



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

(as represented by the Office of the Fair Work Ombudsman)

and

CAFE TOUCHWOOD PTY LTD

ABN: 19 603 353 402 / ACN: 603 353 402

and

Cindy Huynh, a Director of CAFE TOUCHWOOD PTY LTD

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:
 - a) Cafe Touchwood Pty Ltd trading as Touchwood Cafe (ABN: 19 603 353 402 /ACN: 603 353 402) (**Touchwood**).
 - b) Ms Cindy Huynh (**Ms Huynh**), a Director of Touchwood.

BACKGROUND

2. Touchwood operates a café located in Richmond Victoria that employs approximately 22 Employees at any given time.
3. Ms Huynh (previously known as Phuong Thi Ngoc Huynh) is one of five directors of Touchwood. 'Touchwood Café' was an existing business that was purchased by Touchwood in January 2015.
4. The FWO commenced an investigation of Touchwood following an online media article published on 2 May 2018, which alleged that Touchwood was an employer that had underpaid young workers. A former employee of Touchwood alleged that employees did not receive at least their minimum rate of pay for ordinary hours or penalty rates.
5. The FWO's investigation sought to assess all employees of Touchwood for the period 29 January 2018 to 29 April 2018 (**Assessment Period**).
6. Ms Huynh has advised the FWO that the other directors of Touchwood did not play an active role in the day to day operation of Touchwood.

Relevant industrial instruments

7. The terms and conditions of the Touchwood employees' employment was governed by the FW Act, the *Fair Work Regulations 2009* (**FW Regulations**) and the *Restaurant Industry Award 2010* (**Restaurant Award**).

Summary of contraventions

8. The FWO has determined, and Touchwood and Ms Huynh admit, that Touchwood contravened the following Commonwealth workplace laws:
 - a) Section 45 of the FW Act, by failing to comply with the following terms of the Restaurant Award:
 - i. Clause 12.3 – part time agreements
 - ii. Clause 13.1 – casual loading
 - iii. Clause 20.1 – minimum rates of pay
 - iv. Clause 33.2(a) – Monday to Friday overtime

- v. Clause 33.2(b) – Saturday overtime
 - vi. Clause 33.2(c) – Sunday overtime
 - vii. Clause 34.1 - penalty rates for:
 - i) Saturday
 - ii) Sunday
 - iii) Public holiday
 - viii. Clause 35.2 - annual leave loading.
- b) Section 44 of the FW Act by failing to comply with the following provisions of the National Employment Standards (NES):
- i. section 87(2) of the FW Act, by failing to accrue leave for employees with an entitlement to paid annual leave
 - ii. section 90(1) of the FW Act by failing to pay employees for annual leave taken during employment
 - iii. section 90(2) of the FW Act by failing to pay accrued untaken annual leave entitlements on termination of employment
 - iv. section 535(1) of the FW Act by failing to make and keep records of hours worked as prescribed by FW Regulation 3.33(2)
 - v. section 536(1) of the FW Act by failing to issue employees with pay slips within one working day of paying an amount to an employee.

Rectification of contraventions

9. The underpayments determined by the FWO to have arisen, as a result of the contraventions, totalled \$22,313.63 (gross). On 27 February 2019 Touchwood rectified the contraventions by making back-payments to the 17 employees listed in Attachment A.

Involvement of the Director/ Manager

10. Ms Huynh admits and agrees that:
- a) she has been a director of Cafe Touchwood Pty Ltd since December 2014.
 - b) because of her role as Director, she was ultimately responsible for the overall direction, management and supervision of the operations at Touchwood in relation to engaging employees, setting and adjusting pay rates and determining the wages and conditions of employment.
 - c) because of the matters set out in subclause (a) and (b), she was responsible in a practical sense for ensuring that Touchwood complied with its legal obligations.

