

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Ventia Utility Services Pty Limited.

ACN 010 725 247

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. **The Commonwealth of Australia** (as represented by the Office of the Fair Work Ombudsman)

and

Ventia Utility Services Pty Limited (ACN 010 725 247) (**VUS**) [formerly known as Thiess Services Pty Ltd (**Thiess Services**)]

Scope of this Undertaking

2. This Enforceable Undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by VUS for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

Definitions

3. For the purposes of this Undertaking:
 - (a) **Affected Persons** means those sub class 457 visa holder workers from the Philippines engaged under the MEC and listed in Annexure B to this Undertaking.
 - (b) **MEC** means any document identified or described as a Master Employment Contract and entered into by the Affected Persons between 2012 and 2013 unless the context otherwise requires.
 - (c) **POEA** means the Philippines Overseas Employment Administration, an agency of the government of the Republic of the Philippines.
 - (d) **PRIME** means Prime Manpower Resources Development Inc. a body incorporated in the Philippines carrying on a business of a recruitment agency or consultant.

Background

4. VUS is a services company providing utilities and environmental services to Australian and New Caledonian industrial, government and commercial clients with its headquarters based in New South Wales.
5. Thiess Services was a services company providing telecommunications, infrastructure and utilities services to Australian industrial, government and commercial clients. Thiess Services was sold to Ventia Pty Ltd on 31 March 2015 and subsequently changed its name to Ventia Utility Services Pty Limited.

6. On 15 February 2011 Thiess Services entered into a recruitment agreement with PRIME pursuant to which PRIME was appointed the agent of Thiess Services for the purpose of managing a recruitment process under which Filipino workers were to be recruited for employment in Australia in the service of Thiess Services (the **Recruitment Agreement**).
7. Under the Recruitment Agreement, PRIME commenced a recruitment process under which:
 - (a) presentations were made to potential employees of Thiess Services;
 - (b) prospective employees were subjected to trade skills, medical and other suitability testing and assessment;
 - (c) prospective employees were interviewed by representatives of Thiess Services; and
 - (d) applications on behalf of potential recruits were submitted to the Australian Department of Immigration and Border Protection for a sub-class 457 visa.
8. At the completion of the recruitment process the selected employees were offered and signed a binding Thiess Services employment agreement (**Thiess Services Offer of Employment**) with Thiess Services which was signed by a duly authorised officer or employee of Thiess Services on its behalf.
9. After execution of the Thiess Services Offer of Employment each selected employee was required by PRIME, as agent for VUS, to sign a MEC. A Pro-Forma blank MEC had been signed in Australia on 15 February 2011 by a member of Thiess Services' Executive Management, that person not being present in the Philippines at the time the Affected Persons signed the MEC.
10. The execution of a Master Employment Contract is a requirement of Philippine law to enable Filipino nationals to work outside of the Philippines.
11. The MEC contained, at clause 11a(vii), a provision that permitted Thiess Services to terminate the employment of an Affected Person, inter alia, by reason of their "engaging in trade union activities" during their employment with Thiess Services.
12. On arrival in Australia in 2013, the Affected Persons were deployed to Thiess Services sites in the States of Western Australia and Victoria.
13. In about October 2013, the Affected Persons were either redeployed by Thiess Services from Western Australia to Victoria or made redundant.
14. In and around that time, the Electrical Trades Union (**ETU**) raised its concerns with Thiess Services about clause 11a(vii) of the MEC on behalf of the Affected Persons as well as making representations to the FWO complaining of the illegality of the clause.

Before this issue was raised by the ETU, Thiess Services was unaware of the existence of the signed MECs.

15. On or about 10 October 2013, after discussions with the ETU and with their agreement, the Affected Persons were provided with a letter from Thiess Services dated 10 October 2013 which relevantly provided that:

[The reason for this correspondence is] to address a clause which is contained within the incorrectly issued "Master Employment Contract" which states...

[The MEC] contains a clause, prohibiting your involvement in Trade Union activity under risk of dismissal. This is not a lawful practice in Australia and therefore cannot be a condition of your employment. It appears at this time that this second, erroneous contract is one which is commonly used across the Philippines as part of the overseas recruitment process. It does not reflect Australian law or the views and intentions of Thiess [Services].

