**ENFORCEABLE UNDERTAKING**

This undertaking is **given** by RSL LifeCare Limited (ABN 43 000 048 957) 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 7 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 RSL LifeCare Limited (ABN 43 000 048 957), of Level 5, 120 Pacific Highway, St Leonards, NSW 2065 (**RSL LifeCare**).

**COMMENCEMENT**

1. This Undertaking comes into effect when:
   1. the Undertaking is executed by RSL LifeCare; and
   2. the FWO accepts the Undertaking so executed (**Commencement Date**).

**BACKGROUND**

1. RSL LifeCare is an Australian not-for-profit unlisted public company that holds registered charity status with the Australian Charities and Not-for-profits Commission. It is the operator of 27 retirement villages and 29 nursing homes. RSL LifeCare also provides support services to veterans in NSW and ACT, and in-home support services in NSW, the ACT and Southeastern QLD. As of November 2022, RSL LifeCare employed 3,500 people across NSW and ACT in roles including nursing, allied health, support care and recreation services, hospitality and administration and management.
2. On 20 May 2021, RSL LifeCare notified the FWO that:
   1. in June 2020, it transitioned from utilising the Site Administration Management (**SAM**)/Work Force Suite (**WFS**) rostering system, to the RITEQ Workforce Manager system, and during this transition identified it had contravened overtime, penalty rate, sleepover and annual leave provisions of the *RSL LifeCare, NSWNMA and HSU NSW Enterprise Agreement 2017 – 2020* (**NSW EA**) and the *RSL LifeCare (ACT) Enterprise Agreement 2017 – 2020* (**ACT EA**).
   2. at this time, RSL LifeCare also commenced a review of their rostering and payment systems and practices in order to create rules and parameters for the implementation of their new system. FCB Workplace Law and Deloitte Risk Advisory Pty Ltd (**Deloitte**) were engaged to conduct an audit of wages for the period 1 November 2010 to 28 February 2021 (**Audit Period**), the period in which the SAM rostering system was in use. This included a review of the terms of 9 relevant predecessor agreements to the NSW EA and ACT EA that applied to some RSL LifeCare Employees following RSL LifeCare’s acquisition of aged care facilities from other providers, being the:
      1. *RSL LifeCare (ACT) Enterprise Agreement 2016 -2017;*
      2. *RSL LifeCare, NSWNMA and HSU NSW Enterprise Agreement 2015 -2017*;
      3. *ADA Cottage, NSWNMA and HSU NSW Enterprise Agreement 2014 – 2017;*
      4. *The Lara Aged Care, NSWNMA and HSU NSW Enterprise Agreement 2014* – 2017;
      5. *The Whiddon Group Agreement 2014*;
      6. *Christadelphian Homes Ltd (General Service Employees) and the Health Services Union NSW Branch Enterprise Agreement 2013*;
      7. *RSL LifeCare, NSWNMA & HSU Branch Enterprise Agreement 2012*;
      8. *Anglicare (Diocese of Canberra & Goulburn)* – *Aged Care Union Enterprise Agreement 2011; and*
      9. *RSL LifeCare, NSWNA & HSU Enterprise Agreement 2010*.

(**Predecessor Agreements**)

* 1. the review of payment and rostering rules identified non-compliance with:
     1. part-time employees being rostered to work on Rostered Days Off and not being paid at overtime rates for work on Rostered Days Off (where the part-time employee has otherwise worked less than 76 hours in the fortnight);
     2. overtime not being paid where employees have had less than 8 hours break between shifts;
     3. overtime not being paid where employees have had less than 10 hours break between shifts where overtime is worked;
     4. weekend penalty rates not being correctly applied to nursing management roles where work is performed on weekends;
     5. part-time employees performing sleepover shifts not being paid correctly for work performed during the sleepover shift;
     6. full-time employees paid incorrect penalty rates when working a morning or afternoon shift; and
     7. shift workers not receiving an additional week of annual leave.

