

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Challenge Community Services

(ACN: 059 209 675)

and

Mr Barry Murphy

Chief Executive Officer Challenge Community Services

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:
 - (a) Challenge Community Services (ACN 059 209 675) (**Employer**); and
 - (b) Mr Barry Murphy, Chief Executive Officer /Company Secretary (**Mr Murphy**),for the purpose of section 715 of the *Fair Work Act 2009* (**FW Act**).

Background

2. The Employer is a Public Benevolent Institution and operates a not for profit business known as Challenge Community Services, providing support to over 1000 people across NSW.
3. As part of the not for profit business the Employer is involved in the provision of business services in Tamworth, Muswellbrook and Narrabri involving:
 - (a) Waste Recycling;
 - (b) Sewing and Laundry Services; and
 - (c) Document Scanning Services.
4. On 16 August 2016, the FWO commenced an audit, covering the period 1 August 2015 – 30 July 2016 (**Audit Period**) to assess the Employer's compliance with Commonwealth workplace laws at the Tamworth, Muswellbrook and Narrabri sites (**Audit**).
5. The Employer engaged and paid its employees in accordance with the *Challenge Disability Services Workplace Agreement 2009* (AG2009/19154) (**Agreement**) which commenced operation on 11 June 2010 following approval by the Fair Work Commission. The Employer provides supported employment for workers defined as an Employee with a Disability (**EWD**) by operating an 'employment-like environment'¹ in a number of its enterprises. Schedule C of the Agreement provides for a skills assessment for EWD in order to determine an appropriate Pro Rata Award Based Wage² for EWDs.
6. The Pro-rata Award Based Wages payable to EWDs "*remunerate(s) employees in a fair and equitable manner, based on the acquisition of and use of competencies (skills) to a standard of performance linked to output (productivity)*". The Pro-rata Award Based Wages form the basis for the provision of minimum rates of pay to EWDs.
7. The Agreement defines an EWD³ at Paragraph A. Glossary of Key Terms as:

An employee with a disability in this agreement is defined as an employee who is eligible for or in receipt of a Disability Support Pension and employed by a "prescribed service" or "eligible organisation" as defined by the Disability Service Act 1986 (Federal) (as amended) and operates a supported employment business enterprise which employs able-bodied workers and people with a disability in either a workshop, enclave, work crew or small business enterprise.
8. The Audit disclosed that the Employer had determined that 71 of the employees at the Tamworth, Muswellbrook and Narrabri sites were EWDs and consequently paid them in accordance with the Pro Rata Award Based Wage Structure.
9. Following enquiry and direction from the FWO the Employer identified that 18 of the 71 employees did not meet the Agreement's definition of EWD because those 18 employees

¹ The Agreement at B. Preamble p 3

² The Agreement at Schedule "A"

³ The Agreement at "A". Glossary of Key Terms pp 1 -2

(**Employees**) were not eligible for, or in receipt of, a Disability Support Pension either at the commencement of their employment or during the course of their employment.

10. The Audit identified that the Employees were incorrectly paid rates of pay ranging from 50% to 80% of the minimum rates of pay prescribed by the Agreement for their classification as prescribed in the Wage Structure contained in Schedule "A" of the Agreement.
11. On 13 September 2016, the Employer provided to the FWO full and complete calculations of the underpayments due and owing to the 18 employees affected as a result of being paid in accordance with the Pro Rata Award Based Structure. The Employees and the amounts calculated as due and owing to them are contained in Attachment A to this Undertaking.
12. On 6 October 2016, the Employer provided the FWO with evidence of payment amounts to the Employees totalling \$341,788.94. The Employer also paid additional superannuation for the Employees totalling \$30,078.52.

Contraventions

13. The FWO has determined, and the Employer admits, that the Employer contravened section 50 of the FW Act by failing to comply with clause 4.1 'Remuneration' as amended by clause 4.3 'Wage increases', and subject to Schedule "A" Wage Structure to the Agreement (**Contravention**).
14. Mr Murphy admits and agrees that, at all material times, he:
 - (a) was the Chief Executive Officer and Company Secretary of the Employer, having been so since 24 May 1993;
 - (b) was ultimately responsible for overall direction, management and supervision of the operations at the Employer in relation to engaging staff, setting and adjusting pay rates and determining wages and conditions of employment; and
 - (c) by reason of the matters set out in subparagraphs (a) and (b) was responsible in a practical sense for ensuring the Employer complied with its legal obligations.

