



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

PWFV Pty Ltd

(ABN 52 097 189 118)

**Section 715 ENFORCEABLE UNDERTAKING**

**Parties**

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:

(a) PWFV Pty Ltd (ABN 52 097 189 118) (**PWFV**)

for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

**Background**

2. PWFV was incorporated on 19 June 2001 and the company is engaged in the wholesale of fruit and vegetables to customers in the Gold Coast and Brisbane area. PWFV:
  - (a) Trades under the name Pacific Avenue Wholesale Fruit and Vegetables; and
  - (b) Operates a warehouse facility at 7/14 Rothcote Court, Burleigh Heads QLD 4220.
3. Brett Anthony Malouf is the director of PWFV and is involved in the operations of the business.
4. PWFV currently has a workforce of approximately 10 employees.
5. The FWO commenced an investigation in January 2016 (**the Investigation**) after it received five Requests for Assistance (**RFAs**) regarding allegations of underpayments by PWFV to its former employees. The latter two (2) RFAs were lodged by employees identified as Employee 1 and 2 (**the Employees**) in **Attachment A** which this Undertaking relates to.
6. Employee 1 was engaged by the PWFV from February 2014 to March 2015.
7. Employee 2 was engaged by the PWFV from March 2012 to January 2015.
8. At all relevant times, the Employees were paid a flat rate of pay of \$20 per hour for all time worked during their period of service for PWFV, inclusive of early morning starts, weekend work and overtime.
9. The Employees were engaged on a casual basis and at all relevant times were over 21 years of age.
10. The Employees' terms and conditions of employment were governed by the FW Act and the *Storage Services and Wholesale Award 2010* [MA000084] (**the Modern Award**). For the purposes of determining the rates of pay of pay prior to 30 June 2014 (**the Transitional Period**), the applicable pre-modern award is the Award Based Transitional Instrument being the *Agricultural Produce, Fruit And Grain Stores' Award – Southern Division (Eastern District) 2002* [AN140007] (**the Pre-Modern Award**).
11. The Employees' duties were to pick and pack produce in the warehouse and then to

deliver to PWFV's customers in the local area. The FWO determined the Employees were classified as *Wholesale Employee Level 1* under the Modern Award.

12. PWFV agreed that it underpaid:

- (a) Employee 1 - \$25,713.02; and
- (b) Employee 2 - \$50,765.80.

13. Prior to the execution of this Undertaking, the Company has informed the FWO that it has undertaken the following corrective action:

- (a) Sought the advice on an accounting professional and solicitor with respect to their workplace obligations and responsibilities;
- (b) Updated current employees' pay rates to be compliant with the applicable Modern Award;
- (c) Ensured training is provided to staff with managerial responsibilities and/or payroll functions about applicable Commonwealth workplace laws and instruments, including the rights and responsibilities of employers under the Modern Award;
- (d) Refined record keeping practices; and
- (e) Engaged lawyers to prepare an employment agreement to be provided to employees at the commencement of employment.

#### **Contraventions**

14. The FWO has determined, and PWFV admits, that on the basis of the factual matters outlined above, PWFV contravened:

- (a) Section 45 of the FW Act, which provides a person must not contravene a term of a modern award. Those contraventions under the Modern Award as follows:
  - (a) Underpayment of casual loading as per clause 11.4(b);
  - (b) Non-payment of early morning shift penalty as per clause 25.4(a); and
  - (c) Non-payment of overtime as per clause 24.1.

#### **Commencement of Undertaking**

15. This Undertaking comes into effect when:

- (a) the Undertaking is executed by PWFV; and
- (b) the FWO accepts the Undertaking so executed.

