



Australian Government

# Fair Work

## OMBUDSMAN

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### **ENFORCEABLE UNDERTAKING**

Between

The Commonwealth of Australia

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

and

Hiyi Pty Ltd (ACN 151 556 179)

Yiran Gu

Haiyao Xu

**Section 715 ENFORCEABLE UNDERTAKING**

**Parties**

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:
  - (a) Hiyi Pty Ltd (ACN 151 556 179) (**Hiyi**);
  - (b) Yiran Gu (**Ms Gu**); and
  - (c) Haiyao Xu (**Mr Xu**),for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

**Commencement of Undertaking**

2. This Undertaking comes into effect when:
  - (a) the Undertaking is executed by Hiyi, Ms Gu and Mr Xu; and
  - (b) the FWO accepts the Undertaking so executed.
3. Upon the commencement of this Undertaking, Hiyi, Ms Gu and Mr Xu undertake to assume the obligations set out below.

**Background**

4. Hiyi operates a 7-Eleven convenience store franchise located at the corner of Spencer Street and Flinders Street, Melbourne (**Spencer Street 7-Eleven**).
5. Ms Gu and Mr Xu are joint directors of Hiyi. At all relevant times, Mr Gu and Mr Xu were responsible for the overall direction and management of the Spencer Street 7-Eleven and were responsible for determining the pay and conditions of employment for employees working at the Spencer Street 7-Eleven (**Employees**).
6. In September 2014, the FWO conducted a site visit to a 7-Eleven store operated by Hiyi in Parkville, Victoria (**Parkville 7-Eleven**) as part of an audit of compliance with workplace laws within a 7-Eleven stores. As a result of this visit, an investigation was conducted in respect of the Parkville 7-Eleven.
7. In October 2015, the FWO commenced proceedings against Hiyi, Ms Xu and Mr Gu for alleged contraventions of the FW Act occurring at the Parkville 7-Eleven. Hiyi, Ms Gu and Mr Xu have admitted the alleged contraventions.
8. In August 2015, the FWO received information that Hiyi was the operator of a second 7-Eleven franchise located in the Melbourne Central Business District. Subsequent enquiries identified this as the Spencer Street 7-Eleven.
9. As a result of information provided to the FWO in August 2015, the FWO commenced an investigation of the Spencer Street 7-Eleven (**Investigation**) for the period from 1 June 2013 to 30 August 2015 (**Review Period**).
10. As a result of the Investigation the FWO determined that:
  - (a) the terms and conditions of the Employees' employment were governed by the *General Retail Industry Award 2010* (**Retail Award**);

- (b) the Employees were engaged on a casual basis from at least the beginning of the Review Period until 23 August 2015;
  - (c) the Employees' duties included retail sales, cleaning and accepting deliveries; and
  - (d) the Employees' classification was Retail Employee Level 1 under the Retail Award.
11. As a result of the Investigation, the FWO identified underpayments to the Employees during the Review Period. The underpayments occurred because Hiyi paid the Employees rates of pay that were generally between \$17 and \$20 an hour (**Actual Rates of Pay**). As a result Hiyi contravened provisions of the Retail Award and the FW Act with respect to minimum rates of pay, shift work rates of pay, Saturday penalty rates, Sunday penalty rates and public holiday penalty rates.
  12. The FWO also identified contraventions of the *Fair Work Regulations 2009 (FW Regulations)*. These contraventions came about as a result of Ms Gu and Mr Xu entering inaccurate rates of pay and numbers of hours worked into a payroll system used to generate Hiyi's employment records. The inaccurate data was entered into the payroll system to create the impression that the Employees were being paid at least the minimum rates of pay under the Retail Award, when they were instead being paid the Actual Rates of Pay.
  13. At the request of FWO, Ms Gu and Mr Xu undertook to conduct an audit of Hiyi's compliance with the FW Act and the Retail Award (**Audit**) from the period of 1 July 2013 to 23 August 2015 (**Audit Period**).
  14. As a result of the Audit, Ms Gu and Mr Xu identified that Hiyi had underpaid the 13 Employees listed in Schedule A (**Audit Employees**) a total of \$106,189.11. The amount owing to each of the Audit Employees is set out in Schedule A.

