

ENFORCEABLE UNDERTAKING

This undertaking is **given** by Silver Chain Group Limited (ACN 077 082 725) and **accepted** by the Fair Work Ombudsman pursuant to s 715(2) of the *Fair Work Act 2009* in relation to the contraventions described in clause 16 of this undertaking.

ENFORCEABLE UNDERTAKING

PARTIES

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) pursuant to section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**) by Silver Chain Group Limited (ACN 077 082 725), 6 Sundercombe Street, Osborne Park, Western Australia (**Silver Chain**).

COMMENCEMENT

2. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by Silver Chain; and
 - (b) the FWO accepts the Undertaking so executed (**Commencement Date**).

BACKGROUND

3. Silver Chain is a not-for-profit organisation providing community health and aged care services. Silver Chain employs over 4000 staff across five states in Australia.
4. On 20 September 2018, Silver Chain conducted a staff forum at which some staff expressed frustration in relation to rostering arrangements. The concern specifically centred around breaks between client appointments for which staff were not being paid. As a result of this meeting, Silver Chain identified it may have been in contravention of the *Silver Chain Group Limited National (Non Nursing) Enterprise Agreement 2017* (**the 2017 EA**), and the following predecessor agreements:
 - (a) *Silver Chain National (Non-Nursing) Enterprise Agreement 2014* (**the 2014 EA**);
 - (b) *Silver Chain Nursing Association (Incorporated) Enterprise Agreement 2009* (**the 2009 EA**).

by the treatment of some breaks between client appointments as unpaid breaks.

5. On 23 September 2020, Silver Chain notified the FWO that it had identified contraventions of the 2017 EA, the 2014 EA and 2009 EAs (collectively **the relevant industrial instruments**) by treating 'gaps' in employees shifts arising between client appointments as unpaid breaks (**Gaps Issue**). Silver Chain subsequently advised the

FWO that it had engaged Ernst & Young (EY) to analyse and quantify any underpayments.

6. Following the investigations referred to above, Silver Chain identified that it had underpaid 1370 current and former employees \$2,197,741 between 1 January 2013 and 31 December 2018.
7. As at the date of execution of this Undertaking, Silver Chain has made rectification payments of \$2,853,011, including interest and superannuation contributions, to 1367 current and former employees in respect of the Gaps Issue.
8. As result of the investigations above, Silver Chain engaged Deloitte to review its payroll controls and Minter Ellison to conduct a legal compliance audit of its compliance with its workplace relations obligations, such as employment contracts and record-keeping.
9. Silver Chain provided a copy of Deloitte's payroll review to the FWO on 14 May 2021. The review included recommendations and agreed management actions for payroll system improvements (**Agreed Actions**). Silver Chain has continued to update the FWO on the implementation of the Agreed Actions.
10. On 8 April 2021, Silver Chain advised the FWO that the legal compliance audit undertaken by Minter Ellison identified non-compliance with the 2014 and 2017 EAs in respect of unpaid meal break and paid tea break entitlements for its employees in Western Australia (**Meal and Tea Breaks Issue**). Silver Chain subsequently:
 - (a) engaged EY to calculate underpayments arising from the Meal and Tea Breaks Issue as well as additional superannuation contributions and interest on the underpayment amounts;
 - (b) engaged auditors KPMG to assure EY's calculations;
 - (c) provided copies to the FWO of the EY and KPMG reports in November 2021.
11. As a result of these investigations, Silver Chain identified that between 1 January 2015 and 30 June 2021 it had underpaid 2334 current and former employees \$11,355,673. The underpayments arising from both the Gaps and the Meal and Tea Breaks Issues were also limited to employees working in Western Australia.
12. As at the date of execution of this Undertaking, Silver Chain has made rectification

payments of \$14,162,694 (including interest and superannuation contributions) to 2320 affected employees in respect of the Meal and Tea Breaks Issue.