16. Upon the commencement of this Undertaking, PWFV undertake to assume the obligations set out below.

## Undertakings

17. For the purposes of section 715 of the FW Act, PWFV undertake to:

### Rectify the Underpayments

- (a) After execution of this Undertaking, rectify the underpayment contraventions outlined above to Employees 1 and 2 for their entire period of service in the following manner:
  - (i) Pay Employee 1 \$11,334.00 (gross) within 28 days of execution;
  - (ii) Pay Employee 2 \$22,666.00 (gross) within 28 days of execution;
  - (iii) In addition to the above payments, pay Employee 1 consecutive weekly instalments of \$272.30 (gross) commencing on 1 October 2016 until the underpayment contraventions are paid in full on or before 30 September 2017; and
  - (iv) In addition to the above payments, pay Employee 2 consecutive weekly instalments of \$544.60 (gross) commencing on 1 October 2016 until the underpayment contraventions are paid in full, on or before 30 September 2017.
- (b) Provide proof of such payment to the FWO when the lump sum payment outlined in subclause (i) and (ii) above is made.
- (c) Provide proof of payment to the FWO of the weekly instalments outlined in subclause (iii) and (iv) by the following dates:
  - (i) 30 December 2016;
  - (ii) 31 March 2017;
  - (iii) 30 June 2017; and
  - (iv) 29 September 2017.

### Self-Audit and Reporting Activity

- (d) PWFV will have completed by an external accounting professional (e.g. Certified Practising Accountant), audit specialist or employment law specialist, at the expense of PWFV, audits of its compliance with all Commonwealth workplace laws and instruments (**the Audits**), relating to the pay and conditions of PWFV's workforce for each year as follows:
  - (i) Audit for the calendar months of October to November 2016 to be finalised by 31 January 2017;
  - (ii) Audit for the calendar months of April to May 2017 to be finalised by 31 July 2017; and
  - (iii) Audit for the calendar months of August to September 2018 to be finalised by 30 November 2018.
- (e) Provide to the FWO, at least 14 days prior to the commencement of the audit

being undertaken, the methodology used for the purpose of the Audit for approval by the FWO;

- (f) In the event the an Audit discloses contraventions of any applicable Commonwealth workplace law and/or instruments, rectify all such contraventions for the entire period of service of each affected employee and provide evidence of the rectification with 28 days of each of the dates specified in subclause 17(d) above; and
- (g) If any employee(s) identified as having underpayments owing to them cannot be located, within 60 days of each of the finalisation dates specified in subclause 17(d) above, make application to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act to pay monies into the Commonwealth Revenue Fund. PWFV will complete the required documents supplied by the FWO.

#### FWO MyAccount Registration

- (h) Within 14 days of the execution of this Undertaking, register with the FWO MyAccount portal at [www.fairwork.gov.au](http://www.fairwork.gov.au) and complete the profile, minimum pay rates and Award options.
  - (i) Within 15 days of the execution of the Undertaking, provide to the FWO the PWFV My Account Customer Registration Number (CRN);

#### Future Workplace Relations Compliance

- (i) Ensure that PWFV complies at all times and in all respects of the FW Act, the *Fair Work Regulations 2009* and the Modern Award including but not limited to:
- (j) Provide to the FWO, within 28 days of the date of execution of this Undertaking, details of the systems and processes in place or to be implemented to comply with paragraph 17(i) above. Without limitation, such systems and processes will include:
  - (i) Ensuring employees receive the correct minimum rates of pay and entitlements such as penalties and overtime rates;
  - (ii) Ensuring employees receive their break entitlements; and
  - (iii) Issuing payslips to employees within one (1) working day of payment.

#### Apology

- (k) Send a letter of apology (**Apology Letter**) to Employee 1 and 2 in the form of Attachment B to this undertaking.
- (l) Provide a copy of the apology letter to the FWO within 14 days of the execution of this Undertaking.

#### Workplace Notice

- (m) Place a notice within the workplace which is accessible to all employees (**Workplace Notice**) within 28 days of the execution of this Undertaking in the

form set out in Attachment C.

(n) The Workplace Notice must:

- (i) Be printed in at least A4 size;
- (ii) Clearly displayed in a location to which all employees who work at PWFV have access;
- (iii) In a manner which is reasonably capable of drawing attention of all employees to the Workplace Notice (for example, by placement of a staff noticeboard); and
- (iv) Be displayed for a minimum period of 60 continuous days.

(o) Provide to the FWO a copy of the **Workplace Notice** and photographic evidence of its display.

#### Contribution Payment

(p) PWFV undertakes to:

- (i) Make a donation of \$500 within 60 days of execution to Working Women Queensland of Level 2, 144 Adelaide Street Brisbane 4000 to fund support and advice about workplace issues to vulnerable women in Queensland; and
- (ii) Provide proof of the donation above to the FWO on the day of the payment being made.