#### **Admitted Contraventions**

15. The FWO has determined, and Hiyi admits, that during the Audit Period, it contravened:
  - (a) section 45 of the FW Act, by failing to comply with the following provisions of the Retail Award:
    - (i) clause 17 by failing to pay the Audit Employees the minimum base rates of pay for all hours worked;
    - (ii) clause 13.2 by failing to pay the Audit Employees the casual loading for all hours worked from Monday to Saturday;
    - (iii) clause 29.4(b) and Clause A.7.3 by failing to pay the Audit Employees the applicable rate of pay for all hours worked on Saturdays;
    - (iv) clause 29.4(c) and Clause A.7.3 by failing to pay the Audit Employees the applicable rate of pay for all hours worked on Sundays;
    - (v) clause 29.4(d) and Clause A.7.3 by failing to pay the Audit Employees the applicable rate of pay for all hours worked on Public Holidays; and
    - (vi) section 30.3 and Clause A.7.3 by failing to pay the Audit Employees who were employed as shift workers shift work rates for all shift work performed.
  - (b) regulation 3.44(1) of the FW Regulations by knowingly keeping record that are false or misleading; and
  - (c) regulation 3.44(6) of the FW Regulations by making use of entries in employee records knowing that the entries were false or misleading,

(the **Admitted Contraventions**).

16. The FWO has determined and Ms Gu admits that she was involved in each of the Admitted Contraventions, within the meaning of section 550 of the FW Act.
17. The FWO has determined and Mr Gu admits that he was involved in each of the Admitted Contraventions, within the meaning of section 550 of the FW Act.

### **Undertakings**

For the purposes of section 715 of the FW Act, Hiyi, Ms Gu and Mr Xu undertake to:

#### **Rectify Underpayments**

18. Rectify the total underpayment of \$106,189.22 to the Audit Employees within six months from the commencement of this Undertaking.
19. Provide evidence to the FWO of rectification payments made to the relevant employees.
20. In the event that any of the Audit Employees cannot be located within six months from the commencement of this Undertaking, pay any outstanding amount to the Commonwealth within a further 14 days.

#### **Workplace Notice**

21. Place a notice in the Spencer Street 7-Eleven which can be easily viewed by all employees (**Workplace Notice**) within 30 days of the execution of this Undertaking which contains:
  - (a) information on the minimum rates of pay, casual loading and penalty rates under the Retail Award;
  - (b) information to the effect that it is unlawful for an employer to require an employee to repay their wages to the employer or a third party; and
  - (c) information on how to contact the Fair Work Ombudsman;
  - (d) the Workplace Notice must be in a form approved by the FWO at least 7 days prior to Hiyi displaying the Workplace Notice;
  - (e) Hiyi will provide proof of the display of the Workplace Notice to the FWO within 14 days of the Workplace Notice being approved by the FWO; and
  - (f) the Workplace Notice must be displayed continuously for a period of one year.

#### **Workplace Audit**

22. Engage a qualified payroll provider, consultant or lawyer experienced in workplace relations to undertake an audit of Hiyi's compliance with the FW Act and the Retail Award on the following terms:
  - (a) the audit period will be from 1 July 2017 to 30 September 2017;
  - (b) the audit is to be completed within 60 days of the end of the audit period;
  - (c) the audit will apply to all employees employed by Hiyi at any time during the audit period in any classification of work under the Retail Award;
  - (d) the audit will assess Hiyi's compliance with the following obligations according to each employee's classification of work, category of employment and hours worked during the audit period:
    - (i) wages and work-related entitlements under the Retail Award;
    - (ii) accrual and payment of entitlements under the National Employment Standards in Part 2-2 of the FW Act;
    - (iii) record keeping and payslip obligations in Division 3 of Part 3-6 of the FW Act and Part 3-6 of the FW Regulations;
  - (e) within 30 days of the audit being completed, Hiyi will provide to the FWO:
    - (i) a copy of the audit report which will include a statement of the methodology used in the audit;
    - (ii) a copy of the source materials used to audit the times worked by employees, including but not limited to rosters, timebooks and CCTV footage;

- (iii) written details of any contraventions identified in the audit, the steps the First Respondent will take to rectify any identified contravention(s), and the date by when the rectification will occur; and
- (f) the audit must be reviewed and endorsed for accuracy by a lawyer with expertise in workplace relations;
- (g) in the event the lawyer identifies any deficiencies in the audit or any additional compliance concerns, these are to be rectified prior to the audit report being provided to FWO.

**Notification of business interests**

23. For two years from the commencement of this Undertaking, Ms Gu or Mr Xu will notify the FWO of:
- (a) the sale of the Spencer Street 7-Eleven; and/or
  - (b) the acquisition of any business interest by Hiyi, Ms Gu and/or Mr Xu that employs employees;
- within 30 days of any the above actions being taken.