Commencement of Enforceable Undertaking

15. This Undertaking comes into effect when:
 - (a) it is executed by the Employer and by Mr Murphy; and
 - (b) the FWO accepts the Undertaking so executed.

Enforceable Undertaking

16. Upon the execution of this Undertaking and for the purposes of Section 715 of the FW Act the Employer and Mr Murphy undertake to do the following:

16.1 Future Workplace Relations Compliance

- (a) Ensure the Employer complies at all times and in all respects with the FW Act, *Fair Work Regulations 2009* and the Agreement.
- (b) Provide the FWO, within 90 days of the date of execution of this Undertaking, details of systems and processes already in place or to be implemented to comply with paragraph (a) above. Without limitation, such systems and processes will relate to ensuring all employees engaged under the Pro-Rata Award Based Wages are properly assessed as meeting the criteria of an EWD.⁴

16.2 Public Notices

- (a) Place a notice within each of the workplaces at Tamworth, Muswellbrook and Narrabri which is accessible to all employees (**Workplace Notice**) within twenty eight (28) days of

⁴ See Agreement, A. Glossary of Terms, p 1

the execution of this Undertaking for a total consecutive period of seven (7) days in the terms set out in Attachments B and C to this Undertaking noting that Attachment C provides a plain English version more accessible to EWDs.

- (b) Provide copies of the Workplace Notices and provide photographic evidence of their display to the FWO within seven (7) days of the display of the Workplace Notices.

16.3 *Apology*

- (a) Send to the Employees' last known addresses within twenty eight (28) days of the execution of this Undertaking an apology (**Apology Letter**) in the form of the letter set out in Attachments D or E to this Undertaking noting that Attachment E provides a plain English version which the Employer could use as an alternative if appropriate for individual Employees.
- (b) Within seven (7) days of the Apology Letters being sent provide to the FWO a copy of the Apology Letters and proof of them being sent to the Employees.

16.4 *Self- Audit and Reporting Activity*

- (a) During the 2016-2017 and 2017-2018 financial years undertake the self-audit and reporting activities outlined below.
- (b) By 1 July 2017 and 1 July 2018, respectively, have completed at the expense of the Employer, an audit of its compliance with Commonwealth workplace laws by an external accounting professional (e.g. Certified Practising Accountant), audit specialist or employment law specialist. Specifically:
 - (i) The external accounting professional, audit specialist or employment law specialist who undertakes the audit must be approved by the FWO prior to the commencement of each audit;
 - (ii) The Employer must demonstrate compliance with the Pro-Rata Award Based Wages (Wage Schedule 4) in relation to those employees who are employed and paid a percentage of the full wage in accordance with their disability;
 - (iii) Each audit is to be conducted upon all of the Employer's full-time, part-time and casual employees who are paid in accordance with the Pro-Rata Award Based Wages structure working at each of the Employer's business locations for a period of four (4) full pay periods of which at least one pay period must include a public holiday occurring in 2017 and 2018. The audit methodology must be approved by the FWO and is to be submitted for approval by 1 May 2017 and 1 May 2018 respectively; and
 - (iv) The Employer must provide a copy of the audits to the FWO by 1 August 2017 and 1 August 2018 respectively.
- (c) To make available to the FWO, if requested, the records used to conduct the audit.
- (d) Provide evidence of rectification of any contraventions disclosed by the audits to the FWO by 1 September 2017 and 1 September 2018 respectively.

16.5 *Matters notified to the FWO*

Where the FWO receives a request for assistance regarding non-compliance with the Agreement, the Employer and its officers undertake to fully co-operate with the FWO to ensure compliance. This includes:

- (i) Providing all requested employment records and other documentation to the FWO relevant to the request for assistance; and
- (ii) Co-operation in FWO's processes employed to resolve the request for assistance.