13. Silver Chain has apologised to employees for the non-compliance arising from both the Gaps and the Meal and Tea Breaks Issue.
14. Silver Chain has also commenced a review of its rostering system to ensure compliance with the roster notification requirements of the *Silver Chain Group Limited National (Non Nursing) Enterprise Agreement 2021 (2021 EA)* which commenced on 7 December 2021 and any subsequent agreements, providing an update to the FWO on 4 April 2022 on the progress of its review.
15. Silver Chain has also developed and commenced implementation of an education and training program on workplace relations obligations for employees responsible for scheduling. All WA Aged Community Care Resource Co-ordinators responsible for scheduling employees in accordance with the *Silver Chain Group Limited National (Non Nursing) Enterprise Agreement 2017* received training in the rostering requirements of this Enterprise Agreement in April 2021. Training for those with responsibility for scheduling employees in accordance with the *Silver Chain Group Limited National (Non Nursing) Enterprise Agreement 2021 (2021 EA)* is scheduled for completion by July 2022.

ADMISSIONS

16. The FWO has a reasonable belief, and Silver Chain admits, that Silver Chain contravened section 50 of the FW Act:
 - (a) between 1 January 2013 and 31 December 2018 (**first review period**) by failing to pay each of the Schedule A Employees the amount or amounts to which that employee was entitled under the following clauses of the relevant industrial instruments, in respect of the Gaps Issue:
 - (i) Clause 9.5 of the 2009 EA
 - (ii) Clauses 11.3, 11.5 and 13.1 of the 2014 EA
 - (iii) Clauses 7.3, 7.19, 7.20 and 9.1 of the 2017 EA;
 - (b) between 1 January 2015 and 30 June 2021 (**second review period**) by failing to pay each of the Schedule B Employees the amount or amounts to which that

employee was entitled under the following clauses of the relevant industrial instruments, in respect of the Meal and Tea Breaks Issue:

- (i) Clauses 13.1, 13.2 and 13.3 of the 2014 EA
- (ii) Clauses 9.1, 9.2 and 9.3 of the 2017 EA.

17. The contraventions identified in clause 16 of this Undertaking do not include:

- (a) any contraventions which relate to or arise as a consequence of Silver Chain failing to correctly apply the relevant industrial instruments to any employee not listed in Schedule A and Schedule B to this undertaking (**Non-schedule Employees**). For the avoidance of doubt this Undertaking is not given in respect of any Non-schedule Employees who were underpaid as a result of Silver Chain failing to correctly apply the relevant industrial instruments and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any contravention because of any such underpayment; or
- (b) any contraventions of the clauses identified at sub-paragraph 16(a) above occurring after the end of the first review period and any other contraventions occurring after the end of the second review period or which have not yet occurred at the date that this Undertaking is offered by Silver Chain (whether or not those contraventions are identified in the Independent Audits described at clauses 25 - 45 below). For the avoidance of doubt this Undertaking is not given in respect of any contravention which has not occurred on the date which it is offered by Silver Chain and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

UNDERTAKINGS

18. Silver Chain has taken, or will take, the actions set out at clauses 19 to 53 below.

Review and rectification of underpayments

19. The FWO acknowledges that Silver Chain has:

- (a) remediated \$2,853,011 to 1367 of 1370 affected employees in respect of the Gaps Issue;

- (b) remediated \$14,162,694 to 2320 of 2334 affected employees in respect of the Meal and Tea Breaks issue;
 - (c) notified the FWO of the correct quantum of each underpayment (contained in Schedules A and B);
 - (d) paid each of the Schedule A and B Employees to whom the Underpayments relate:
 - (i) the underpayment amount owing to them;
 - (ii) any superannuation payments which may be required by law, by making payment to their chosen superannuation fund;
 - (iii) interest on the amount referred to in (i);
 - (e) for those former employees who have been identified as having been underpaid and who Silver Chain was unable to locate, paid the underpayment amounts owing to them to the Commonwealth of Australia in accordance with section 559 of the FW Act.
20. In the event that the FWO is able to locate any former Silver Chain employees identified at 19(e) to whom Underpayments are owed, the FWO will (in addition to its obligations under s 559 of the FW Act) notify Silver Chain in writing of the name and contact details of the current or former employee. Within 14 days of receiving any such notice Silver Chain will pay the employee interest on the amount already paid by Silver Chain to the Commonwealth of Australia in respect of that employee, calculated for each financial year from the date that the employee first became entitled to that amount until the date on which that amount is paid to the Commonwealth.

