



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

(as represented by the Office of the Fair Work

Ombudsman) and

Activ Foundation Inc. (ABN 11 553 592 765)

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 Activ Foundation Inc, ABN 11 553 592 765 of 327 Cambridge Street, Wembley Western Australia 6014 (**Activ**).

BACKGROUND:

2. Activ is a not for profit disability services provider supporting people living with intellectual disability within Western Australia. Activ is registered as an Australian Disability Enterprise (**ADE**), employing people with a disability (**supported employees**) in a workplace environment, which ensures those supported employees are provided with the assistance, supervision and support that they require to perform their role. This level of support is distinct from mainstream workplaces, in that without these services, these supported employees would find it more difficult to secure and sustain employment.
3. The supported employees are engaged in work such as timber products manufacturing, property maintenance, landscaping and product packaging in worksites across Western Australia. Currently, Activ employs approximately 1000 supported employees across these industries.
4. On 11 December 2017, Activ contacted the FWO to self-report suspected underpayments of their supported employees. Activ's supported employees are covered by the *Activ Foundation Inc Supported Employees Enterprise Bargaining Agreement 2014* (**2014 Agreement**) and its predecessor the *Activ Foundation Inc. Australian Disability Enterprise, Enterprise Agreement 2009-2013* (**2009 Agreement**) which are both underpinned by the *Supported Employment Services Award 2010* (**SES Award**).
5. In their self-disclosure, Activ outlined that they believed underpayments have occurred due to their use of a customised wage assessment tool (**WAT**). WATs are used to assess an employee's (reduced) capacity for work, usually expressed as a percentage value or wage level which is then calculated against the relevant minimum wage to determine the applicable rate of pay.
6. The SES Award provides for a list of approved WATs in clause 14.4(b). In 2002, Activ purchased the WAT listed in clause 14.4(b)(vi), Greenacres Association Competency

Based Wages System (**Greenacres Tool**) and made modifications to the tool to ensure it could be used and cover all of Activ's supported employees and business operations. The varied tool is known as the Activ Competency Based Wages Assessment System (**ACBWAS**) and was ratified in Activ's current 2014 Agreement and its predecessor the 2009 Agreement.

7. It is the variation between the Greenacres Tool and the ACBWAS that caused an underpayment of wages, where supported employees assessed under ACBWAS received a lower percentage of capacity than if assessed under the Greenacres Tool. The ACBWAS also created an additional 'Level F' above the Greenacres 'Level E' which is inconsistent with the SES Award. The Level F supported employees would traditionally be assessed under the WAT outlined in clause 14.4(b)(i), the Supported Wage System.
8. Activ further disclosed that they have identified underpayments in respect of superannuation obligations outlined in their 2014 Agreement. An obligation existed for supported employees who earned less than the superannuation guarantee (\$450 per month), that contributions must be made at either 3% of ordinary time earnings or \$6 per week whichever is greater. Activ also reviewed their superannuation payments and disclosed to the FWO they had failed to pay their supported employees superannuation in accordance with the manner outlined above, but had paid supported employee \$7.01 per fortnight instead of the required \$6 per week.
9. Activ committed to re-assessing all their supported employees using the Greenacres Tool and the Supported Wage System (for Level F supported employees) from 12 December 2011 to 12 December 2017 and determined supported employees were underpaid an average of \$2,000 per annum across this six (6) year period taking into account length of service over the six (6) year period.
 - a) An underpayment of \$13 469 943.71 for 1,694 current and former supported employees had been calculated;
 - b) \$12,562,113.06 had been back paid to supported employees, inclusive of superannuation, growth applied on superannuation and interest applied to the underpayments;
 - c) Taking into account length of service over the six (6) year period, supported employees were underpaid an average of \$2,000 per annum;
 - d) To date, there remains \$907,830.65 to be paid to 382 supported employees;
 - e) The underpayments have also resulted in associated underpayments in

superannuation contributions (in addition to the contravention outlined in paragraph 8).