I understand that the provision of the "Master Employment Contract" containing this clause may have resulted in employees being reluctant to join a Trade Union for fear of losing their job. I would like to assure you that Thiess Services WA works closely with our Trade Union colleagues to ensure the best possible outcomes for our employees and our business. Your employment will not be at risk if you choose to join a Trade Union.

16. Thiess Services and VUS cooperated at all times with FWO and voluntarily assisted FWO in its investigation.
17. Thiess Services and VUS have no prior contraventions under the FW Act.

Contraventions

18. The FWO has determined and VUS now admits, that in respect of the Affected Persons who were subject to clause 11(a)(vii) of the MEC, VUS contravened the following provisions of the FW Act:

(a) VUS engaged in adverse action contrary to section 340 of the FW Act in that, by having the Affected Persons enter into the MEC, they were deprived of the rights that they possessed by virtue of their prior signing of the employment agreement.

(b) VUS made false and misleading representations contrary to section 345 of the FW Act as the MEC purported to convey to the Affected Persons that they were not permitted to join a trade union and that VUS had the right to terminate their employment if they did.

Commencement of Undertaking

19. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by VUS; and
 - (b) the FWO accepts the Undertaking so executed.
20. Upon the commencement of this Undertaking, VUS undertakes to assume the obligations set out below.

Undertakings

21. For the purposes of section 715 of the FW Act, VUS undertakes to:

Apology

- (a) within 28 days of the execution of this Undertaking, send a letter of apology in the form of **Annexure A** to each of the Affected Persons listed in **Annexure B** at their last known address ;and
- (b) within seven days of the distribution of the letters of apology to the Affected Persons provide copies to the FWO.

Changes to labour engagement practices

- (c) by 30 June 2016, issue a direction to any recruitment agent acting outside of Australia on behalf of VUS, that they must not prepare, present to an employee or prospective employee for execution any MEC or any other employment contract which is contrary to Commonwealth workplace laws and instruments in respect of the recruitment of any employees on behalf of VUS.
- (d) provide to the FWO written confirmation that the direction in paragraph 21(c) above has been issued, seven days after issue of the direction in paragraph 21(c) occurring.

Future workplace relations compliance

- (e) commit to ongoing compliance with applicable Commonwealth workplace laws and instruments by developing systems and processes to promote ongoing compliance with those requirements concerning the employment of non-Australian citizen or permanent resident employees.
- (f) provide to the FWO, within 90 days of the execution of this Undertaking, written details of the systems and processes implemented in satisfaction of the undertaking in paragraph 21(e) above.

Designated enquiry line

- (g) for a period of 12 months after the commencement of this Undertaking, maintain a telephone hotline and designated email address that can be accessed by persons employed by VUS to make enquiries or complaints regarding clauses contained within their MECs.
- (h) ensure that the access details and purpose of the telephone hotline and email address are made known and accessible to VUS employees.
- (i) provide to the FWO, within 90 days of the execution of this Undertaking, written details of the systems and processes implemented in satisfaction of the undertakings in paragraph 21(g) and (h) above.
- (j) provide to the FWO within seven days of the access details being made available to VUS employees evidence of the communication to VUS employees in accordance with paragraph 17(h) above.

Resolution of new complaints

- (k) within 28 days after execution of this Undertaking, engage and thereafter retain suitably qualified human resources personnel for the purpose of receiving, investigating and resolving enquiries and complaints submitted via the designated enquiry line and advise the FWO of the identity, skills and qualifications of the suitably qualified human resources personnel.
- (l) in the event of personnel changes, provide the FWO with the name and contact details of the suitably qualified human resources personnel appointed to liaise with the FWO in relation to any new workplace complaints received by the FWO.

Website notice

- (m) cause to be placed, within 28 days of the execution of this Undertaking, a notice on the VUS website (**Website Notice**) in the form of Annexure C to this Undertaking and which:
 - a. is displayed on the homepage of the website in at least size 10 font;
 - b. remains on the website for a period of at least 28 days;
 - c. contains a html link to the executed Undertaking; and
- (n) provide a copy of the Website Notice to the FWO within seven days of publication.