#### No Inconsistent Statements

(q) PWFV:

- (i) Must not; and
- (ii) Must ensure that each of its officers, employees or agents, do not,

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

#### **Acknowledgements**

18. PWFV PTY LTD acknowledges 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 PWFV;
- (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 PWFV 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;
- (g) consistent with section 715(3) of the FW Act, PWFV may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

**Executed as an undertaking**

EXECUTED by PWFV PTY LTD (ABN 52 097 189 118) in accordance with section in accordance with section 127(1) of the *Corporations Act 2001*:

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

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

BRETT ANTHONY MALOUF  
\_\_\_\_\_  
(Name of director)

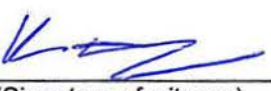
\_\_\_\_\_  
(Name of director/company secretary)

28/09/16  
\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Date)

in the presence of:

in the presence of:

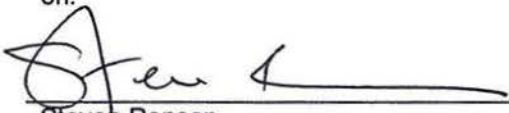
  
\_\_\_\_\_  
(Signature of witness)

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

Katrina Contacos  
\_\_\_\_\_  
(Name of witness)

\_\_\_\_\_  
(Name of witness)

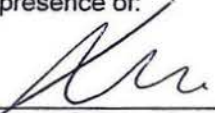
ACCEPTED by the FAIR WORK OMBUDSMAN pursuant to section 715(2) of the *Fair Work Act 2009* on:

  
\_\_\_\_\_  
Steven Ronson

1 NOVEMBER 2016  
\_\_\_\_\_  
(Date)

Executive Director  
Dispute Resolution and Compliance  
Delegate for the FAIR WORK OMBUDSMAN

in the presence of:

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

LISA - MARIE OLIVER  
\_\_\_\_\_  
(Name of Witness)



**Attachment A**

List of Employees

<b>Employee</b>	<b>Identifier</b>	<b>Date RFA Lodged</b>
[REDACTED]	Employee 1	6 January 2016
[REDACTED]	Employee 2	1 February 2016

## Attachment B

### Letter of Apology

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I am writing to apologise on behalf of PWFV Pty Ltd for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that PWFV Pty Ltd had contravened the *Fair Work Act 2009* by:

1. failing to pay employees casual loading;
2. failing to pay early morning shift penalties
3. failing to pay employees overtime

Regrettably, the investigation determined that you were affected by the above contraventions.

PWFV Pty Ltd is taking steps to remedy the contraventions, including by rectifying the amount that you have been underpaid and changing workplace practices. You will receive payment on <date 14 days from date of execution of the Undertaking> and a payslip within one working day.

PWFV Pty Ltd has formally admitted to the FWO that the PWFV Pty Ltd 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 will be available on the FWO website at [www.fairwork.gov.au](http://www.fairwork.gov.au). As part of the Enforceable Undertaking we have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

PWFV Pty Ltd expresses its sincere regret and apologises to you for failing to comply with our lawful obligations.

Should you have any questions, please contact Michelle Malouf on [REDACTED] or via email: [REDACTED]

Yours sincerely

Mr Brett Malouf, PWFV Pty Ltd

## Attachment C

### Form of Workplace Notice

#### **Contraventions of Fair Work Act 2009 and the Storage Services and Wholesale Award 2010 by PWFV Pty Ltd, trading as Pacific Avenue Wholesale Fruit and Vegetables**

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that PWFV Pty Ltd contravened the *Fair Work Act 2009* and the *Storage Services and Wholesale Award 2010* by:

1. failing to pay employees casual loading;
2. failing to pay early morning shift penalties;
3. failing to pay employees overtime; and

PWFV Pty Ltd has formally admitted to FWO that these contraventions occurred and has entered into an Enforceable Undertaking with the FWO (will be available at [www.fairwork.gov.au](http://www.fairwork.gov.au)) committing to a number of measures to remedy the contraventions, including by rectifying the underpayments to the employee affected by the contraventions. PWFV Pty Ltd expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore PWFV Pty Ltd gives 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 PWFV Pty Ltd and have queries or questions relating to your employment, please contact Michelle Malouf on [REDACTED] or via email: [REDACTED]

Alternatively, anyone can contact the FWO via the website at [www.fairwork.gov.au](http://www.fairwork.gov.au) or the Infoline on 13 13 94.