

ENFORCEABLE UNDERTAKING

This undertaking is **given** by Uniting AgeWell Limited (ABN 19 628 178 816) 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 Uniting AgeWell Limited (ABN 19 628 178 816), of Level 6, Wesley Place 130 Lonsdale Street Melbourne VIC 3000 (**Uniting AgeWell**).

COMMENCEMENT

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

BACKGROUND

3. Uniting AgeWell is a large not-for-profit, charitable organisation of the Uniting Church in Australia (Synod of Victoria and Tasmania) that holds registered charity status with the Australian Charities and Not-for-profits Commission. It operates a range of supported living services (supported living, respite care, independent retirement living and residential care) across Victoria and Tasmania. As of November 2022, Uniting AgeWell employed 3,678 people in residential aged care, community and home care roles.

RELEVANT INSTRUMENTS

4. The following enterprise agreements (collectively, the **Agreements**) applied to Uniting AgeWell and its employees:
 - (a) *Uniting AgeWell Enterprise Agreement (Tasmania) 2014 – 2018* (**Uniting AgeWell EA TAS 2014**) in respect of employees who were employed to carry out Aged Care Support (**ACS**), Home Care (**HC**) and Nursing duties;
 - (b) *Uniting AgeWell Enterprise Agreement (Tasmania) 2018 – 2022* (**Uniting AgeWell EA TAS 2018**) in respect of employees who were employed to carry out ACS, HC and Nursing duties;
 - (c) *Uniting AgeWell Victoria ANF and HSU Collective Agreement 2013* (**Uniting AgeWell VIC EA 2013**) in respect of employees who were employed to carry out ACS, HC, Nursing and Personal Care Worker (**PCW**) duties; and
 - (d) *Uniting AgeWell Victoria ANMF and HWU Enterprise Agreement 2018* (**Uniting AgeWell**

VIC EA 2018) in respect of employees who were employed to carry out ACS, Nursing and PCW duties.

DISCLOSURES TO THE FWO

5. On 6 September 2021, Uniting AgeWell notified the FWO that:

- (a) in January 2020 it had commenced a wage review following the identification of wage variances in their internal payroll system. Uniting AgeWell undertook a comprehensive wage audit to ensure industrial compliance;
- (b) following this, on or around mid-February 2020 Uniting AgeWell engaged Russell Kennedy Lawyers who subsequently engaged FTI Consulting to undertake the wage audit for the period 22 June 2015 to 27 June 2021 (**Audit Period**). The audit included the review of the terms of the Agreements;
- (c) a full report of the audit findings was provided to the FWO on 6 October 2021. Findings included:
 - (i) 2,227 current and 2,744 former employees had been underpaid a total of \$3,106,805 gross wages during the Audit Period;
 - (ii) the main causes of underpayments across both Victoria and Tasmania related to rostering and the misunderstanding and misinterpretation of the differing entitlements and nuances between the different states and employee cohorts. The cohorts include:
 - 1. VIC PCWs;
 - 2. TAS Aged Care Employees;
 - 3. VIC ACS Workers;
 - 4. VIC Nurses (Registered/Enrolled);
 - 5. TAS Nurses (Registered/Enrolled);
 - 6. VIC Health Professionals;
 - 7. VIC HC Workers; and
 - 8. TAS Community.

6. Prior to the execution of this Undertaking, Uniting AgeWell notified the FWO that:

- (a) it completed rectification of \$2,386,954 in back payments to 2,227 current employees on

29 October 2021;

- (b) it completed rectification of \$1,201,914 in back payments to 1,957 (of the 2,744) former employees who could be located and who provided verification of their identity on 17 March 2023; and
- (c) as of 17 March 2023, \$3,588,868 (inclusive of interest calculated at the Federal Court of Australia pre-judgement interest rate (cash rate plus 4%) and superannuation at a rate of 10%) had been paid to 2,227 current and 2,048 former employees (either directly to the person and/or to their nominated superannuation fund), who could be located and who provided verification of their identity.