Provision of information to the FWO

21. By 1 September 2022, Silver Chain will provide a report on the roll-out of the education and training campaign training of relevant personnel described above at clause 15.
22. By 1 September 2022, Silver Chain will a report an update to the FWO on its systems and processes to ensure future compliance with the FW Act; including:
- (a) implementation of the Agreed Actions described above at clause 9;

- (b) a report on the review of its rostering system as described above at clause 14, including any identified and/or recommended modifications or system replacements and a draft project schedule including system implementation timeframes when identified.

No limitation on use of information

- 23. When providing information under clauses 21 to 22 above, Silver Chain will state in writing that it does so without qualification and without seeking to place any limitation on how the FWO may use the information in the lawful performance of its statutory functions and powers. Silver Chain will not assert, or seek to assert, any limitation on how the FWO may use or rely on the information in the lawful performance of its statutory functions and powers.

Letter of Assurance

- 24. By 15 July 2022, Silver Chain will provide the FWO a signed letter of assurance from its CEO declaring that the calculations have been conducted correctly, and confirming that all underpayments have been rectified as described above at clause 19.

Independent Audits

- 25. Silver Chain must, at its cost, engage an appropriately qualified, experienced, external and independent accounting professional or an employment law specialist (**Independent Auditor**) to conduct two audits of Silver Chain's compliance with the FW Act and FW Regulations, in relation to the relevant industrial instruments, and any future agreements that replace the relevant industrial instruments (**Compliance Audits**).
- 26. Silver Chain will notify the FWO of its proposed Independent Auditor by no later than 31 July 2022. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require Silver Chain to propose other Independent Auditors until the FWO has approved in writing an Independent Auditor. The Independent Auditor must be approved by the FWO in writing prior to being engaged by Silver Chain.
- 27. Silver Chain must ensure that each of the Compliance Audits conducted by the Independent Auditor includes:

- (a) an assessment of 10% of Domestic Support and Personal Care employees to whom the 2021 EA applies, across the range of classifications and pay points, employment types (full time, part time and casual employment), and range of locations during the relevant pre-audit period (**Sampled Employees**) in respect of their employment by Silver Chain;
- (b) an assessment of whether the pay and conditions of the Sampled Employees to whom the 2021 EA applies during the relevant audit period is in compliance with the FW Act and the 2021 EA;
- (c) direct contact with 25% of Sample Employees by way of site visits to at least five different locations, to ensure accuracy of hours worked;
- (d) the production of a written report on each of the Audits setting out the Independent Auditor's findings, and the facts and circumstances surrounding them, to the FWO; and
- (e) that each of the written reports referred to in (d) above contains the following declarations from the Independent Auditor:
 - (i) the Independent Auditor has no actual, potential, or perceived conflict of interest in providing the report to the FWO;
 - (ii) notwithstanding that the Independent Auditor is retained by Silver Chain, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from Silver Chain in preparing the report;
 - (iii) the report is provided in accordance with applicable professional standards (which will be listed in the report); and
 - (iv) the report is provided to the FWO for its benefit and the FWO can rely on the report.

The First Compliance Audit

- 28. Silver Chain must ensure the Independent Auditor commences the first of the Compliance Audits by no later than 31 October 2022 (**First Compliance Audit**).
- 29. For the First Compliance Audit, the relevant pre-audit period to assess Sampled

Employees is 1 September 2021 – 31 August 2022.

30. The relevant audit period for the First Compliance Audit must be at least two full consecutive pay periods falling within the period 1 July 2022 – 31 August 2022.
31. By 30 September 2022, Silver Chain will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the First Compliance Audit.
32. Silver Chain will use its best endeavours to ensure the Independent Auditor provides a draft written report of the First Compliance Audit directly to the FWO by 15 February 2023, setting out the draft First Compliance Audit findings, and the facts and circumstances supporting the First Compliance Audit findings. Silver Chain will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Silver Chain without the FWO's approval.
33. Silver Chain will use its best endeavours to ensure the Independent Auditor finalises the First Compliance Audit and provides a written report of the First Compliance Audit (**First Compliance Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. Silver Chain will ensure the Independent Auditor does not provide the First Compliance Audit Report, or a copy of the same, to Silver Chain without the FWO's approval.

