1 January 2009 and 11 June 2010, _____ was employed with Ivanho & Kew Pty Ltd as a medical receptionist on a part time basis.
2. Ivanho & Kew Pty Ltd t/as Anglesea Medical Centre operates a medical centre located at 63 Great Ocean Road, Anglesea in the State of Victoria.
3. Ms Woon Lan Melissa Kew is the Company Secretary. During the period of employment, Woon Lan Melissa Kew was involved in the management of Ivanho & Kew Pty Ltd and was responsible for employing staff and determined wages.
4. Early in 2010, _____ part time hours were reduced to Monday 9am to 12noon and Friday 9am to 12noon due to the restructure of the working arrangements of Dr Ho. Rosemarie Jones was happy to accept these changes.
5. On 3 June 2010 _____ was contacted by Ivanho & Kew Pty Ltd's part time receptionist, _____ told her there was a new employment contract that she needed to sign. _____ attended the medical centre where she was given her copy of this contract titled 'Part time employment agreement - effective 1.6.2010'. _____ attempted to explain the content to _____ and advised her that she had already signed hers. Upon reading through the terms and conditions, _____ told _____ that she had some concerns and was not prepared to sign hers immediately.
6. On 7 June 2010, Woon Lan Melissa Kew entered the medical centre's reception area and told _____ to 'pick a piece of paper' from one of a number she held in her hand. _____ chose a piece of paper with the number 3 written on it. Woon Lan Melissa Kew explained this meant that she would be the third employee to receive payment for public holidays i.e. on a rotation basis. _____ told Kew that she thought this was illegal and that a part time employee was entitled to payment for a public holiday if the public holiday was on the day that the part time employee was ordinarily scheduled to work. Woon Lan Melissa Kew replied that she was able to reward her employees as she liked and that because Ivanho & Kew Pty Ltd has fewer than 15 employees, it has more flexibility as to employee's conditions. In relation to the proposed contract, Woon Lan Melissa Kew also told _____ that the casual loading for casual employees was to be paid at the rate of 25 cents per hour. The casual loading was actually payable at the rate of 25% of the applicable base rate of pay as per the *Health Professionals and Support Services Award 2010* [MA000027] (Modern Award).
7. On 11 June 2010, _____ attended work and was asked to attend a meeting with Woon Lan Melissa Kew after the last patient. Upon hearing this, _____ handed a letter to Dr Ho outlining her concerns with the contract she had been asked to sign and asked him to read this prior to her meeting later with Woon Lan Melissa Kew. _____ explained she couldn't currently sign the contract and was unsure if she was to be classified as part time or casual.
8. At the end of that day, _____ met with Woon Lan Melissa Kew and was told by her that Ivanho & Kew Pty Ltd had never had contracts before and only introduced them because of an Australian General Practice Accreditation Limited (AGPAL) requirement for accreditation. Woon Lan Melissa Kew again said that Ivanho & Kew Pty Ltd had flexibility regarding employee's conditions because it has fewer than 15 employees. _____ told Woon Lan Melissa Kew that those conditions still needed to comply with the National Employment Standards (NES) and the Modern Award. Woon Lan Melissa Kew said words to the effect "We have never got on. We don't clap with the same hand; we row in different boats".
9. Woon Lan Melissa Kew told _____ that she was afraid because "your daughter is a lawyer and we don't like surrounding ourselves with people who are associated with lawyers and legal people."
10. _____ asked Woon Lan Melissa Kew if she was dismissing her to which Woon Lan Melissa Kew replied that she was. _____ left the medical centre a short time later.

ATTACHMENT "B" (CONTRAVENTIONS)

(a) *Workplace Relations Act 1996 (Cth) (WR Act) (s.182 – The guarantee)*

Between the period 1 January 2009 and 30 June 2009, Ivanho & Kew Pty Ltd contravened s. 182(1) of the WR Act by failing to pay the basic periodic rate of pay as specified under the terms of the Australian Pay and Classification Scale (APCS) derived from the *Health and Allied Services – Private Sector – Victoria Consolidated Award 1998* [AP783872] for hours worked.

(b) *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) (Transitional Act)(Item 5 of Schedule 16) (s.182 – The guarantee)*

Between the period 1 July 2009 and 31 December 2009, Ivanho & Kew Pty Ltd contravened s.182(1) of the WR Act (contravention of Item 5 of Schedule 16 of the Transitional Act) by failing to pay the basic periodic rate of pay as specified under the terms of the transitional APCS derived from the *Health and Allied Services – Private Sector – Victoria Consolidated Award 1998* [AP783872] for hours worked.