10. The self-audit also identified that the supported employees' capacity assessments were calculated against the applicable Grade 1 rate of pay in the SES Award, and not against other grades that may be more commensurate with the nature of the duties performed by an employee, such as Grades 2 to 7 as defined in Schedule B of the SES Award.
11. This re-assessment was completed and a report submitted to the FWO on 11 October 2018 which included details of the underpayment amount and the actions taken by Activ in response to the underpayments.
12. On 20 September 2019, Activ contacted the FWO to formally self-report further suspected under and over payments of their supported employees that were identified in an internal review. The underpayments affected 181 current supported employees and were calculated at a total of \$227,600.11. The total amount has been back paid to all impacted supported employees, inclusive of superannuation, with growth applied to superannuation and interest applied to the underpayments.
13. In this self-disclosure, Activ outlined that they believed these under and overpayments have occurred due to an error, which led to some supported employees not being paid for their correct hours of work.
14. The FWO has determined, and Activ admits, that Activ contravened section 50 of the FW Act, relating to the contravention of an enterprise agreement by:
 - a) Failing to meet the base rates of pay in the underpinning Modern Award as required by section 206 of the FW Act;
 - b) Failing to pay some supported employees for all of their hours of work as required by clause 7 of the 2014 Agreement; and
 - c) Failing to make the minimum superannuation contributions required by clause 19.3 of the 2014 Agreement.
15. The underpayments arising as a result of the contraventions total \$13,697,543.80 owing to 1,695 supported employees of which \$12,789,713.10 has been repaid, with amounts still to be paid to former employees who Activ has been unable to contact.
16. Prior to execution of this Undertaking, Activ has taken of its own volition the following remedial actions to rectify the underpayments:
 - a) Contacted all impacted supported employees to apologise;

- b) Processed back pay for each underpayment amount;
- c) Applied interest on the underpayment amounts, calculated at the average cash rate of at least 4%;
- d) Applied interest on the associated superannuation contribution underpayments, calculated at the average growth rate of the top ten performing superfunds as identified on www.superrating.com.au;
- e) Completed an update of leave accruals from September 2019 in relation to the error noted in paragraph 12 above.
- f) Confirmed with all impacted supported employees that Activ will not seek reimbursement of overpayments or correction of over accrued leave balances.
- g) Engaged KPMG in both issues to assist with quality assurance measures such as setting up templates to calculate historical underpayments, review wage assessment data against original hard copy files, sample checks to ensure amounts paid are correct and comparison of amounts paid against payroll data and bank statements showing transfer of funds;
- h) Communicated and announced the under and overpayments through a number of channels including face to face presentations at all worksites, phone calls, information packs and FAQs sent to supported employees, letters sent to affected supported employees and their Guardians/Trustees at their most recent address, as well as intranet and website updates and announcements were made in Activ's newsletter;
- i) Offered to hold, and held, in-person meetings with all affected supported employees to discuss their back pay or change in working hours;
- j) Put in place a dedicated helpline via phone and email from December 2017 to June 2018 and supported employees, staff, families and the public were invited to ask questions either through this helpline or at site level. A request was also made for anyone with contact information of former supported employees that had been uncontactable to date and to encourage them to contact Activ in order to claim back pay;
- k) Liaised with the Department of Human Services via Centrelink about back payments, providing appropriate documents to ensure that the back payments would not adversely impact social security payments;
- l) Separately reported to the Australian Taxation Office about superannuation contribution underpayments;

- m) Given consideration as to whether it is appropriate to make an application for the 2014 Agreement (and use of the ACBWAS) to be terminated and, if the 2014 Agreement is terminated, intend to use the SES Award, the Greenacres Tool and the Supported Wage System as their relevant industrial agreement and WAT; and
- n) Facilitated Activ's CEO, Danielle Newport appearing on radio station 6PR Mornings with Gareth Parker on 10 April 2018 to explain how Activ has addressed the underpayments and to raise awareness with former supported employees who remain to be back paid.

COMMENCEMENT OF ENFORCEABLE UNDERTAKING

17. This Undertaking comes into effect when:
- a) The Undertaking is executed by Activ Foundation Inc; and
 - b) The FWO accepts the Undertaking so executed.

ENFORCEABLE UNDERTAKING

18. Upon the execution of this Undertaking and for the purposes of section 715 of the FW Act, Activ Foundation Inc. undertakes the following in respect of its supported employees:

Rectify remaining underpayments

- a) Within 90 days of the execution of this Undertaking, back pay the remaining 382 supported employees owed the total amount of 907,830.65 and provide evidence to the FWO that the payments were made by the same date;
- b) If any of the supported employees cannot be located, after 90 days of the execution of this Undertaking, 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. Activ Foundation will complete the required documents supplied by the FWO.

