

ENFORCEABLE UNDERTAKING

This undertaking is **given** by Community Living & Respite Services Inc (ABN 44201747656) 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 11 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 Community Living & Respite Services Inc (**CLRS**), 26A Percy Street, Echuca VIC 3564.

COMMENCEMENT

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

BACKGROUND

3. CLRS is a Victorian incorporated entity and registered charity with the Australian Charities and Not-for-profits Commission. CLRS is accredited to provide disability services in the New South Wales/Victoria border towns of Echuca and Moama and surrounding areas. CLRS is a registered provider under the National Disability Insurance Scheme (**NDIS**) and provides three main service categories: NDIS services, social enterprises and aged care services.
4. As of 30 June 2021, CLRS had 192 employees. In the 2020-21 Financial Year, CLRS had a total revenue of approximately \$15 million.
5. In the period relevant to this Undertaking, the terms and conditions of CLRS' employees were set out in:
 - (a) the *Community Living & Respite Services Inc. Enterprise Agreement (EA)*, which commenced on 26 March 2010 and was terminated on 27 June 2021;
 - (b) the *Social, Community, Home Care and Disability Services Industry Award 2010 (Award)*; and
 - (c) the *Social, Community and Disability Services Industry Equal Remuneration Order 2012 (ERO)*.
6. On 30 April 2021, and through subsequent correspondence and responses to requests

for information, CLRS notified the FWO that:

- (a) on 1 February 2021, in the course of the process relating to the termination of the EA, CLRS identified that the rates of pay it was applying were lower than rates of pay specified in the ERO;
 - (b) CLRS had engaged chartered accountants Johnsons MME to conduct a review of its payments to employees between 1 January 2015 to 7 February 2021 (**Relevant Period**); and
 - (c) Johnsons MME provided a preliminary report on 24 May 2021; draft reports on 8 June 2021 and 19 August 2021; and a final report on 20 October 2021. The final report identified:
 - (i) that 452 employees were reviewed;
 - (ii) that 381 employees had been underpaid;
 - (iii) the total underpayment was \$2,395,137.98, plus \$832,127 in PAYG withholding tax, \$219,797.09 in superannuation and \$19,232.46 in long service leave portability payments.
7. On 1 March 2022 and 31 May 2022, CLRS provided a further update to the FWO on the calculation of the underpayment and its progress in rectifying the underpayment. CLRS advised that:
- (a) it had made total back payments of \$2,788,590.47 (gross), divided between \$922,429.48 to 212 former employees and \$1,796,160.99 to 179 current employees. This figure included an overpayment made during rectification, which CLRS did not intend to seek repayment of;
 - (b) it had made total superannuation back payments of \$251,226.39, divided between \$84,716.11 to 212 former employees and \$166,510.28 to 179 current employees;
 - (c) it had made a total of \$136,029.50 in goodwill payments to current and former employees; and
 - (d) there were two former employees it was yet to back pay, one being deceased, who were owed \$753.41 in gross underpayments, \$61.73 in superannuation and

\$42.19 goodwill payments, plus a further \$5,558.07 in superannuation owed to former employees who had closed their superannuation accounts (**Outstanding Payments**).

8. Prior to the execution of this Undertaking, CLRS notified the FWO that it had:

- (a) rectified the underpayments under the ERO referred to in clause 11 below by:
 - (i) paying each of the employees referred to in column A of Schedule A to this undertaking (**Schedule A Employees**) the amounts referred to in column B of Schedule A; or
 - (ii) where a Schedule A Employee could not be located or paid by CLRS, paying the amount referred into in Column B of Schedule A to the Commonwealth of Australia in accordance with section 559 of the FW Act; and
- (b) rectified any associated superannuation underpayments as required by law to each of the Schedule A Employees who could be located and had active superannuation accounts, by paying any such required superannuation contributions to the chosen superannuation fund of the employee;
- (c) made an additional payment to each of the Schedule A Employees it could locate.

9. Prior to the execution of this Undertaking, CLRS also notified the FWO that it had taken or was taking the following measures:

- (a) issued a media statement in relation to the underpayments on 26 May 2021, which included an apology, and all staff were sent a letter of apology on 26 May 2021;
- (b) engaged Michael Pegg of Purpose at Work, an IR Consultant, (**Purpose at Work**) to deliver training to employees who have responsibility for human resources, recruitment or payroll functions regarding compliance with the FW Act and the Award;
- (c) engaged Purpose at Work to review its position descriptions and determine the appropriate classification under the Award for each position;
- (d) implemented, in November 2021, a new payroll system to support its compliance with the Award;

- (e) engaged Workplace Plus to conduct an audit of its compliance with the FW Act and the SCHADS Award in September 2021, and committed to a further audit in September 2022.

10. Prior to the execution of this Undertaking, CLRS disclosed to the FWO copies of:

- (a) complete and unredacted copies of the reports prepared by Johnsons MME referred to in clause 6(c), above;
- (b) sample employee records for 10 employees to allow the FWO to examine CLRS' current compliance with the Award;
- (c) advice provided to CLRS by Purpose at Work in relation to determining appropriate award classifications, as referred in clause 9(c), above; and
- (d) the Workplace Plus audit report, referred to in clause 9(c), above.