16.6 *Workplace relations training*

- (a) Within five months of the execution of this Undertaking, organise and ensure training of Mr Murphy Chief Executive Officer/Company Secretary and all persons engaged by the Employer who have managerial responsibility for human resources, recruitment or payroll functions (**Training**).
- (b) Ensure the Training relates to compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the FW Act, and the Agreement.
- (c) Ensure the Training is conducted by an accredited workplace trainer such person or organisation to be approved by the FWO and paid for by the Company.
- (d) Provide the training materials to be used in the Training to the FWO no later than fourteen (14) days before the Training is to be conducted.
- (e) Provide evidence of attendance at the Training to the FWO within seven (7) days of the Training being provided (including the name and position of all attendees and the date on which the Training was attended).

No Inconsistent Statements

17. The Employer and Mr Murphy:

(a) must not; and

(b) must ensure that each of the Employer's officers, employees or agents, do not,

make any statement, orally or in writing or otherwise imply anything that is inconsistent with admissions or acknowledgements contained in this Undertaking.

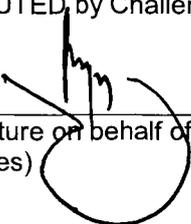
Acknowledgements

18. The Employer and Mr Murphy 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 (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 the Employer and/or Mr Murphy;
- (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 the Employer has contravened any of the terms of this 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, the Employer may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

Executed as an undertaking

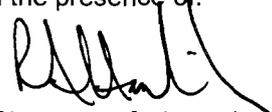
EXECUTED by Challenge Community Services (ACN: 059 209 675)



(Signature on behalf of Challenge Community Services)

Barry Murphy Chief Executive Officer/Company Secretary

in the presence of:



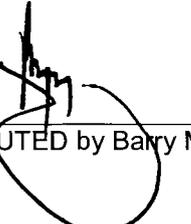
(Signature of witness)

2/5/17

(Date)

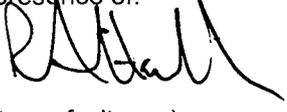
Richard Hardwick.

(Name of witness)



EXECUTED by Barry Murphy

in the presence of:



(Signature of witness)

2/5/17

(Date)

Richard Hardwick

(Name of witness)

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



Michael Campbell

24/5/17

(Date)

Deputy Fair Work Ombudsman - Operations
Delegate for the FAIR WORK OMBUDSMAN

in the presence of:



(Signature of witness)

Rouise Cato

(Name of Witness)

Attachment A – Employee Names and Underpayment Amounts

Name	Gross	Super
[REDACTED]	\$28,892.38	\$2,641.85
[REDACTED]	\$18,026.49	\$1,686.81
[REDACTED]	\$3,951.78	\$373.92
[REDACTED]	\$44,755.09	\$3,712.80
[REDACTED]	\$62,192.75	\$4,585.17
[REDACTED]	\$10,505.89	\$967.94
[REDACTED]	\$33,582.42	\$3,167.76
[REDACTED]	\$4,796.60	\$426.23
[REDACTED]	\$19,831.46	\$1,840.57
[REDACTED]	\$2,620.15	\$268.26
[REDACTED]	\$35,685.19	\$3,319.41
[REDACTED]	\$1,502.10	\$95.31
[REDACTED]	\$2,549.45	\$231.94
[REDACTED]	\$3,338.77	\$282.51
[REDACTED]	\$1,868.07	\$168.24
[REDACTED]	\$2,664.42	\$235.55
[REDACTED]	\$1,203.85	\$109.53
[REDACTED]	\$63,822.08	\$5,964.72
TOTALS	\$341,788.94	\$30,078.52

Attachment B – Form of Workplace Notice

Contraventions of the *Fair Work Act 2009* by

Challenge Community Services (ABN: 17 059 209 675)

The Office of the Fair Work Ombudsman (FWO) is the government agency responsible for ensuring compliance with workplace laws.

Recently the FWO audited Challenge Community Services to check that employees are paid correctly.

Challenge Community Services has contravened the *Fair Work Act 2009* by;

- failing to ensure that a term of an Enterprise Agreement that applies to the person was not contravened.
- The Employer engaged, assessed and paid the Employees in accordance the Pro-rata Award Wage Based Structure whilst those Employees were not in receipt of the Disability Support Pension.