COMMENCEMENT OF ENFORCEABLE UNDERTAKING

11. This Undertaking comes into effect when:
- a) the Undertaking is executed by Touchwood and Ms Huynh.
 - b) the FWO accepts the Undertaking so executed.

ENFORCEABLE UNDERTAKING

12. Upon the execution of this Undertaking and for the purposes of section 715 of the FW Act, Touchwood and Ms Huynh, undertake the following:

FWO My account registration

13. Within 21 days of the execution of this Undertaking:
- a) register with the FWO My account portal at www.fairwork.gov.au/register and fully complete the My account profile, including information about the business and award/agreement coverage, through this portal.
 - b) using the FWO Pay Calculator, calculate relevant minimum pay rates (and penalty rates where necessary) and save these calculations to your My account; provide to the FWO the My account Customer Registration Number (CRN).
14. Within 60 days of the execution of the Undertaking, at a mutually agreed time and location, demonstrate to an officer of the FWO, knowledge of the use of My Account, including saving information within My Account from the website and relevant FWO online tools. You must also demonstrate how your use of this saved information will contribute toward your compliance with workplace obligations including payment to employees of the correct minimum pay rates and entitlements including; penalty rates, overtime and leave entitlements.
15. Within 28 days of the execution of the Undertaking, subscribe to the FWO's subscription service and provide evidence to the FWO of the subscription:
- a) subscribe to the FWO's Subscribe to email updates function available at <http://www.fairwork.gov.au/website-information/staying-up-to-date/subscribe-to-email-updates>.
 - b) choose the relevant State/s and industry, selecting information updates on the following options:
 - i. pay rates and entitlements
 - ii. new products and resources
 - iii. about us and our work
 - iv. updates in my industry
 - v. tailored information that's relevant to me.

Workplace relations systems and processes

16. Ensure that Touchwood complies at all times and in all respects with the FW Act, the FW Regulations and the Restaurant Award;
17. Provide the FWO, within 60 days of the date of execution of this Undertaking, details of systems and processes already in place or to be implemented to comply with paragraph (16) above. Without limitation, such systems and processes relating to:
- a) ensuring employees receive the correct minimum rates of pay and entitlements

including but not limited to penalty rates and overtime rates

- b) ensuring that full time and part time employees are receiving annual leave and personal leave entitlements
- c) ensuring part time agreements are made and maintained
- d) issuing payslips to employees within one (1) working day of payment
- e) keeping accurate and complete records to ensure employees receive their correct wages and entitlements.

Workplace relations training

- 18. Within 90 days of the execution of this Undertaking ensure that all persons responsible for payroll human resources and on-site management (including but not limited to café managers, supervisors and senior kitchen staff) complete all education courses designed for employers available on the FWOs online learning centre available at www.fairwork.gov.au/how-we-will-help/online and provide certificates of completion to the FWO.
- 19. For each person required to complete the training, enter all of the required information in Attachment D and provide copies of the completed attachment to the FWO within 90 days of the execution of this Undertaking.
- 20. If any person, as well as, or instead of Ms Huynh, takes on responsibility for any human resources administrative functions including but not limited to; employee rosters, timesheets, wage processing and payment and the issuing of pay slips is during the period of this Undertaking, Touchwood and Ms Huynh are required to notify the FWO of the name of this person. The person is required to complete training in accordance with subclause (19) above, within 28 days of appointment.
- 21. For any persons taking on any of the functions or responsibilities in clause 18 complete Attachment D and submit to the FWO within 28 days of taking responsibility for these functions.

Apology

- 22. Send a letter of apology (**Apology Letter**) to the Employees listed in Attachment A in the form of Attachment C to this Undertaking, and provide copies to the FWO within 14 days of the execution of this Undertaking.