1. RSL LifeCare advised the FWO it had calculated that 1,275 current and 2,613 former employees had been underpaid a total of $4,629,501.67 gross wages in the Audit Period.
2. Prior to the execution of this Undertaking, RSL LifeCare notified the FWO that:
   1. it completed rectification of back payments to all current employees on 4 May 2022;
   2. it completed rectification of back payments to former employees who could be located on 11 November 2022; and
   3. as of 11 November 2022, $5,182,603.06 (inclusive of interest calculated at Consumer Price Index (CPI) rates and superannuation at a rate of 10%) had been paid to 1275 current employees and 2,316 former employees, who could be located.

ADMISSIONS

1. The FWO has a reasonable belief, and RSL LifeCare admits, that RSL LifeCare contravened section 50 of the FW Act during the Audit Period by failing to pay each of the employees identified in Schedule A to this Undertaking (**Affected Employees**) the amount or amounts to which that employee was entitled under the clause or clauses of the NSW EA, ACT EA and/or Predecessor Agreement identified below, resulting in the total underpayment identified in Column C of Schedule A to this Undertaking in relation to that Affected Employee (**Underpayments**). The FWO has a reasonable belief, and RSL LifeCare admits, that RSL LifeCare’s contraventions of section 50 of the FW Act were constituted by:
   1. the non-payment of overtime rates for work performed by part-time employees on rostered days off (where the employee has otherwise worked less than 76 hours in the fortnight), as required by clause 17.1(b)(iv) of the NSW EA or the ACT EA or equivalent clauses of the Predecessor Agreements;
   2. the non-payment of overtime where employees have had less than 8 hours break between shifts, as required by clause 16.4(a) of the NSW EA or the ACT EA or equivalent clauses of the Predecessor Agreements;
   3. the non-payment of overtime where employees have had less than 10 hours break between shifts, where overtime is worked, as required by clause 16.4(b) of the NSW EA or the ACT EA or equivalent clauses of the Predecessor Agreements;
   4. the incorrect application of weekend penalty rates in clause 18.5 of the NSW EA or the ACT EA or equivalent clauses of the Predecessor Agreements to nursing management roles for work performed on weekends;
   5. part-time employees performing sleepover shifts not being paid correctly in accordance with clause 20.4 of the NSW EA or the ACT EA or equivalent clauses of the Predecessor Agreements in respect of work performed during the sleepover shift;
   6. full-time employees not being paid correct penalty rates in accordance with clause 18.1 of the NSW EA or the ACT EA or equivalent clauses of the Predecessor Agreements when working a morning or afternoon shift; and
   7. Shift workers not receiving an additional one week of annual leave in accordance with clause 21.2(b) of the NSW EA or the ACT EA or equivalent clauses of the Predecessor Agreements.
2. The contraventions identified in clause 7 of this Undertaking do not include:
   1. any contraventions which relate to or arise as a consequence of RSL LifeCare failing to correctly apply the NSW EA, ACT EA or Predecessor Agreements 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 RSL LifeCare failing to correctly apply the NSW EA, ACT EA or Predecessor Agreements 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
   2. any contraventions which have not yet occurred at the date that this Undertaking is offered by RSL LifeCare (whether or not those contraventions are identified in the Independent Audits described at clause 19 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 RSL LifeCare and the FWO’s acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

UNDERTAKINGS

1. RSL LifeCare will take the actions set out at clauses 10 to 40 below.

Review and rectification of underpayments

1. By 31 December 2022 RSL LifeCare will have (as applicable), adjusted annual leave balances and/or paid each of the Affected Employees who could be located:
   1. the Underpayment amount owing to them;
   2. any superannuation payments which may be required by law, calculated at least 10% of the Underpayment amount, by making payment to their chosen superannuation fund; and
   3. interest on the Underpayment, calculated using an interest rate that is the Consumer Price Index for each relevant financial year.
2. By 31 January 2023 , RSL LifeCare will provide the FWO evidence of all payments made to current and former employees to rectify the Underpayments, including the superannuation and interest payments referred to in clauses 10(b) and 10(c) above.
3. By 1 April 2023, RSL LifeCare will pay the Underpayment amounts owing to employees who have not been located to the Commonwealth of Australia in accordance with section 559 of the FW Act. RSL LifeCare will complete the required documents supplied by the FWO for this purpose.
4. In the event that the FWO is able to locate and contact any former employees to whom Underpayments are owed, the FWO will (in addition to its obligations under s559 of the FW Act) notify RSL LifeCare in writing of the name and contact details of the former employee. Within 14 days of receiving any such notice RSL LifeCare will:
   1. pay to the former employees interest on the amount already paid by RSL LifeCare to the Commonwealth of Australia in respect of that employee, calculated using the Consumer Price Index, calculated for each full financial year ; and
   2. pay to the former employee’s nominated superannuation fund the amount calculated in accordance with clause 10(b) above.