The Second Compliance Audit

34. Silver Chain must ensure the Independent Auditor commences the second of the Compliance Audits by no later than 31 October 2023, (**Second Compliance Audit**).
35. For the Second Compliance Audit, the relevant pre-audit period to assess Sampled Employees is 1 September 2022– 31 August 2023.
36. The relevant audit period for the Second Audit must be at least two full pay periods falling within the period 1 July 2023 – 30 August 2023.
37. By 30 September 2023, Silver Chain will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Second Compliance Audit.
38. Silver Chain will use its best endeavours to ensure the Independent Auditor provides a

draft written report of the Second Compliance Audit directly to the FWO by 15 February 2024, setting out the draft Second Compliance Audit findings, and the facts and circumstances supporting the Second Compliance Audit findings. Silver Chain will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Silver Chain without the FWO's approval.

39. Silver Chain will use its best endeavours to ensure the Independent Auditor finalises the Second Compliance Audit and provides a written report of the Second Compliance Audit (**Second Compliance Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. Silver Chain will ensure the Independent Auditor does not provide the written report, or a copy of the same, to Silver Chain without the FWO's approval.

Outcome of Compliance Audits

40. If any of the Compliance Audits identify underpayments to any current or former employees, Silver Chain will conduct a reconciliation of the amounts paid to those employees and rectify any underpayments that are identified.
41. The reconciliation period for each identified employee will be, for the Compliance Audit, from the start of the relevant pre-audit period to the end of the relevant audit period.
42. Silver Chain will provide to the FWO evidence of such rectification within 28 days of being informed by the FWO of the requirement to undertake the reconciliation.
43. If any employees identified in the Compliance Audits as having underpayments owing to them cannot be located within 60 days of the conclusion of the Second Compliance Audit, Silver Chain will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. Silver Chain will complete the required documents supplied by the FWO for this purpose.
44. If any of the Compliance Audits identify an underpayment of minimum entitlements to one or more employees, and the FWO reasonably believes that employees not included in the Compliance Audits are also likely to have been underpaid, Silver Chain will engage an accounting professional or an employment law specialist approved by the FWO to conduct a further audit of all its employees to whom the 2021 EA applies (or a particular cohort of employees within this group), as determined by the FWO (**Additional Audit**).

Any Additional Audit must be paid for by Silver Chain.

45. If requested by the FWO, Silver Chain will provide the FWO with all records and documents used to conduct any or all of the Compliance Audits (including any Additional Audit), within 7 days of such a request.

Notices – Internal and External

Media Release

46. Upon acceptance of the Undertaking, the FWO will publish a media release on its website in respect of this Undertaking.

Website Notice

47. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Silver Chain will place a notice on its website, accessible through a hyperlink, placed in a prominent position, on the front page of silverchain.org.au (**Website Notice**).
48. The Website Notice must:
 - (a) be in the form of the Website Notice set out at Attachment A;
 - (b) be displayed in at least size 10 font; and
 - (c) remain on the website for a period of 1 month.
49. Within 7 days of placing the Website Notice on its website, Silver Chain will provide to the FWO evidence of its placement.

Social Media Notice

50. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Silver Chain will place a post on its Facebook page (**Social Media Notice**).
51. The Social Media Notice must:
 - (a) be posted to Silver Chain's timeline, pinned to the top of the Facebook page in public view;
 - (b) remain on the Facebook page for a continuous period of at least one month; and

(c) be in the form of the Social Media Notice set out at Attachment A.

52. Within 7 days of posting the Social Media Notice to its Facebook page, Silver Chain will provide to the FWO evidence of the post.

No Inconsistent Statements

53. Silver Chain must not, and must use its best endeavours to ensure that its officers, employees or agents do not, make any statement or otherwise imply, either orally or in writing, anything that is inconsistent with admissions or acknowledgements contained in this Undertaking.