FWO My account registration

- c) Within 21 days of the execution of this Undertaking:
 - i) register a minimum of 3 appropriate staff members with the FWO My account portal at <https://www.fairwork.gov.au/my->

- account/registerpage.aspx and fully complete the My account profile, including information about the business and award/agreement coverage, through this portal;
- ii) using the FWO Pay Calculator, calculate relevant minimum pay rates (and penalty rates, where necessary) for those supported employees for whom Activ uses the supported wage system as their wage assessment tool and save these calculations to your My account; and
 - iii) provide to the FWO the 'My account' Customer Registration Number (CRN);
- d) Within 28 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. At least one staff member must also demonstrate how Activ's use of this saved information will contribute toward Activ's compliance with workplace obligations including payment to supported employees of the correct minimum pay rates;
- e) Within 21 days of the execution of the Undertaking, a minimum of three appropriate staff members will subscribe to the FWO's subscription service and provide evidence to the FWO of the subscription:
- i) 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>;
 - ii) Choose the relevant State/s and industry, selecting information updates on the following options in relation to supported employees:
 - i. pay rates and entitlements;
 - ii. new products and resources;
 - iii. about us and our work;
 - iv. updates in my industry; and
 - v. tailored information that's relevant to me.

Workplace relations systems and processes

- f) Ensure that it complies at all times and in all respects with the FW Act, the Fair Work Regulations 2009 (Cth) and the 2014 Agreement or, if the 2014 Agreement is terminated, the SES Award;

- g) Provide the FWO, within 90 days of the date of execution of this Undertaking, a report outlining processes already in place or to be implemented to comply with paragraph (f) above for the supported employees. This report will outline how Activ is:
- i) Ensuring supported employees' capacity assessments are accurately assessed using the Greenacres Tool or Supported Wage System and calculated against the correct classification outlined in Schedule B of the SES Award;
 - ii) Ensuring supported employees are paid the correct amount of superannuation, in accordance with clause 19.3 of the 2014 Agreement (or clause 19.5 of the SES Award if the 2014 Agreement is terminated); and
 - iii) Ensuring supported employees receive the correct minimum rates of pay and entitlements, such as penalty rates and overtime rates.

Workplace relations training

- h) Within 120 days of the execution of this Undertaking, organise and ensure training is provided to a minimum of 25 persons who have responsibility for human resource, recruitment, and payroll functions as applicable to Activ's supported employees (**Training**);
- i) Ensure the Training relates to compliance with applicable Commonwealth of Australia workplace laws and instruments, including but not limited to the rights and responsibilities of employers of supported employees under the FW Act and the SES Award;
- j) Ensure the Training is conducted by a workplace trainer, such person or organisation to be approved by the FWO and paid for by Activ;
- k) Provide the training materials to be used in the Training to the FWO no later than 14 days before the Training is to be conducted;
- l) Provide evidence of attendance at the Training to the FWO within 14 days of the Training being provided (including the name and position of all attendees and the date on which the training was attended);
- m) Ensure that all persons responsible for management, payroll and human resources functions for supported employees complete the educational activities on the FWO website, as set out in Attachment C;

- n) For each person required to complete the education activities, enter all of the required information in Attachment C and provide copies of the completed attachment to the FWO within 180 days of the execution of this Undertaking;
- o) For a period of 3 years from the execution of this Undertaking, ensure that the educational activities are completed by any new or existing staff or contractors who, after the commencement of this Undertaking, acquire managerial, payroll and human resources functions or responsibilities for supported employees and accredited Greenacres assessors; and
- p) For any persons taking on any of these functions, complete Attachment C and submit to the FWO within 28 days of taking responsibility for these functions.

FWO Online Training

- q) Within 180 days of the execution of this Undertaking ensure that a minimum of 50 persons responsible for management, payroll and human resources functions as applicable to Activ's supported employees complete all education courses designed for employers available on the FWO online learning centre via <http://www.fairwork.gov.au/how-we-will-help/online-training> and provide certificates of completion to the FWO.