Public notice

- (o) place a public notice in the Saturday edition of The Weekend Australian (**Public Notice**) within 28 days of the FWO publishing a Media Release on its website in respect of this Undertaking in the terms set out in Annexure C.

Workplace notices

- (p) place a notice within the workplace, which is accessible to VUS employees, (**Workplace Notice**) within 28 days of the execution of this Undertaking in the terms set out in Annexure C:
- a. for a period of at least 28 days in locations owned or controlled by VUS;
 - b. in a manner which is reasonably capable of drawing the notice to the general attention of VUS employees (for example, by placement on a staff noticeboard at each workplace in at least A3 size); and
 - c. provide a copy of the Workplace Notice and written details of how the Workplace Notice has been displayed within seven days of publication/display of the notices.

Workplace relations training

- (q) within six months of the execution of this Undertaking, organise and ensure training for all persons employed by VUS with managerial responsibility for, or involvement in human resources within the People and Capability Function of VUS that relate to the recruitment or engagement of off-shore labour through the 457 visa programme. (**Training**).
- (r) ensure the Training:
- a. addresses compliance with the FW Act in particular Part 3 – 1 General Protections of the FW Act;
 - b. is conducted by external human resources or legal professional with expertise in employment law, (at VUS's expense); and
 - c. provide the name and qualification of the person or organisation to conduct the training and copies of the proposed training materials to the FWO no later than seven days before the first training session is to be conducted.
- (s) provide evidence of attendance at the Training to the FWO within seven days of the Training being provided (including the name and position of all attendees and the date on which the Training was conducted); and
- (t) for a period of three years from the execution of this Undertaking, ensure that Training is conducted for any newly appointed managers responsible for, or involved in human resources within the People and Capability Function of VUS in the criteria and manner prescribed in paragraph 21(q) to (s).

Donation

- (u) donate to The Philippines-Australia Community Services Inc (PACSI) (ABN 45 570 366 150) and make payment of a \$50,000 donation within 60 days of this Undertaking being executed. Provide proof of payment of the amount of \$50,000 to the FWO within seven days of payment.

Acknowledgements

22. VUS acknowledges that:

- (a) this Undertaking may be withdrawn by VUS for the purposes of section 715(3) of the FW Act, only if the FWO gives its written consent (in which case the FWO may apply for orders against VUS in respect of the alleged contraventions specified in paragraph 18).
- (b) the FWO reserves the right to refer to this Undertaking and its contents in respect of any future proceedings brought by the FWO against VUS in relation to any future contraventions of Commonwealth workplace laws.
- (c) VUS will not, and will take reasonable steps to ensure that their respective 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 terms of this Undertaking.
- (d) 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 (subject to the FWO taking any necessary steps to redact the names of individuals not party to the Undertaking).
- (e) the FWO may release a copy of this Undertaking pursuant to any relevant request under the Freedom of Information Act 1982 (Cth).
- (f) 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.
- (g) consistent with the Note to subsection 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; and
- (h) if the FWO considers that VUS has contravened any of the terms of this Undertaking the FWO may apply to any of the Courts set out in subsection 715(6) of the FW Act, for orders under subsection 715(7) of the FW Act.

Executed as an undertaking

EXECUTED by Ventia Utility Services Pty Limited (ACN 010725247) in accordance with subsection 127(1) of the *Corporations Act 2001*:

(Name of director)

MICHAEL KRITH METCALFE

1 June 2016

(Date)

in the presence of:

[Signature]

(Signature of witness)

RICHARD KELLEWAY

(Name of witness)

(Name of director/company secretary)

JONATHAN PASK & DOUGLAS
1 June 2016

(Date)

in the presence of:

[Signature]

(Signature of witness)

PETER METCALFE

(Name of witness)

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

MICHAEL CAMPBELL

Deputy Fair Work Ombudsman

[Insert name and role of Delegate]

10/6/2016

(Date)

Delegate for the FAIR WORK
OMBUDSMAN

in the presence of:

[Signature]

(Signature of witness)

Louise Carto

(Name of Witness)

Annexure A

– Letter of Apology

Dear

I am writing on behalf of Ventia Utility Services Pty Limited (**VUS**), formerly known as Thiess Services Pty Ltd, to apologise for VUS's failure to comply with Commonwealth workplace law.