ACKNOWLEDGEMENTS

54. Silver Chain acknowledges that:

- (a) the FWO may;
 - (i) make this Undertaking (and any of the Attachments hereto) available for public inspection, including by posting it on the FWO internet site at www.fairwork.gov.au;
 - (ii) release a copy of this Undertaking (and any of the Attachments hereto) pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
 - (iii) issue a media release in relation to this Undertaking;
 - (iv) from time to time, publicly refer to the Undertaking (and any of the Attachments hereto) and its terms; and
 - (v) rely upon the admissions made by Silver Chain set out in clause 16 above in respect of decisions taken regarding enforcement action in the event that Silver Chain is found to have failed to comply with its workplace Silver Chain obligations in the future, including but not limited to any failure by Silver Chain to comply with its obligations under this Undertaking;
- (b) 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 herein;

- (c) consistent with section 715(3) of the FW Act, Silver Chain may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if Silver Chain contravenes any of the terms of this Undertaking:
 - (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 Undertaking may be provided to the Court as evidence of the admissions made by Silver Chain in clause 16 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by Silver Chain in accordance with section 127(1) of the *Corporations Act 2001*:



(Signature of director)

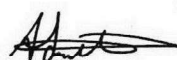
Kathryn Anne Skipper

(Name of director)

4 July 2022

(Date)

in the presence of:



(Signature of witness)

Allana Lee Smith

(Name of witness)



(Signature of director/company secretary)

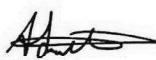
Michael Anthony Still

(Name of director/company secretary)

30 June 2022

(Date)

in the presence of:

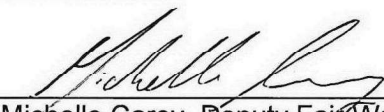


(Signature of witness)

Allana Lee Smith

(Name of witness)

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



Michelle Carey, Deputy Fair Work
Ombudsman (A/g) – Compliance and
Enforcement

Delegate for the FAIR WORK
OMBUDSMAN

in the presence of:



(Signature of witness)

5 July 2022

(Date)

Sally McLeod

(Name of Witness)

Schedule A

Refer attached Schedule A

Schedule B

Refer attached Schedule B

Attachment A – Form of Website and Social Media Notice

Silver Chain Group Limited ACN 077 082 725 (Silver Chain) undertook a review of its industrial arrangements and identified that it has contravened the *Fair Work Act 2009* (Cth). It did so by failing to properly pay some employees who perform Domestic Support and Personal Care roles for some gaps in their rostered work times as well as for some meal and tea break entitlements, as required by the *Silver Chain Group Limited National (Non Nursing) Enterprise Agreement 2017*, the *Silver Chain National (Non-Nursing) Enterprise Agreement 2014* and the *Silver Chain Nursing Association (Incorporated) Enterprise Agreement 2009*. This resulted in underpayments to some Western Australian-based employees.

On 23 September 2020 and 8 April 2021, Silver Chain made formal admissions to the Fair Work Ombudsman (**FWO**) that contraventions of the Act had occurred and consequently a number of employees had been underpaid.

Silver Chain expresses its sincerest regret and apologises that these underpayments occurred. In 2020 and 2021, Silver Chain wrote to current and former employees affected by the underpayments to inform them of the issue and apologise. It then rectified all underpayments to those current and former employees that Silver Chain could locate, with interest and superannuation.

Silver Chain has entered into an Enforceable Undertaking with the FWO to ensure its ongoing compliance with Commonwealth workplace laws.

Silver Chain has, as a result of the Enforceable Undertaking, committed to undertaking a number of activities to ensure its ongoing compliance, such as conducting two independent audits.

If you worked for Silver Chain as a Domestic Support or Personal Care role employee during the period 1 January 2013 and 30 June 2021 and have queries or questions relating to your employment, please contact Silver Chain's dedicated team at eu.enquiry@silverchain.org.au or on 1300 650 803.

Alternatively, anyone can contact the FWO via www.fairwork.gov.au or on 13 13 94.