**Training**

1. By 1 June 2023, RSL LifeCare will ensure that all current employees of RSL LifeCare with responsibility for HR, payroll and rostering, have completed training which satisfies clause 15 below.
2. The training must:
   1. be provided by an external workplace relations, human resources or employment law expert, approved by the FWO prior to the training being provided; and
   2. cover, at a minimum:
      1. how to correctly apply entitlements under the NSW EA and the ACT EA including, without limitation: overtime and penalty rates and shift worker annual leave entitlements; and
      2. other FW Act entitlements and obligations, including the National Employment Standards and recording keeping obligations.
   3. be provided on an ongoing basis to all new employees with responsibility for HR, payroll and rostering until at least the completion of the second audit referred to in clauses 27–31, below.
3. By 30 June 2023, RSL LifeCare will provide to the FWO evidence of its compliance with clause 14, including:
   1. a copy of the training materials used; and
   2. a schedule or list of the employees who received the training and the date on which they attended.

Provision of information — new systems and processes

1. By 1 May 2023, RSL LifeCare will provide to the FWO detailed information about the new systems and processes that it has put in place to ensure compliance with its obligations under the FW Act, particularly in relation to the NSW EA and the ACT EA.
2. The FWO may, within 28 days of receiving the information under clause 17, seek reasonable further information regarding the new systems and processes from RSL LifeCare by issuing a written notice to RSL LifeCare specifying the additional information required. RSL LifeCare must provide the information specified in such a notice within 14 days of receipt.

Independent Audits

1. RSL LifeCare 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 RSL LifeCare’s compliance with the FW Act and FW Regulations, in relation to the NSW EA and ACT EA, and any future agreements that replace the NSW EA or the ACT EA (**Audits**).
2. RSL LifeCare will notify the FWO of its proposed Independent Auditor by no later than 1 April 2023. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require RSL LifeCare 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 RSL LifeCare.
3. RSL LifeCare must ensure that each of the Audits conducted by the Independent Auditor includes:
   1. an assessment of 75 employees to whom the NSW EA and ACT EA 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 RSL LifeCare;
   2. an assessment of whether the Sampled Employees have been correctly classified by RSL LifeCare;
   3. an assessment of whether the pay and conditions of the Sampled Employees during the relevant audit period are in compliance with the FW Act and the NSW EA and ACT EA (or replacement instruments); and
   4. 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
   5. that each of the written reports referred to in (d) above contains the following declarations from the Independent Auditor:
      1. the Independent Auditor has no actual, potential or perceived conflict of interest in providing the report to the FWO;
      2. notwithstanding that the Independent Auditor is retained by RSL LifeCare, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from RSL LifeCare in preparing the report;
      3. the report is provided in accordance with applicable professional standards (which will be listed in the report); and
      4. the report is provided to the FWO for its benefit and the FWO can rely on the report.

The First Audit

1. RSL LifeCare must ensure the Independent Auditor commences the first of the Audits by no later than 1 July 2023 (**First Audit**).
2. The relevant audit period for the First Audit must be at least two full consecutive pay periods falling within the period 1 May 2023 – 30 June 2023.
3. By 1 June 2023 RSL LifeCare will provide for the FWO’s approval, details of the methodology to be used by the Independent Auditor to conduct the First Audit.
4. RSL LifeCare will use its best endeavours to ensure the Independent Auditor provides a draft written report of the First Audit directly to the FWO by 1 November 2023, setting out the draft First Audit findings, and the facts and circumstances supporting the First Audit findings. RSL LifeCare will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to RSL LifeCare without the FWO’s approval.
5. RSL LifeCare will use its best endeavours to ensure the Independent Auditor finalises the First Audit and provides a written report of the First Audit (**First Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. RSL LifeCare will ensure the Independent Auditor does not provide the First Audit Report, or a copy of the same, to RSL LifeCare without the FWO’s approval.