On 28 July 2015 the Fair Work Ombudsman (**FWO**) wrote to the then Thiess Services Pty Ltd referring to an investigation that had been conducted involving contraventions of the *Fair Work Act 2009* (**FW Act**) and a Master Employment Contract (**MEC**). Regrettably, the investigation identified you as an Affected Person having entered into a MEC with Thiess Services Pty Ltd.

The FWO has determined and VUS now admits that clause 11a(vii) of the MEC contravened the following provisions of the FW Act:

- (a) section 340 of the FW Act: VUS engaged in adverse action in that, by having Affected Persons enter into the MEC they were deprived of the rights that they possessed by virtue of their prior signing of the employment agreement.
- (b) section 345 of the FW Act: VUS made false and misleading representations as the MEC purported to convey to the Affected Persons that they were not permitted to join a trade union and that VUS had the right to terminate their employment if they did.

VUS formally admitted to the FWO that it has failed to comply with its obligations under Commonwealth workplace law and has entered into an Enforceable Undertaking with the FWO, a copy of which is available on the Ventia and the FWO Web sites www.fwo.gov.au.

As part of the Enforceable Undertaking, VUS have committed to a number of measures to ensure future compliance with Commonwealth workplace law.

VUS expresses its sincere regret and apologises to you for failing to comply with its lawful obligations.

Should you have any inquiries about any matter referred to in this letter, please contact Melissa Nolet on +61 3 9861 8120 or melissa.nolet@ventia.com.au.

Yours sincerely,

Name

Annexure B

Affected Employees

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Annexure C – Form of Website, Public and Workplace Notice

Enforceable Undertaking with the Fair Work Ombudsman

Ventia Utility Services Pty Limited (**VUS**) is a services company providing utilities and environmental services to Australian and New Caledonian industrial, government and commercial clients with its headquarters based in New South Wales.

Thiess Services Pty Ltd (**Thiess Services**) was a services company providing telecommunications, infrastructure and utilities services to Australian industrial, government and commercial clients. Thiess Services was sold to Ventia Pty Ltd on 31 March 2015 and subsequently changed its name to VUS.

In 2011 Thiess Services entered into a recruitment agreement with an intermediary agent for the purpose of managing a recruitment process under which 457 Filipino visa workers (**Affected Persons**) were to be recruited for employment in Australia.

At the completion of the recruitment process the Affected Employees were offered and signed a binding Thiess Services employment agreement (**Thiess Services Offer of Employment**) and, without Thiess Services' knowledge, a Master Employment Contract (**MEC**) provided by the intermediary. The MEC contained a provision that would permit Thiess Services to terminate the employment of an Affected Person, inter alia, by reason of their “engaging in trade union activities” during their employment.

In 2015 the Fair Work Ombudsman (**FWO**) conducted an investigation of VUS. VUS co-operated at all times. The FWO determined and VUS now admits the MEC contravened the following provisions of the Fair Work Act 2009 (**FW Act**):

- (a) VUS engaged in adverse action contrary to section 340 of the FW Act in that, by having the Affected Persons enter into the MEC they were deprived of the rights that they possessed by virtue of their prior signing of the Employment Agreement.
- (b) VUS made false and misleading representations contrary to section 345 of the FW Act as the MEC purported to convey to the Affected Persons that they were not permitted to join a trade union and that VUS had the right to terminate their employment if they did.

VUS has entered into an Enforceable Undertaking with the FWO (available at www.fwo.gov.au) committing to ensuring compliance with Commonwealth workplace laws.

Further VUS have committed to:

- (a) Formally apologies to the Affected Persons
- (b) Change their labour engagement practices
- (c) Implement processes to ensure future workplace relations compliance

- (d) Implement a designated enquiry line
- (e) Resolve any new complaints
- (f) Publish website, public and workplace notices
- (g) Conduct workplace relations training
- (h) Make a donation to The Philippines-Australia Community Services Inc (PACSI) for the amount of \$50,000

If you were engaged by Thiess Services or VUS and signed a MEC and have any concerns, you may wish to contact Melissa Nolet on +61 3 9861 8120 or melissa.nolet@ventia.com.au. Alternatively, you can contact the FWO via its website at www.fairwork.gov.au or the Infoline on 13 13 94.