Dispute Resolution Procedure for Capacity Assessments under Greenacres Tool

- r) Maintain a clear and easily accessible process for supported employees and/or their nominated representative/family member/guardian(s)/trustee(s) to dispute their capacity/wage level assessment under the Greenacres Tool. The appeal process must include:
 - i) The opportunity for the supported employee to meet with Activ's assessors to outline their dispute and Activ must outline the basis for the current assessment;
 - ii) Formally request for a review of the assessment by an internal specialist;
 - iii) Be resolved within 60 days of the employee raising the dispute; and
 - iv) Report to the FWO of any such appeal process and the outcome within 28 days of completion of the appeal process.

Wage Level Audits of Greenacres Tool Assessments¹

- s) Cause to have performed by an internal specialist of the Greenacres Tool (**Assessor**) an audit of current supported employees' wage level (**Wage Level Audits**) using the most recent version of the Greenacres Tool purchased by Activ from the Greenacres Association;
- t) The Wage Level Audits require the capacity assessments by the Assessor of 15% of Activ's supported employees to include a range of classifications and employment types (full time, part time and casual (if any) employees), and include supported employees from a range of sites;
- u) Will ensure that the following requirements are met:
 - i) 21 days prior to the Audit due date/s, as specified below, Activ will provide, for the FWO's approval, the list of supported employees intended to be re-assessed and:
 - (I) Review 1 is to be finalised and a report on the outcome of the Wage Level Audit is to be provided to the FWO by 31 August 2020;
 - (II) Review 2 is to be finalised and a report on the outcome of the Wage Level Audit is to be provided to the FWO by 31 August 2021; and
 - (III) Review 3 is to be finalised and a report on the outcome of the Wage Level Audit is to be provided to the FWO by 31 August 2022;
- v) The Wage Level Audits are to be finalised and a report on the outcomes of the audit is to be provided to the FWO by the dates outlined above. The report must include details of Activ's assessment of the wage level assessment and any changes/variations to the relevant wage level;
- w) In the event a Wage Level Audit discloses variances in the applicable capacity assessment and relevant wage level, rectify any underpayments arising out of the assessment within 21 days of each of the finalisation dates specified above, including rectification of any and all underpayments to supported employees and provide evidence of rectification to the FWO;

¹ As part of its four-year review of the SES Award, the Fair Work Commission has proposed that existing wage assessment tools (including the Greenacres Tool) cease to operate on 1 January 2022 and that a new wage structure will come into operation on that date. If the proposed determination becomes the Commission's final determination, then on and from the date in the final determination, Activ will use the new wages structure in the SES Award in place of the Greenacres Tool.

- x) If requested, provide the FWO with all records and documents used to conduct the Wage Level Audit, including any working documents, within 14 days of such a request; and
- y) If any supported employee(s) identified as having underpayments owing to them cannot be located, within 60 days of each of the finalisation dates specified in paragraphs 18u)(i)(I) to (III) above, 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. Activ will complete the required documents supplied by the FWO.

Audit Activity

- z) Cause to have performed by an accounting professional (for example a Certified Practising Accountant), at Activ's expense, audits of Activ's compliance with all Commonwealth workplace laws and instruments (**Compliance Audits**) with respect to the supported employees who were the subjects of the Wage Level Audit. If at the time of the execution of this Undertaking, the 2014 Agreement is still in place then an audit will take place in relation to entitlements under the 2014 Agreement. If the SES Award is the industrial instrument after the execution of the Undertaking, the following clauses of the SES Award will form part of the Compliance Audit:
 - i) Clause 14.2 base rate of pay;
 - ii) Clause 10.5 Casual loadings;
 - iii) Clause 10.4 Part time agreements;
 - iv) Clause 21 Penalty and overtime rates of pay;
 - v) Clause 25 Public holidays;
 - vi) Schedule B correct classification level, with reference to the duties performed by the supported employees; and
 - vii) Clause 19.5 Minimum superannuation contributions;
- aa) The Compliance Audits will include the pay and conditions of 15% of supported employees, include two full pay periods, include a range of classifications and employment types (full time, part time and casual (if any) supported employees), and include supported employees from a range of sites. For the avoidance of doubt, the 15% of supported employees reviewed in the Compliance Audit will be the same employees reviewed in the Wage Level