The Second Audit

1. RSL LifeCare must ensure the Independent Auditor commences the second of the Audits by no later than 1 February 2024 (**Second Audit**).
2. The relevant audit period for the Second Audit must be at least two full pay periods falling within the period 1 November 2023 – 31 December 2023 . If any significant issues are identified in the First Audit, the sample size for the Second Audit will be increased to 100 employees.
3. By 1 May 2024, RSL LifeCare will provide for the FWO’s approval, details of the methodology to be used by the Independent Auditor to conduct the Second Audit.
4. RSL LifeCare will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Second Audit directly to the FWO by 1 July 2024, setting out the draft Second Audit findings, and the facts and circumstances supporting the Second Audit findings. RSL LifeCare will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to RSL LifeCare without the FWO’s approval.
5. RSL LifeCare will use its best endeavours to ensure the Independent Auditor finalises the Second Audit and provides a written report of the Second Audit (**Second Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. RSL LifeCare will ensure the Independent Auditor does not provide the written report, or a copy of the same, to RSL LifeCare without the FWO’s approval.

Outcome of Audits

1. If any of the Audits identify underpayments to any current or former employees, RSL LifeCare will:
   1. rectify any underpayments identified in the relevant audit period; and
   2. conduct a reconciliation of the amounts paid and owed to those employees in the 12 month period immediately prior to the relevant audit period, and rectify any underpayments that are identified.
2. RSL LifeCare 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.
3. If any employees identified in the Audits as having underpayments owing to them cannot be located within 60 days of the conclusion of each Audit, RSL LifeCare will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. RSL LifeCare will complete the required documents supplied by the FWO for this purpose.
4. If any of the Audits identify an underpayment of minimum entitlements to one or more employees, and the FWO reasonably believes that employees not included in the Audits are also likely to have been underpaid, RSL LifeCare 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 NSW EA or ACT EA (or replacement instruments) 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 RSL LifeCare. If an Additional Audit identifies underpayments to any current or former employees, RSL LifeCare will conduct a reconciliation of the amounts paid to those employees during the previous 12 month period (or other timeframe agreed with the FWO) and rectify any underpayments that are identified. RSL LifeCare will provide to the FWO evidence of such rectification within 60 days of being informed by the FWO of the requirement to undertake the Additional Audit.
5. If requested by the FWO, RSL LifeCare 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.

Employee Hotline

1. From the Commencement Date, , at its own expense, RSL LifeCare will engage an independent organisation to operate a dedicated telephone number for all current and former employees to whom the NSW EA or ACT EA applies, or had applied, to make enquiries in relation to their entitlements, underpayments or related employment concerns (**Employee Hotline**). Employees will have the option of making enquiries on a confidential basis.
2. The independent organisation must be approved by the FWO prior to being engaged by RSL LifeCare to operate the Employee Hotline.
3. RSL LifeCare will:
   1. ensure the Employee Hotline remains operational for a period of 3 months;
   2. communicate the existence and purpose of the Employee Hotline by way of notice on the intranet for current staff and email to the last known email address of all former employees to whom the NSW EA or ACT EA applies, or had applied, known as at the Commencement Date, or identified during the Independent Audit, and dating back to 1 November 2010. RSL LifeCare will:
      1. ensure the notice/email is in the form of Attachment A to this Undertaking; and
      2. provide evidence to the FWO that the email has been sent to all required current and former employees within 28 days of the Commencement Date.
   3. take steps to respond to each telephone enquiry and seek to resolve any issues within 30 days and notify the FWO of any issues that are not resolved within 60 days of the Commencement Date; and
   4. provide a de-identified list of enquiries received by the Employee Hotline to the FWO at the end of the 3 month period.

No Inconsistent Statements

1. RSL LifeCare 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

1. RSL LifeCare acknowledges that:
   1. the FWO may;
      1. 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](http://www.fairwork.gov.au);
      2. 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);
      3. issue a media release in relation to this Undertaking;
      4. from time to time, publicly refer to the Undertaking (and any of the Attachments hereto) and its terms; and
      5. rely upon the admissions made by RSL LifeCare set out in clause 7 above in respect of decisions taken regarding enforcement action in the event that RSL LifeCare is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by RSL LifeCare to comply with its obligations under this Undertaking;
   2. 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;
   3. consistent with section 715(3) of the FW Act, RSL LifeCare may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
   4. if RSL LifeCare contravenes any of the terms of this Undertaking:
      1. 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
      2. this Undertaking may be provided to the Court as evidence of the admissions made by RSL LifeCare in clause 7 above, and also in respect of the question of costs.