Audit Activity and Compliance Review

- 23. Engage an external accounting professional (for example a Certified Practising Accountant) or an employment law specialist, at Touchwood's own expense, to perform audits of Touchwood's compliance with all Commonwealth workplace laws and instruments (**Audits**), including the Restaurant Award and the FW Act.
- 24. The Audits will include the pay and conditions of all employees and meet the following requirements:

- a) 30 days prior to the Audit due date/s, as specified below, Touchwood will provide for the FWO's approval, details of the methodology to be used to conduct the Audit.
 - b) The Audit will be conducted for all full pay periods where any part of the period falls within the following dates:
 - i. 30 April 2018 to 31 March 2019 – audit period to be finalised by 31 July 2019
 - ii. 1 September 2019 to 30 September 2019 – audit report to be finalised and provided to the FWO by 30 November 2019
 - iii. 1 January 2020 to 31 January 2020 – audit report to be finalised and provided to the FWO by 28 March 2020.
25. In the event an Audit discloses contraventions of any applicable Commonwealth workplace law and/or instrument, Touchwood will rectify all such contraventions within 14 days of each of the finalisation dates specified in subclause 24(b) above, including rectification of any and all underpayments to employees via Electronic Funds Transfer, and provide evidence of rectification to the FWO.
26. If requested, Touchwood will provide the FWO with all records and documents used to conduct the audit, including any working documents, within 7 days of such a request.
27. If any employee(s) identified as having underpayments owing to them cannot be located, within 60 days of each of the finalisation dates specified in subclause 24(b) above, Touchwood will make application to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act to pay money into the Commonwealth Revenue Fund (CRF). Touchwood will complete the required documents supplied by the FWO. Any employees that have underpayments paid into the CRF can contact the FWO to claim the money.

Single Touch Payroll

28. Within 30 days of the execution of this Undertaking, Touchwood will ensure compliance with the Australian Taxation Office (ATO) Single Touch Payroll reporting requirements by:
- a) updating current payroll software to implement Single Touch Payroll reporting for all employees.
 - b) provide evidence to the FWO that Single Touch Payroll reporting has been implemented and is compliant with ATO requirements.

Matters notified to the FWO

29. Where the FWO receives a request for assistance from a current or former Touchwood employee regarding non-compliance with the relevant award or legislative requirement the FWO will, at its discretion and subject to the below clause regarding serious non-compliance, notify Touchwood and provide relevant details.
30. Where a matter is notified to Touchwood, Ms Huynh and Touchwood will undertake to

fully co-operate with the FWO to ensure compliance. This includes:

- a) touchwood determining an appropriate outcome for the matter within 45 days of notification.
- b) touchwood advising the FWO of its determination and actions in relation to the matter including:
 - i. the reasons for the determination and any compliance issues identified
 - ii. the details of any underpayments and amounts rectified
 - iii. steps taken to address compliance issues identified, including for any similarly affected employees
 - iv. if any matter remains unresolved, the steps taken by Touchwood to facilitate the resolution of any such matter.
- c) The FWO reserves the right to investigate any allegations.
- d) The FWO may advise Touchwood of any active investigations the FWO is undertaking. If this is the case Touchwood undertakes to:
 - i. provide all requested employment records and other documentation to the FWO relevant to the investigation
 - ii. participate fully in any subsequent requests for information relevant to the investigation
 - iii. fully co-operate in FWO's investigative processes.

Workplace Notice

- 31. Within 30 days of the execution of this Undertaking, display a notice in the workplace, in the form of Attachment B (**Workplace Notice**) and provide the FWO with photographic evidence of its display and the location of the notice in Touchwood Cafe.
- 32. Ensure that the Workplace Notice is printed in at least A3 size and is clearly displayed:
 - a) in locations to which all employees who work at Touchwood have access
 - b) in a manner which is reasonably capable of drawing the attention of all employees to the Workplace Notice (for example, by placement on a staff noticeboard
 - c) for a period of 30 continuous days
 - d) at the end of the period of 30 days provide confirmation to the FWO that the Workplace Notice has been continuously displayed for the required period.