We have formally admitted to FWO that these contraventions occurred and have entered into an Enforceable Undertaking with the FWO (available at www.fairwork.gov.au) committing to a number of measures to fix the contraventions.

We express our sincere regret and apologise for the conduct which resulted in the contraventions. Furthermore we give a commitment that such conduct will not occur again and that it will comply with all requirements of the Commonwealth workplace relations laws in the future.

If you worked for Challenge Community Services and have queries or questions relating to your employment please contact the Human Resources Head Office on phone [REDACTED]

If you believe that you have been underpaid you can also contact the FWO via their website at www.fairwork.gov.au.

Mr Barry Murphy
Challenge Community Services

Attachment C- Alternative Form of Workplace Notice

Contraventions of the *Fair Work Act 2009* by

Challenge Community Services (ABN: 17 059 209 675)

The Office of the Fair Work Ombudsman (**FWO**) is the government agency responsible for making sure that workers are paid properly.

The FWO has checked to see whether people working for Challenge in Narrabri, Muswellbrook and Tamworth were being paid correctly.

The FWO found that some people were not paid properly.

We did not correctly follow the Agreement we have with our workers. Some people, who do not get the Disability Pension, were not paid enough for the work that they did. They were underpaid.

We admit that we broke the law by not paying these people the right wages.

We are really sorry that we underpaid some people and we promise that this will not happen again. We have now back paid everyone who was not paid properly. We will obey the law at all times.

We have agreed to work with the FWO so they can check that we are doing the right thing and paying you correctly.

If you think you have not been paid correctly you should speak with your supervisor or phone our office [REDACTED]

Barry Murphy
Challenge Community Services

Attachment C – Letter of Apology

Date>

<Employee Name & Address>

Dear <Employee Name>

I am writing to apologise on behalf of Challenge Community Services for non-compliance with Commonwealth Workplace relations laws.

Challenge Community Services has contravened the *Fair Work Act 2009* by:

- Failing to ensure that a term of an Enterprise Agreement that applies to the person was not contravened.
- The Employer engaged, assessed and paid the Employees in accordance the Pro-rata Award Wage Based Structure whilst those Employees were not in receipt of the Disability Support Pension.

The investigation determined that you were affected by the above contraventions.

Challenge Community Services has taken steps to remedy the contraventions, including by:

- Committing to future compliance in relation to the provisions of the Pro-rata Award Based Structure under the Agreement;
- Undertaking audits to ensure employees are being paid correctly

Challenge Community Services has formally admitted to the FWO that it did not comply with its obligations under Commonwealth workplace relations laws and has entered into an Enforceable Undertaking with the FWO, a copy of which is available from the FWO website at www.fairwork.gov.au.

As part of the Enforceable Undertaking, Challenge Community Services has committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Challenge Community Services expresses sincere regret and apologises to you for failing to comply with our lawful obligations.

Should you have any questions relating to your employment including whether you have been underpaid during your employment with us, please contact the Human Resources Head Office on phone [REDACTED]

Alternatively, anyone can contact the FWO via their website at www.fairwork.gov.au.

Yours sincerely,

Mr Barry Murphy
Challenge Community Services

Attachment D – Alternative Letter of Apology

Date>

<Employee Name & Address>

Dear <Employee Name>

I am writing to you on behalf of Challenge Community Services to apologise for not paying you the correct wages.

The Office of the Fair Work Ombudsman (**FWO**) is the government agency responsible for making sure that workers are paid properly.

Recently the FWO checked to see whether people working for Challenge in Narrabri, Muswellbrook and Tamworth were being paid correctly.

The FWO found that you were not paid properly.

This happened because we did not correctly follow the Agreement we have with our workers.

We admit that we broke the law by not paying you the right wages and we have now paid you the wages that we should have paid you.

We are really sorry that we underpaid you and we promise that this will not happen again. We will obey the law at all times.

We have agreed to work with the FWO so they can check that we are doing the right thing and paying you correctly.

If you have any questions about what has happened or about whether you have been paid correctly please contact us by phoning [REDACTED]
[REDACTED]

Yours sincerely,

Mr Barry Murphy
Challenge Community Services