(Disclosed Documents)

ADMISSIONS

11. The FWO has a reasonable belief, and CLRS admits, that CLRS contravened section 305 of the FW Act during the Relevant Period by failing to pay each of the Schedule A Employees some or all of the amount or amounts to which that employee was entitled under clause 5.5 and clause 6.2 of the ERO.

12. The contraventions identified in Clause 11 of this Undertaking do not include:

- (a) any contraventions which relate to or arise as a consequence of CLRS failing to correctly apply the ERO, the EA, or the Award to any employee not listed in Schedule A 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 CLRS failing to correctly apply the ERO, the EA, or the Award, 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 which have not yet occurred at the date that this Undertaking is offered by CLRS (whether or not those contraventions are identified in the Independent Audit described at clause 16 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 CLRS and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

UNDERTAKINGS

13. CLRS will take the actions set out at clauses 14 to 32 below.

Rectification of Outstanding payments

14. In the event that the FWO is able to locate and contact any former CLRS employees to whom an Outstanding Payment is owed, the FWO will (in addition to any obligations under s 559 of the FW Act) notify CLRS in writing of the name and contact details of the former employee. Within 14 days of receiving any such notice CLRS will:

- (a) pay to the former CLRS employee a goodwill payment of 5.6% of the amount referred to in column B of Schedule A for that employee; and
- (b) pay to the former employee's nominated superannuation fund (if the employee has such a fund) any Outstanding Payment owed to that employee in the nature of a superannuation entitlement.

Letter of Assurance

15. Within 14 days of the Commencement Date, CLRS will provide the FWO a Letter of Assurance signed by the Chief Executive Officer in the terms as set out at Attachment A.

Independent Audit

16. CLRS must, at its cost, engage an appropriately qualified, experienced, external and independent accounting professional or an employment law specialist (**Independent Auditor**) to conduct an audit of CLRS' compliance with the FW Act and FW Regulations, in relation to the Award and the ERO (**Audit**).

17. The FWO has provided CLRS with in-principle approval to engage Workplace Plus as the Independent Auditor. CLRS may notify the FWO of an alternative proposed Independent Auditor by no later than 30 September 2022. The FWO may in its sole discretion approve an alternative Independent Auditor in writing or otherwise require

CLRS to propose other Independent Auditors until the FWO has approved in writing an Independent Auditor. Any alternative Independent Auditor must be approved by the FWO in writing prior to being engaged by CLRS.

18. CLRS must ensure that the Audit conducted by the Independent Auditor includes:

- (a) an assessment of 15% of all employees to whom the Award (or replacement instrument) applies, across a range of classifications, locations and employment types (full time, part time and casual employment), during the relevant audit period (**Sampled Employees**) in respect of their employment by CLRS;
- (b) an assessment of whether the Sampled Employees have been correctly classified by CLRS;
- (c) an assessment of whether the pay and conditions of the Sampled Employees during the relevant audit period is in compliance with the FW Act, the Award and the ERO (or any replacement instruments);
- (d) an assessment of whether time and wage records, including pay slips are made and kept in accordance with the FW Regulations;
- (e) direct contact with the Sample Employees by way of site visits to at least 5 different sites, to ensure accuracy of hours worked;
- (f) the production of a written report on the Audit setting out the Independent Auditor's findings, and the facts and circumstances surrounding them, to the FWO; and
- (g) that the written report referred to (f) 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 CLRS, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from CLRS 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.

Timing of the Audit

- 19. CLRS must use its best endeavours to ensure the Independent Auditor commences the Audit by no later than 13 December 2022.
- 20. The relevant audit period for the Audit must be at least two full pay periods falling within the period 30 September 2022 to 29 November 2022.
- 21. By 28 October 2022, CLRS will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Audit.
- 22. CLRS will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Audit directly to the FWO by 28 February 2023, setting out the draft Audit findings, and the facts and circumstances supporting the Audit findings. CLRS will use its best endeavours to ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to CLRS without the FWO's approval.
- 23. CLRS will use its best endeavours to ensure the Independent Auditor finalises the Audit and provides a written report of the Audit (**Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. CLRS will use its best endeavours to ensure the Independent Auditor does not provide the Audit Report, or a copy of the same, to CLRS without the FWO's approval.

Outcome of Audit

- 24. If the Audit identifies underpayments to any Sampled Employees, CLRS will:
 - (a) rectify any underpayments identified in the audit period; and
 - (b) conduct a reconciliation of the amounts paid and owed to all Sampled Employees in the 12 month period immediately prior to the relevant audit period, and rectify any underpayments that are identified.
- 25. CLRS 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.