Website Notices

- 33. Touchwood will maintain its Website for at least six months after the execution of this Undertaking and place a notice (**Website Notice**) on the front page of the website within 30 days of, but not prior to the FWO publishing a Media Release on its website which will:
 - a) be in the form of the Public Notice set out at Attachment B
 - b) be displayed in at least size 10 font on the home page

- c) remain on the website for a period of six months
- d) provide evidence of the placement of the Website Notice to the FWO on the date it is published.

Access to the Award and NES

34. Touchwood will, within 14 days of this Undertaking:
- a) Ensure that copies of the applicable Award and the NES are available to all employees to whom they apply in accordance with Clause 5 of the Award. These will be made available either:
 - i. on a noticeboard which is conveniently located at or near the workplace or
 - ii. through electronic means.
 - b) Notify the FWO within 30 days of how Touchwood has made the Award and NES available to employees.

Record Keeping

35. Within 30 days of the execution of this Undertaking, provide to the FWO a copy of time and wage records and payslips for one employee for the first full pay period following the execution of this Undertaking. Such records are to comply with Commonwealth workplace laws.

Employee reporting

36. Every six months from the date of execution of this Undertaking, for a period of three years Touchwood will:
- a) report to the FWO on all employees that worked for the Touchwood during the previous six months. Touchwood will complete the signed declaration at Attachment E that includes the employee names, start dates and finish dates (where relevant), the status of employment and the classification under the Award.
 - b) make a declaration in Attachment E that employees have received their minimum entitlements under the FW Act and the Restaurant Award that Touchwood has made superannuation payments on behalf of the employee and has submitted PAYG tax withholding to the ATO.
 - c) touchwood may be liable to a civil remedy for giving false or misleading information or producing false or misleading documents.

Contribution Payment

37. Within 90 days of the execution of this Undertaking, make a payment of \$4,000 to the CRF and provide evidence of the payment to FWO. Touchwood will complete the documents required to make this payment as supplied by the FWO.

Reporting

38. Touchwood will notify the FWO of any changes of circumstances that could potentially impact on Touchwood's ability to comply with the undertakings contained in this Enforceable Undertaking, as soon as it becomes aware of such circumstances. Such circumstances shall include but not be limited to:
- a) sale or potential sale of the business, or part of the business
 - b) change of or change in details of company directors, or other officeholder positions
 - c) change in engagement of workers, for example engaging contractors, labour hire or family members in lieu of employees
 - d) Touchwood or its Directors opening any new establishments or businesses, or acquiring any existing businesses establishments, whether alone or in partnership with another entity
 - e) ceasing or an expectation of ceasing to trade
 - f) business going in to administration or liquidation.
 - g) in the event that there are any events or circumstances described in 15 above, required to be reported to the FWO, Touchwood and Ms Huynh will provide any documentation or other evidence requested by the FWO to confirm the event/s that have transpired.

No Inconsistent Statements

39. Touchwood and Ms Huynh must not, and must ensure that each of their officers, employees and agents, do not make any statement, orally or in writing or otherwise imply anything that is inconsistent with admission or acknowledgement contained in this agreement.

ACKNOWLEDGEMENTS

40. Touchwood and Ms Huynh acknowledge 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 rely upon the admissions made by Touchwood set out in paragraph 8 above in respect of decision making concerning any future non-compliance with Touchwood's workplace relations

obligations.

- v. 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.
- vi. consistent with section 715(3) of the FW Act, Touchwood and Ms Huynh may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.
- vii. if Touchwood contravenes any of the terms of this Enforceable Undertaking:
- viii. 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.
- ix. this Enforceable Undertaking may be provided to the Court as evidence of the admissions made by Touchwood and Ms Huynh in paragraphs 8 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by Café Touchwood Pty Ltd in accordance with section 127(1) of the Corporations Act 2001:



(Signature of director)



(Signature of director/company secretary)

Cindy Huynh

ANH HUYNH

(Name of director/company secretary)


6-6-2019 .