ADMISSIONS

7. The FWO has a reasonable belief, and Uniting AgeWell admits, that Uniting AgeWell contravened section 50 of the FW Act during the Audit Period by failing to pay the employees listed in Schedule A to this Undertaking (**Affected Employees**) in accordance with their relevant entitlements under the identified clauses of the Agreements and the amount or amounts to which that employee was entitled. The FWO has a reasonable belief, and Uniting AgeWell admits, that contraventions of:

- (a) Section 50 of the FW Act were constituted by the following contraventions of the Uniting AgeWell EA TAS 2014:
 - (i) failing to pay the correct amount for overtime worked in excess of the ordinary hours of work after 76 hours in a fortnight as prescribed by clause 54.3.1;
 - (ii) failing to pay the applicable shift allowance for work performed during a night shift and during overtime as prescribed by clause 60.2.2;
 - (iii) failing to pay the correct amount for nurse handovers as prescribed by clause 53.12;
 - (iv) failing to schedule broken shifts to home care employees in accordance with clause 53.10.4, resulting in a failure to pay the correct penalty rate, shift allowance or overtime rate as prescribed by clause 53.13.4;
 - (v) failing to pay the applicable qualifications allowance to one nurse as prescribed by clause 19.1;
 - (vi) failing to pay the applicable preceptor allowance to 4 nurses as prescribed by clause 20;

- (vii) failing to consistently pay the applicable buddy allowance to 121 Extended Care Assistants (ECAs) working in residential aged care facilities as prescribed by clause 21;
 - (viii) failing to consistently pay the applicable in charge allowance to 45 registered nurses as prescribed by clause 23.1;
 - (ix) failing to pay the applicable buddy allowance for one home care worker as prescribed by clause 24.1;
 - (x) failing to pay the correct amount for uniform allowance as prescribed by clause 31 and in accordance with Schedule A;
 - (xi) failing to pay the applicable foul and nauseous linen allowance as prescribed by clause 33;
 - (xii) failing to pay the mobile phone allowance to 32 home care workers as prescribed by clause 25 and in accordance with Schedule A; and
 - (xiii) failing to consistently pay the first aid allowance to 30 home care workers as prescribed by clause 27.
- (b) Section 50 of the FW Act were constituted by the following contraventions of the Uniting AgeWell EA TAS 2018:
- (i) failing to pay the correct amount to aged care and home care employees when they were required to start a shift where there is less than 10 hours from their previous shift, or by mutual agreement 9 hours from the previous shift and not provided with the minimum shift break as prescribed by undertaking 5 and clause 47.5(e);
 - (ii) failing to pay the correct amount for overtime worked in excess of the ordinary hours of work after 76 hours in a fortnight as prescribed by clause 48.3;
 - (iii) failing to pay the applicable shift allowance for work performed during a night shift and during overtime as prescribed by clause 54.1(b);
 - (iv) failing to pay the correct amount for nurse handovers as prescribed by clause 47.12;
 - (v) failing to schedule broken shifts to aged care and home care employees in accordance with clause 53.10.4, resulting in a failure to pay the correct penalty rate, shift allowance or overtime rate as prescribed by clause 47.10(d);

- (vi) failing to pay the applicable qualifications allowance to one nurse as prescribed by clauses 13.1 and 14.1;
 - (vii) failing to consistently pay the applicable preceptor allowance to 3 nurses as prescribed by clause 15;
 - (viii) failing to consistently pay the applicable buddy allowance to 69 ECAs working in residential aged care facilities as prescribed by clause 16;
 - (ix) failing to pay the applicable in charge allowance to 9 registered nurses as prescribed by clause 18.1;
 - (x) failing to consistently pay the first aid allowance to 6 home care workers as prescribed by clause 22; and
 - (xi) failing to pay the correct amount for uniform allowance as prescribed by clause 25 and in accordance with Schedule A.
- (c) Section 50 of the FW Act were constituted by the following contraventions of the Uniting AgeWell VIC EA 2013:
- (i) failing to pay the correct amount for overtime worked in excess of the ordinary hours of work by casual employees as prescribed clause 48.3;
 - (ii) failing to pay the correct penalty amount to casual employees when rostered to perform work on a public holiday as prescribed by clauses 49.3 and 49.5;
 - (iii) failing to pay aged care employees, home care workers, enrolled nurses and health professionals the correct penalty amount when employees are required to work more than six consecutive periods of ordinary duty without 24 hours off duty being given as prescribed by clause 48.1(c);
 - (iv) failing to pay aged care employees, home care workers and health professionals the correct overtime rates where employees are required to work a second consecutive short shifts and have not been provided with a break between shifts as prescribed by clauses 48.3 and 54.13(d);
 - (v) failing to pay the correct amount for enrolled nurses appointed as Team Leaders as prescribed by clauses 21.1, 27.7 and Appendix E;
 - (vi) failing to pay the correct incremental progression for part-time and casual enrolled nurses as prescribed by clause 73 and Appendix A;
 - (vii) failing to pay the correct amount to personal care workers appointed as Team