26. If any employees identified in the Audit as having underpayments owing to them cannot be located within 60 days of the conclusion of the Audit, CLRS will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. CLRS will complete the required documents supplied by the FWO for this purpose.
27. If the Audit identifies an underpayment of minimum entitlements to one or more Sampled Employees, and the FWO reasonably believes that employees not included in the Audit are also likely to have been underpaid, CLRS 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 Award (or replacement instrument) 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 CLRS. The relevant audit period for the Additional Audit will be 30 September 2021 to 29 November 2022.
28. If requested by the FWO, CLRS will provide the FWO with all records and documents used to conduct any or all of the Audits (including any Additional Audit), within 7 days of such a request.

Notices – Internal and External

Letter to Employees

29. Within 28 days of the Commencement Date, CLRS will send a letter (**Employee Letter**) to all current CLRS employees giving notice of this Undertaking and relevant contact details for any enquiries (**Enquiry Line**). The Employee Letter will be in the form of Attachment B to this Undertaking.
30. Within 35 days of the Commencement Date, CLRS will provide evidence to the FWO that the Employee Letter has been sent to all current CLRS employees.

Enquiry Line

31. CLRS will provide the FWO with quarterly updates on the nature of any enquiries received through the Enquiry Line (including anonymous enquiries) and the outcome of any investigation of the enquiries.

No Inconsistent Statements

32. CLRS 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


33. CLRS 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 CLRS set out in clause 11 above in respect of decisions taken regarding enforcement action in the event that CLRS is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by CLRS 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, CLRS may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if CLRS 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 CLRS in clause 11 above, and also in respect of the question of costs.

Executed as an undertaking

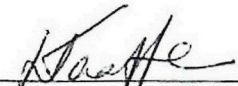
EXECUTED by CLRS in accordance with section 38 of the *Association Incorporation Reform Act 2012* (Vic):


(Signature of committee member or secretary)

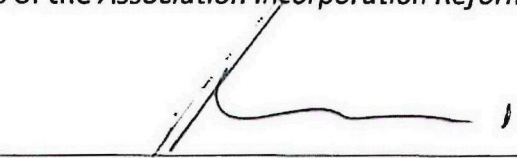
ERIN LANGMAN
(Name of committee member or secretary)

25/08/2022
(Date)

in the presence of:


(Signature of witness)

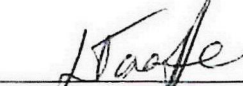
LEAH TAYLOR
(Name of witness)


(Signature of committee member)

Wayne Jenkins
(Name of committee member)


25-8-2022
(Date)

in the presence of:


(Signature of witness)

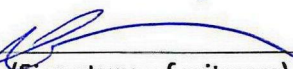
LEAH TAYLOR
(Name of witness)

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


Mark Scully
Deputy Fair Work Ombudsman –
Compliance & Enforcement

Delegate for the FAIR WORK
OMBUDSMAN

in the presence of:


(Signature of witness)

31 August 2022
(Date)

JOANNA WILLIAMS
(Name of Witness)

SCHEDULE A

See attached.

Attachment A – Letter of Assurance

Sandra Parker
The Fair Work Ombudsman
Fair Work Ombudsman
GPO Box 9987
MELBOURNE VIC 3001

Dear Ms Parker

I am writing on behalf of Community Living & Respite Services Inc (**CLRS**) in my capacity as the Chief Executive Officer. This letter follows a process where CLRS self-reported that it had underpaid employees between 1 January 2015 to 7 February 2021 by failing to pay employees higher wage rates provided by the *Social, Community and Disability Services Industry Equal Remuneration Order 2012 (ERO)*.

I write to provide the FWO with my assurance that I am satisfied:

- a. the process by which CLRS, as assisted by Johnsons MME, calculated the underpayments to their current and former employees was correctly undertaken; and
- b. that CLRS is compliant with the *Fair Work Act 2009* as it relates to the *Social, Community, Home Care and Disability Services Industry Award 2010 (Award)* and the ERO; and
- c. as of <insert date> all former and current employees impacted by the underpayments, apart from those who have not been able to be located or paid by CLRS, have been paid their entitlements, plus a goodwill payment, under the Award, the Community Living & Respite Services Inc. Enterprise Agreement and ERO by CLRS.

CLRS has remediated all issues as a matter of priority and is committed to minimising the risk of future non-compliance.

Sincerely

<CEO name>

Attachment B – Letter to employees

Dear <insert name>

As you may be aware, Community Living & Respite Services Inc (**CLRS**) has admitted to the Fair Work Ombudsman (**FWO**) that it contravened the *Fair Work Act 2009* (Cth) by failing to identify that employees were entitled to a higher rate of pay under the *Social, Community and Disability Services Industry Equal Remuneration Order 2012*, and so failing to pay employees amounts owed under this Order.

CLRS has formally admitted to the FWO that CLRS did not comply with its obligations under Commonwealth workplace relations laws and have entered into an Enforceable Undertaking with the FWO, a copy of which will be available at 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.

CLRS understands that you may have questions and concerns relating to this and other employment issues.

Should you wish to discuss your concerns directly with CLRS you can contact our enquiry line on <insert telephone number/ email address>. We will make every attempt to resolve your enquiry within 30 days of receiving it and commit to maintaining open communication with you about the progress of your enquiry.

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

Yours sincerely

<CLRS Signatory>