(Date)

6-6-2019 .


(Date)

in the presence of:



(Signature of witness)

in the presence of:



(Signature of witness)


PETER HUYNH

(Name of witness)

NGO LE

(Name of witness)

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




Lynda McAlary-Smith

7/6/19

(Date)

Delegate for the FAIR WORK OMBUDSMAN

In the presence of:

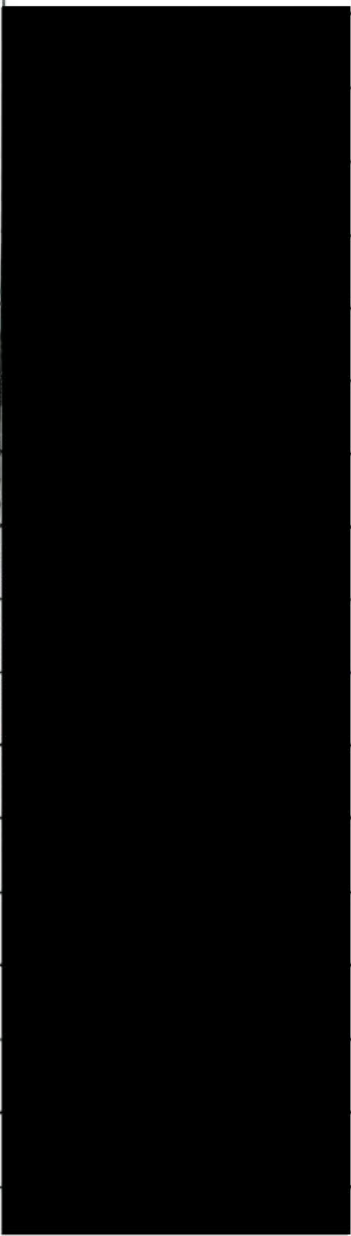


(Signature of witness)

Tina Debeuc

(Name of Witness)

Attachment A - Underpaid Employees

Employee	Total underpayment (gross)	Date Paid
	\$2,234.71	27 February 2019
	\$2,513.42	27 February 2019
	\$1,962.52	27 February 2019
	\$1,121.69	27 February 2019
	\$2,013.56	27 February 2019
	\$1,014.91	27 February 2019
	\$347.70	27 February 2019
	\$378.40	27 February 2019
	\$242.54	27 February 2019
	\$3,852.77	27 February 2019
	\$1,526.48	27 February 2019
	\$686.59	27 February 2019
	\$425.23	27 February 2019
	\$484.07	27 February 2019
	\$853.30	27 February 2019
	\$1,834.26	27 February 2019
	\$821.48	27 February 2019

Attachment B – Form of Public Notice, Workplace Notice and Website Notice

Contravention of Fair Work Act by CAFÉ TOUCHWOOD PTY LTD

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that Café Touchwood Pty Ltd trading as Café Touchwood (Touchwood) has contravened the *Fair Work Act 2009* and the *Restaurant Industry Award 2010* by:

- Failing to create part time employment agreements
- Failing to pay the correct rate of pay
- Failing to pay casual loading
- Failing to pay penalty rates
- Failing to pay overtime rates
- Failing to pay annual leave on termination
- Failing to pay annual leave loading on termination
- Failing to keep records of hours worked
- Failing to issue pay slips to all employees.

Touchwood has formally admitted to FWO that these contraventions occurred and has entered into an Enforceable Undertaking with the FWO (available at www.fairwork.gov.au) committing to a number of measures to remedy the contraventions, including by rectifying the underpayments for a sample of employees during an audit period, committing to workplace training and making a contrition payment.

Touchwood expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Touchwood gives a commitment that such conduct will not occur again and that it will comply with all requirements of the Commonwealth workplace relations laws in the future.