Leaders as prescribed by clauses 21.1, 21.4 and 74.14;

- (viii) failing to schedule broken shifts to home care workers in accordance with clause 48.7.3, resulting in a failure to pay the correct penalty rate, shift allowance or overtime rate as prescribed by clause 48.3;
 - (ix) failing to pay the applicable qualifications allowance to 4 registered nurses as prescribed by clause 20.1;
 - (x) failing to pay the applicable qualifications allowance to 2 health professionals as prescribed by clause 20.2;
 - (xi) failing to pay the correct amount for uniform allowance as prescribed by clause 24.1.1(b);
 - (xii) failing to pay the applicable foul and nauseous linen allowance as prescribed by clause 25.2; and
 - (xiii) failing to correctly apply the relevant span of hours for home care workers and all other employees resulting in a failure to pay the applicable shift allowance as set out in clauses 54.2, 54.3, 54.4 and 54.5.
- (d) Section 50 of the FW Act were constituted by the following contraventions of the Uniting AgeWell VIC EA 2018:
- (i) failing to pay the correct amount for overtime worked in excess of the ordinary hours of work by casual employees as prescribed by clause 48.3;
 - (ii) failing to pay the correct penalty amount to casual employees when rostered to perform work on a public holiday as prescribed by clauses 50.1, 50.3 and 50.5;
 - (iii) failing to pay aged care employees, home care workers, enrolled nurses and health professionals the correct penalty amount when employees are required to work more than six consecutive periods of ordinary duty without 24 hours off duty being given as prescribed by clause 48.1(c);
 - (iv) failing to pay aged care employees, home care workers and health professionals the correct overtime rates where employees are required to work a second consecutive short shift and have not been provided with a break between shifts as prescribed by clauses 48.3 and 55.5.2(d);
 - (v) failing to pay the correct amount for enrolled nurses appointed as Team Leaders as prescribed by clauses 25.6 and Appendix C;

- (vi) failing to pay the correct incremental progression for part-time and casual enrolled nurses as prescribed by Appendix A and clause 76;
- (vii) failing to pay the correct amount to personal care workers appointed as Teams Leaders as prescribed by clauses 20.1, 20.4 and 77.5;
- (viii) failing to schedule broken shifts to home care workers in accordance with clause 49.3, resulting in a failure to pay the correct penalty rate, shift allowance or overtime rate as prescribed by clause 48.3;
- (ix) failing to pay the applicable qualifications allowance to one nurse as prescribed by clause 19.1;
- (x) failing to pay the applicable qualifications allowance to 2 health professionals as prescribed by clause 19.2;
- (xi) failing to pay the correct amount for uniform allowance as prescribed by clause 22(b) and 22(c);
- (xii) failing to pay the applicable foul and nauseous linen allowance as prescribed by clause 23.2; and
- (xiii) failing to correctly apply the relevant span of hours in accordance with undertaking 2, resulting in a failure to pay the applicable shift allowance as set out in clauses 55.1.1, 55.1.2, 55.1.3, 55.1.4 and 55.1.5.

LIMITATIONS

8. The contraventions identified in clause 7 of this Undertaking do not include:

- (a) any contraventions which relate to or arise as a consequence of Uniting AgeWell failing to correctly apply the Agreements to any employee not listed in Schedule A to this Undertaking (**Non-affected Employees**). For the avoidance of doubt this Undertaking is not given in respect of any Non-affected Employees who were underpaid as a result of Uniting AgeWell failing to correctly apply the 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
- (b) any contraventions which relate to or arise as a consequence of Uniting AgeWell failing to correctly apply any of the Agreements to any of the Schedule A Employees other than as identified in clause 6 to this Undertaking; or
- (c) any contraventions which have not yet occurred at the date that this Undertaking is

offered by Uniting AgeWell (whether or not those contraventions are identified in the Independent Audits 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 Uniting AgeWell and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

UNDERTAKINGS

9. Uniting AgeWell will take the actions set out at clauses 10 to 31 below.

Review and rectification of underpayments

10. By 1 June 2023, Uniting AgeWell will provide the FWO with evidence that all underpayments (including those relating to superannuation and interest) have been rectified for current and former employees, who can be located.