Audit;

bb) The Compliance Audits will ensure that the following requirements are met:

- i) 21 days prior to the Compliance Audit due date/s, as specified below, Activ will provide for the FWO's approval, details of the methodology to be used to conduct the Compliance Audit; and:
 - (I) Compliance Audit 1 is to be finalised and a report on the outcome of the audit is to be provided to the FWO by 31 October 2020;
 - (II) Compliance Audit 2 is to be finalised and a report on the outcome of the audit is to be provided to the FWO by 31 October 2021; and
 - (III) Compliance Audit 3 is to be finalised and a report on the outcome of the audit is to be provided to the FWO by 31 October 2022.
- cc) Each Compliance Audit report must include details of Activ's compliance or non-compliance with the 2014 Agreement or, if the 2014 Agreement is terminated, the SES Award;
- dd) In the event a Compliance Audit discloses contraventions of any applicable Commonwealth workplace law and/or instruments, rectify all such contraventions within 14 days of each of the finalisation dates specified above, including rectification of any and all underpayments to supported employees and provide evidence of rectification to the FWO;
- ee) If requested, provide the FWO with all records and documents used to conduct the audit, including any working documents, within 28 days of such a request; and
- ff) If any supported employee(s) identified as having underpayments owing to them cannot be located, within 60 days of each of the finalisation dates specified in paragraphs 18bb)(i)(I) to (III) above, 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. Activ will complete the required documents supplied by the FWO.

Matters notified to the FWO

- gg) Where the FWO receives a request for assistance from Activ's supported employees or former supported employees 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 Activ and its officers and provide

relevant details;

hh) Where a matter is notified to Activ they will undertake to fully co-operate with the FWO to ensure compliance. This includes:

- i) Determining an appropriate outcome for the matter within 60 days of notification; and
- ii) Advising the FWO of their 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 supported employees; and
 - (IV) if any matter remains unresolved, the steps taken by Activ to facilitate the resolution of any such matter.

ii) The FWO reserves the right to investigate any allegations;

jj) The FWO may advise Activ of any active investigations the FWO is Undertaking. If this is the case Activ 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, including participation in any formal records of interview; and
- iii) Fully co-operate in FWO's investigative processes.

Public Notice

kk) Place a public notice (**Public Notice**) in the Saturday edition of *The West Australian* within 28 days of, but not prior to, the FWO publishing a Media Release on its website in respect of this Undertaking. The Public Notice must:

- i) Bear the name of Activ Foundation Inc;
- ii) Contain the logo (if any) of Activ Foundation Inc;
- iii) Appear within the first 5 pages of newspaper;
- iv) Be at least 10 cm x 8 cm;
- v) Contain wording in the form of Attachment A;

ll) Provide a copy of the Public Notice to the FWO within seven days of the publication of the Public Notice.

Workplace Notice

mm) Within 30 days of the execution of this Undertaking, cause to be displayed within all the supported workplace(s) controlled by Activ Foundation a notice in the form of Attachment B to this Undertaking (**Workplace Notice**) and provide photographic evidence of its display and the location of the notice in the workplace. The

Workplace Notice must be:

- i) Printed in at least A3 size and clearly displayed;
- ii) In a location to which all supported employees who work at Activ Foundation have access;
- iii) Displayed in a manner which is reasonably capable of drawing attention of all supported employees to the Workplace Notice (for example, by placement on a staff noticeboard); and
- iv) Displayed for a period of 28 continuous days; and

nn) At the end of the period of 28 days provide confirmation to the FWO that the Workplace Notice has been continuously displayed for the required period.

Website Notice

oo) Activ will place a prominent banner at the top of the home page of its public website, with this banner linking a page which sets out in full the statement in Attachment B and must do so within 28 days of, but not prior to the FWO publishing a Media Release on its website. The banner must be in at least 12 point bold font and the statement must be displayed in at least 10 point font. The banner and statement must remain on Activ's website for a period of six months from the date on which the FWO publishes the Media Release on its website. The banner must be provided to the FWO for approval 7 days prior to its publication on Activ's website;

pp) Activ will provide evidence of the placement of the Website Notice to the FWO on the date it is published.