**Complaint Resolution**


24. If Hiyi is notified by the FWO of a complaint from a former or current employee, Hiyi will:
- (a) within 28 days of the notification of the complaint by the FWO, attempt to resolve the matter; and
  - (b) within a further 7 days, provide to the FWO:
    - (i) an outline of the findings made in respect of the complaint, including the outcome;
    - (ii) copies of the evidence relied on in making any findings; and
    - (iii) evidence of rectification of any identified underpayments or a proposal for rectification of identified underpayments.

**Acknowledgements**

25. Hiyi, Ms Gu and Mr Xu each acknowledge that:
- (a) the FWO may make this Undertaking (including any attachments) available for public inspection, including by posting it to its website at [www.fairwork.gov.au](http://www.fairwork.gov.au) (subject to the FWO taking any necessary steps to redact the names of individuals not party to the Undertaking);
  - (b) the FWO may release a copy of this Undertaking pursuant to any relevant request under the Freedom of Information Act 1982 (Cth);
  - (c) the FWO may issue a media release in relation to this Undertaking and from time to time, publicly refer to the Undertaking and its terms;
  - (d) the admissions made in the Undertaking may be relied upon by the FWO in respect of any future decision about enforcement action to be taken in relation to any future non-compliance with Commonwealth workplace relations obligations by Hiyi, Ms Gu or Mr Xu;
  - (e) consistent with the Note to section 715(4) of the FW Act, this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this Undertaking;
  - (f) if the FWO considers that Hiyi, Ms Gu or Mr Xu have contravened any of the terms of this Undertaking 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
  - (g) consistent with section 715(3) of the FW Act, Hiyi, Ms Gu or Mr Xu may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

**Executed as an undertaking**

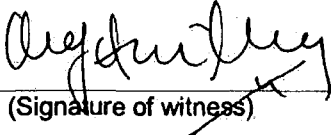
Executed by Hiyi Pty Ltd (ACN 151 556 179) in accordance with section 127(1) of the *Corporations Act 2001*:

  
\_\_\_\_\_  
(Signature of director)

HAIYAO XU  
\_\_\_\_\_  
(Name of director)


20/09/2016  
\_\_\_\_\_  
(Date)

in the presence of:

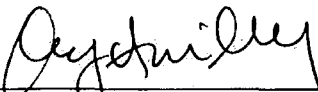
  
\_\_\_\_\_  
(Signature of witness)

HUI MENG ONG  
\_\_\_\_\_  
(Name of witness)


EXECUTED by Ms Yiran Gu:

  
\_\_\_\_\_  
(Signature)

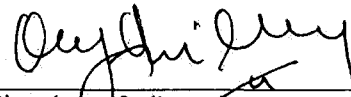
in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

EXECUTED by Ms Haiyao Xu:

  
\_\_\_\_\_  
(Signature)

in the presence of:

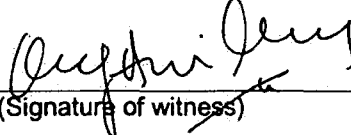
  
\_\_\_\_\_  
(Signature of witness)

  
\_\_\_\_\_  
(Signature of director/company secretary)

YIRAN GU  
\_\_\_\_\_  
(Name of director/company secretary)

20/4/2016  
\_\_\_\_\_  
(Date)

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

HUI MENG ONG  
\_\_\_\_\_  
(Name of witness)

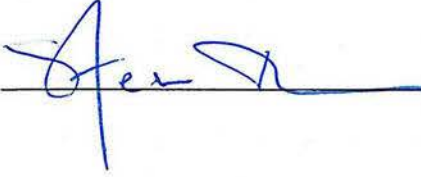
20/4/2016  
\_\_\_\_\_  
(Date)

HUI MENG ONG  
\_\_\_\_\_  
(Name of witness)

20/09/2016  
\_\_\_\_\_  
(Date)

HUI MENG ONG  
\_\_\_\_\_  
(Name of witness)


ACCEPTED by the FAIR WORK OMBUDSMAN pursuant to section 715(2) of the *Fair Work Act 2009* on:

  
\_\_\_\_\_

20 APRIL 2016  
\_\_\_\_\_  
(Date)

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

PIA MORGAN  
\_\_\_\_\_  
(Name of Witness)

**Schedule A – Audit Employees**

<b>Employee</b>	<b>Underpayment</b>
[REDACTED]	\$14,570.79
[REDACTED]	\$2,608.94
[REDACTED]	\$7,213.51
[REDACTED]	\$22,749.17
[REDACTED]	\$5,555.91
[REDACTED]	\$10,536.22
[REDACTED]	\$12,882.02
[REDACTED]	\$3,128.30
[REDACTED]	\$4,323.88
[REDACTED]	\$15,104.43
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