Rectification of underpayments to employees who cannot be located

11. If any of the Affected Employees to whom underpayments are owed cannot be located by 1 July 2023, Uniting AgeWell will pay monies owing to those employees (excluding superannuation and interest) to the Commonwealth of Australia within 30 days of being provided with the necessary details for payment by the FWO in accordance with Section 559 of the FW Act.
12. In the event that the FWO is able to locate and contact any former employees of Uniting AgeWell to whom underpayments are owed, the FWO will (in addition to its obligations under section 559 of the FW Act) notify Uniting AgeWell in writing of the name and contact details of the former employee. Within 14 days of receiving any such notice Uniting AgeWell will:
- (a) verify their identity and pay the former employee interest on the amount already paid by Uniting AgeWell 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, using the Federal Court pre-judgement interest rate for the period in which the underpayment occurred; and
 - (b) pay to the employee's nominated superannuation fund any additional superannuation payments which may be required by law in respect of the amount already paid by Uniting AgeWell to the Commonwealth of Australia in respect of that employee.

Training

13. Uniting AgeWell will, by 1 July 2023 and at its own cost, engage a suitably qualified workplace trainer (**Trainer**) to deliver Workplace Relations training (**Training**). The Training must:

- (a) address compliance with applicable workplace laws and instruments, including but not limited to the rights and responsibilities of employers under the FW Act, the FW Regulations and the Agreements (and any future instruments that replace the Agreements);
 - (b) be completed by all employees with human resources, payroll, rostering or recruitment responsibilities; and
 - (c) be provided on an ongoing basis during the life of this Undertaking to any new or existing employees who acquire human resources, payroll, rostering or recruitment responsibilities, and in line with any developments in Australian workplace laws.
14. Uniting AgeWell will notify the FWO of its proposed Trainer by 1 June 2023. The FWO may in its sole discretion approve the Trainer in writing or otherwise require Uniting AgeWell to propose other Trainers until the FWO has provided approval. The Trainer must be approved by the FWO in writing prior to being engaged by Uniting AgeWell.
15. Within 12 months of the Commencement Date, Uniting AgeWell will provide to the FWO evidence of its compliance with clause 13 including:
- (a) a copy of the training materials used; and
 - (b) a schedule or list of the employees who received the training and the date on which they attended.

Independent Audit

16. Uniting AgeWell must, at its own cost, engage an appropriately qualified, experienced, external and independent accounting professional or employment law specialist (**Independent Auditor**) to conduct an audit of Uniting AgeWell's compliance with the FW Act and FW Regulations, in relation to the applicable industrial instruments (**Audit**).
17. Uniting AgeWell will notify the FWO of its proposed Independent Auditor by no later than 1 June 2023. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require Uniting AgeWell 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 Uniting AgeWell.

The Audit

18. Uniting AgeWell must ensure the Independent Auditor commences the Audit by no later than 15 October 2023.

19. The relevant audit period for the Audit must be at least two full consecutive pay periods falling within the period 1 August 2023 – 31 October 2023.
20. By 1 July 2023 Uniting AgeWell will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Audit.
21. Uniting AgeWell will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Audit directly to the FWO by 1 December 2023, setting out the draft Audit findings, and the facts and circumstances supporting the Audit findings. Uniting AgeWell will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Uniting AgeWell without the FWO's approval.
22. Uniting AgeWell will use its best endeavours to ensure the Independent Auditor finalises the Audit and provides a final 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. Uniting AgeWell will ensure the Independent Auditor does not provide the Audit Report, or a copy of the same, to Uniting AgeWell without the FWO's approval.

Outcome of Audits

23. If the Audit identifies underpayments to any current or former employees, Uniting AgeWell will:
 - (a) rectify any underpayments identified in the Audit period; and
 - (b) conduct a reconciliation of the amounts paid and owed to those employees in the 12 month period immediately prior to the Audit period, and rectify any underpayments that are identified.
24. Uniting AgeWell 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.
25. 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, Uniting AgeWell will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. Uniting AgeWell will complete the required documents supplied by the FWO for this purpose.
26. If the Audit identifies an underpayment of minimum entitlements to one or more employees, and the FWO reasonably believes that employees not included in the Audit are also likely to have been underpaid, Uniting AgeWell 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 Agreements (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 Uniting AgeWell. If an Additional Audit identifies underpayments to any current or former employees, Uniting AgeWell 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. Uniting AgeWell will provide to the FWO evidence of such rectification within 120 days of being informed by the FWO of the requirement to undertake the Additional Audit.