**Executed as an undertaking**

Executed by RSL LifeCare Limited (ABN 43 000 048 957) in accordance with section 127(1) of the *Corporations Act 2001*:

|  |  |  |
| --- | --- | --- |
|  |  |  |
| (Signature of director) |  | (Signature of director/company secretary) |
|  |  |  |

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

|  |  |  |
| --- | --- | --- |
|  |  |  |

(Date) (Date)

in the presence of: in the presence of:

|  |  |  |
| --- | --- | --- |
|  |  |  |
| (Signature of witness) |  | (Signature of witness) |
|  |  |  |

(Name of witness) (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 and Enforcement  Delegate for the FAIR WORK OMBUDSMAN |  | (Date) |
| in the presence of: |  |  |
| (Signature of witness) |  | (Name of Witness) |

**SCHEDULE A**

**Part 1 — NSW EA Contraventions**

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | **Column A** | **Column B** | | | | **Column C** | **Column D** | **Column E** |
| **No** | **Employee** | **Contraventions** | | | | **Total underpayment (excl interest and super)** | **Interest** | **Superannuation** |
|  |  | **7(a) Overtime for part-time employees working RDOs** | **Overtime where employees had less than 8 or 10 hrs between shifts: 7(b) and 7(c)** | **Correction of penalty rates for:**  **7(d) Weekend penalties for nursing management**  **7(e) work performed during sleepover shifts**  **7(f) Part-time shift penalties** | **7(g) Shift worker annual leave** |  |  |  |
| 1. |  |  |  |  |  |  |  |  |
| 2. |  |  |  |  |  |  |  |  |

**See attached**

**Part 2 — ACT EA Contraventions**

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | **Column A** | **Column B** | | | | **Column C** | **Column D** | **Column E** |
| **No** | **Employee** | **Contraventions** | | | | **Total underpayment (excl interest and super)** | **Interest** | **Superannuation** |
|  |  | **7(a) Overtime for part-time employees working RDOs** | **Overtime where employees had less than 8 or 10 hrs between shifts: 7(b) and 7(c)** | **Correction of penalty rates for:**  **7(d) Weekend penalties for nursing management**  **7(e) work performed during sleepover shifts**  **7(f) Part-time shift penalties** | **7(g) Shift worker annual leave** |  |  |  |
| 1. |  |  |  |  |  |  |  |  |
| 2. |  |  |  |  |  |  |  |  |

**See attached**

**Attachment A - Notification to employees**

Dear <insert name >

As you may be aware from previous communications, in 2021 while moving from one rostering system to another, RSL LifeCare identified certain payroll inaccuracies. RSL Lifecare self-reported these inaccuracies to the Fair Work Ombudsman (**FWO**) and has agreedthat it contravened s 50 of the *Fair Work Act 2009* (Cth) by failing to comply with overtime, penalty rate, sleepover and annual leave provisions of the *RSL LifeCare, NSWNMA and HSU NSW Enterprise Agreement 2017 – 2020* and the *RSL LifeCare (ACT) Enterprise Agreement 2017 – 2020* and their predecessor agreements between 1 November 2010 and 28 February 2021.

Since identifying the inaccuracies, RSL LifeCare has undertaken an extensive process to ensure that all staff affected have been identified and notified. We are pleased to confirm that we have completed the process of paying back shortfall amounts, plus interest payments, to all affected current staff and to all affected former staff who could be located. As per the attached FWO Media Release, to complete the remediation process, on xx 2022, RSL LifeCare entered into an Enforceable Undertaking with the FWO, a copy of which is available 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.

Should you wish to discuss your concerns directly with RSL LifeCare you can contact our enquiry line on insert telephone number. 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](http://www.fairwork.gov.au) or on 13 13 94.

RSL LifeCare again expresses its sincere regret and apologises to you for these payroll inaccuracies, please know that we have since fixed all payroll irregularities.

Yours sincerely

### <Employer name>