Use the following passage in Public Notices

If you worked for Touchwood and have queries or questions relating to your employment, please contact Ms Huynh, Director of Café Touchwood Pty Ltd at [REDACTED]. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.

Attachment C – Letter of Apology

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

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

- Failing to create part time employment agreements
- Failing to pay the correct rate of pay
- Failing to pay casual loading
- Failing to pay penalty rates
- Failing to pay overtime rates
- Failing to pay annual leave on termination
- Failing to pay annual leave loading on termination
- Failing to keep records of hours worked
- Failing to issue pay slips to all employees.

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

Café Touchwood Pty Ltd is taking steps to remedy the contraventions, including by rectifying the amount that you have been underpaid, paying compensation of \$[insert amount] to you. You will/have receive/d this payment on [insert date] and will be provided with a payment advice regarding the payment.

Café Touchwood Pty Ltd have formally admitted to the FWO that Café Touchwood Pty Ltd 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 from the FWO website 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.

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

Should you have any questions, please contact [party to include contact details].

Yours sincerely

Cindy Huynh

TRAINING RESOURCES UTILISED FROM THE FAIR WORK OMBUDSMAN WEBSITE

I, _____ (Enter name and position in the organisation)

have undertaken the following tools:

Completed online courses* including:

- Difficult conversations in the workplace – manager course date _____ completed: _____

- Hiring employees date completed: _____
- Managing employees date completed: _____
- Managing performance date completed: _____
- Diversity and discrimination date completed: _____
- Workplace flexibility date completed: _____
- Record-keeping and pay slips date completed: _____

** Please provide printout of the Statement/Certificate of Attainment for each course completed*

Viewed Videos Including:

- Welcome to fairwork.gov.au date completed: _____
- Finding information for your industry date completed: _____
- My account date completed: _____
- Introduction to the Pay and Conditions Tool date completed: _____
- PACT – Award classifications date completed: _____

- PACT – Pay summary _____ date completed: _____
- PACT – Penalty rates _____ date completed: _____
- PACT – Allowances _____ date completed: _____
- PACT – Award Coverage _____ date completed: _____

Read Factsheets including:

- Role of the Fair Work Ombudsman _____ date completed: _____
- Contractors and employees – what's the difference? _____ date completed: _____

Read information on the following:

- ***Pay Overview***

- o Minimum wages _____ Page Ref No. _____ date _____ completed: _____
- o Penalty rates & allowances _____ Page Ref No. _____ date _____ completed: _____

- ***Leave Overview***

- o Annual leave _____ Page Ref No. _____ date _____ completed: _____
- o Sick & carer's leave _____ Page Ref No. _____ date _____ completed: _____

- ***Ending Employment Overview***

- o Notice & final pay _____ Page Ref No. _____ date _____ completed: _____

o Unfair dismissal

Page Ref No. _____

date

completed:

• ***Employee Entitlements Overview***

o Types of employees

Page Ref No. _____

date

completed:

o National Employment Standards Page Ref No. _____

date

completed:

• ***Awards & Agreements Overview***

o Awards

Page Ref No. _____

date

completed:

• Date and signature: _____

Employee Reporting

[illegible]

I, _____ declare that all employees are receiving at least their minimum entitlements under the *Fair Work Act 2009*, and the *Restaurant Industry Award 2010*, Superannuation payments have been made on behalf of all employees and PAYG tax withholding has been submitted to the Australian Taxation Office.

In providing this information, I confirm that the information is true and correct.

I am aware that providing false or misleading information is a contravention of section 718A of the *Fair Work Act 2009* and is a civil remedy with a maximum penalty of 60 penalty units for an individual and 300 penalty units for a body corporate.

Providing false or misleading information is also a criminal offense under section 137.1 and 137.2 of the *Criminal Code Act 1995*, which could result in imprisonment for 12 months.

Name and position of person providing the information: _____

Signature of person providing information: _____

Date: _____

Name of witness: _____

Signature of Witness: _____

Date: _____