27. If requested by the FWO, Uniting AgeWell 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

28. Upon acceptance of the Undertaking, the FWO will publish a media release on its website in respect of this Undertaking.
29. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Uniting AgeWell will undertake to implement the following Notification measure:
 - (a) write to all impacted employees notifying them of the commencement of the Undertaking, in the terms set out at Attachment A.

No Inconsistent Statements

30. Uniting AgeWell 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.

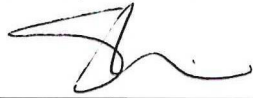
ACKNOWLEDGEMENTS

31. Uniting AgeWell 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 Uniting AgeWell set out in clause 6 above in respect of decisions taken regarding enforcement action in the event that Uniting AgeWell is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by Uniting AgeWell 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, Uniting AgeWell may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if Uniting AgeWell 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 Uniting AgeWell in clause 7 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by Uniting AgeWell Limited (ABN 19 628 178 816) in accordance with section 127(1) of the *Corporations Act 2001*:



(Signature of director)

Simon Brewin

Deputy Chair

(Name of director)

10 May 2023

(Date)

in the presence of:



(Signature of witness)

Jodi McMahon

(Name of witness)



(Signature of director)

Jan Begg

Board Director

(Name of director)

10 May 2023

(Date)

in the presence of:



(Signature of witness)

Jodi McMahon

(Name of witness)

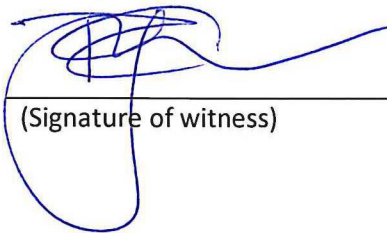
ACCEPTED by the FAIR WORK OMBUDSMAN pursuant to section 715(2) of the *Fair Work Act 2009* on:



Mark Scully, Deputy Fair Work Ombudsman –
Compliance and Enforcement

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:



(Signature of witness)

11 May 2023

(Date)

Rachel Volzke

(Name of Witness)

ATTACHMENT A – Letter to impacted employees

DATE

EMP NAME

EMP ADDRESS

Dear [Impacted Employee]

We write further to our correspondence dated 8 October 2021 and 29 October 2021 regarding the notification of underpayments and subsequent payment of monies owed to affected employees by Uniting AgeWell. As previously communicated, we formally self-reported to the Fair Work Ombudsman (FWO) in September 2021 and have been working with the FWO since that time.

Uniting AgeWell Limited has formally admitted to the FWO that it contravened the *Fair Work Act 2009* (Cth) and the following enterprise agreements and consequently employees had been underpaid:

- *Uniting AgeWell Enterprise Agreement (Tasmania) 2014 – 2018*
- *Uniting AgeWell Enterprise Agreement (Tasmania) 2018 – 2022*
- *Uniting AgeWell Victoria ANF and HSU Collective Agreement 2013*
- *Uniting AgeWell Victoria ANMF and HWU Enterprise Agreement 2018*

Uniting AgeWell Limited has now entered into an Enforceable Undertaking with the FWO to ensure its ongoing compliance with Commonwealth workplace laws.

Uniting AgeWell Limited will, as a result of the Enforceable Undertaking, undertake a number of activities to ensure its ongoing compliance such as conducting an independent audit and formally notifying individual employees of the Enforceable Undertaking.

A copy of the Enforceable Undertaking can be found here <insert link to published version on FWO website>.

Uniting AgeWell regrets and sincerely apologises to you for the inadvertent errors that lead to our failure to comply with our obligations and is absolutely committed to ensuring ongoing compliance with Commonwealth workplace relations laws and our Enterprise Agreements. We have reviewed our systems and processes to ensure payment in accordance with our Enterprise Agreements.

If you have queries or questions relating to the Enforceable Undertaking or your employment, please contact the People and Culture team on **NUMBER** or email **EMAIL ADDRESS**.

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

Yours sincerely

[insert signature block]