(c) *Fair Work Act 2009 (Cth) (FW Act) (s.45 – Contravening a modern award)*

Between the period 1 January 2010 and 11 June 2010, Ivanho & Kew Pty Ltd contravened s.46 of the FW Act by failing to pay the minimum basic hourly rate of pay under the transitional APCS derived from the *Health and Allied Services – Private Sector – Victoria Consolidated Award 1998* [AP783872] for hours worked in contravention of clause A.2.3 of the *Modern Award*.

(d) *Fair Work Act 2009 (Cth) (s.340 – Protection)*

On 11 June 2010, Ivanho & Kew Pty Ltd contravened s.340(1) of the FW Act by taking adverse action against in terminating her employment because she was entitled to the benefit of a workplace law or workplace instrument, specifically the *Modern Award* and the *National Employment Standards*.

Woon Lan Melissa Kew was involved within the meaning of section 728 of the WR Act and section 550 of the FW Act, in the contraventions identified at paragraphs (a) – (d) above.

ATTACHMENT "C" (UNDERTAKINGS)

Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew jointly and severally undertake to:

Future workplace relations compliance

1. ensure that they comply at all times and in all respects with the FW Act and the *Health Professionals and Support Services Award 2010* [MA000027], by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws.
2. 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.

Apology

3. write and send to _____ at _____ within 7 days of executing this document, a letter of apology in the form of Attachment D to this EU, signed by Woon Lan Melissa Kew, the Secretary of Ivanho & Kew Pty Ltd.

Ivanho & Kew Pty Ltd workplace relations compliance training

4. provide to the FWO the training materials used in the VHIA training course on the FW Act, attended by Woon Lan Melissa Kew on or around 17 November 2010, within 7 days of the date of this EU.
5. ensure Woon Lan Melissa Kew attends a training course ("the training course") on the rights and responsibilities of employers and employees under the FW Act in the event that the FWO does not retrospectively approve the VHIA training course referred to in paragraph 4 as an appropriate training course.
6. ensure the training course must be conducted by an accredited workplace trainer (not being anyone who has advised Ivanho & Kew Pty Ltd and Woon Lan Melissa Kew in relation to the subject matter of the Contraventions) who is approved by the FWO and paid for by Ivanho & Kew Pty Ltd, in the event that the FWO does not retrospectively approve the VHIA training course referred to in paragraph 4 as an appropriate training course.
7. provide the training materials used in the training course to the FWO for approval no later than 14 days before the training is to be conducted in the event that the FWO does not retrospectively approve the VHIA training course referred to in paragraph 4 as an appropriate training course.

Rectification of non-compliant agreement making process

8. within 14 days of the signing of this EU, provide evidence that current employees have been notified of the withdrawal of the document titled 'Part time employment agreement - effective 1.6.2010'.
9. within 14 days of the signing of this EU, provide evidence that current employees have been made aware that the terms and conditions of their employment is contained in the *Health Professionals and Support Services Award 2010* [MA000027].

Workplace relations compliance audit activity

10. within 28 days of the signing of this EU, audit Ivanho & Kew Pty Ltd's compliance with Commonwealth workplace laws from 1 June 2009 to 31 December 2010, including to identify whether there has been any potential underpayments to current and former employees, and provide to the FWO evidence of the audit and its results within 7 days of the audit being finalised.

ATTACHMENT "D"

[Ivanho & Kew Pty Ltd letterhead]

Date: xx/xx/xxxx

Dear

I am writing to let you know about the outcome of an ongoing investigation by the Fair Work Ombudsman (FWO), and to offer you a sincere apology on behalf of myself and Ivanho & Kew Pty Ltd (the Company) for the unfortunate situation which was the subject of the FWO's investigation.

The FWO's investigation looked at the termination of your employment which occurred on Friday, 11 June 2010. Following its investigation, the FWO determined that the Company contravened workplace relations laws by terminating your employment for a protected reason as defined in the *Fair Work Act 2010* (the Act). More specifically, the FWO has determined that your employment was terminated as a direct result of your request to the Company and Woon Lan Melissa Kew in particular, to comply with the National Employment Standards (NES) and the *Health Professionals and Support Services Award 2010* (the Award).

The Company and I express our sincere regret and apologise to you for failing to comply with our lawful obligations. Furthermore, the Company and I have given a commitment to FWO that the proscribed conduct will not occur again.

Yours sincerely

Woon Lan Melissa Kew
Secretary – Ivanho & Kew Pty Ltd