Contribution Payment

qq) Within 28 days of the Commencement Date, make a contribution payment to the following organisations and provide evidence of the payment to the FWO:

- i) \$10 000.00 to People With Disabilities WA, of 23/2 Delhi Street West Perth 6005; and

- ii) \$10 000.00 to Citizen Advocacy Perth West, of 2A/28 Guthrie Street Osborne Park 6017.

Dedicated Helpline

- rr) For a period of 12 months after the commencement of this Undertaking, Activ will:
 - i) Maintain adequate resources to receive and address telephone and email enquiries from current or former supported employees regarding their wages, entitlements and capacity assessments;
 - ii) Nominate a telephone number and create a designated email address for enquiries to be directed; and
 - iii) Include details of the telephone number and email address referred to above in Attachment A.
- ss) On expiry of each six months during that 12 month period, Activ will provide a report to the FWO regarding enquiries received to the dedicated helpline.

Reporting

- tt) Activ will notify the FWO of any changes of circumstances that could potentially impact on Activ's ability to comply with the undertakings contained in this Undertaking, as soon as it becomes aware of such circumstances. Such circumstances shall include but not be limited to:
 - i) Sale or potential sale of the business, or part of the business that may impact supported employment services;
 - ii) Change of or change in details of Activ's directors, or other officeholder positions;
 - iii) Change in engagement of workers, for example engaging contractors, labour hire or family members in lieu of supported employees;
 - iv) Activ opening any new establishments or businesses, or acquiring any existing businesses establishments, whether alone or in partnership with another entity;
 - v) Activ ceasing to, or the directors forming an expectation that it will cease to, trade;
 - vi) Activ going into administration or liquidation;
 - vii) Any decision by Activ to use a different Wage Assessment Tool, or to make any variation to the Wage Assessment Tool used by Activ; and

- viii) Intention to create a new enterprise agreement for the Fair Work Commission's approval; and
- uu) In the event that there are any events or circumstances described above, required to be reported to the FWO, Activ will provide any documentation or other evidence requested by the FWO to confirm the event/s that have transpired.

Employee Reporting

- vv) Every 12 months at the time of Compliance Audit requirements (31 October), for a period of 3 years Activ will report to the FWO on all supported employees who worked for the Activ during the previous 12 months. Activ will complete the signed declaration at Attachment D that includes the employee names, start dates and finish dates (where relevant), the status of employment, the capacity assessment percentage and the classification under the Award. Activ will make a declaration in Attachment D that supported employees who were subject to the Wage Level Audit and Compliance Audit have received their minimum entitlements under the FW Act and 2014 Agreement or, if the 2014 Agreement is terminated, the SES Award and that Activ has made superannuation payments on behalf of the supported employee and has submitted PAYG tax withholding to the Australian Taxation Office;
- ww) Activ acknowledges that it may be liable to a civil remedy for giving false or misleading information or producing false or misleading documents.

No Inconsistent Statements

19. Activ:

- a) Must not; and
- b) Must ensure that each of its officers, employees or agents, do not make any statement, orally or in writing or otherwise imply anything that is inconsistent with the admission or acknowledgements contained in this Undertaking.

ACKNOWLEDGEMENTS

20. Activ 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 rely upon the admission made by Activ Foundation set out in paragraph 14 above in respect of decision making concerning any future non-compliance with Activ's workplace relations obligations;
- 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, Activ may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- d) If Activ contravenes any of the terms of this Enforceable 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

21. This Enforceable Undertaking may be provided to the Court as evidence of the admission made by Activ in paragraph 14 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by Activ Foundation Inc in accordance with Part 26 of its Constitution:

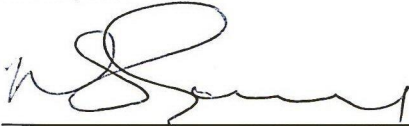


Danielle Newport
Chief Executive Officer

28 FEBRUARY 2020

(Date)

in the presence of:



(Signature of witness)

NEIL GUARD

(Name of witness) ^{BOARD} CHAIR

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



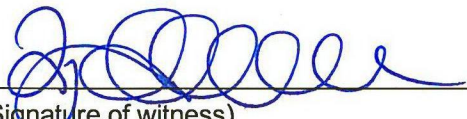
Michael Campbell
Deputy Fair Work Ombudsman - Operations

17/3/2020

(Date)

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:



(Signature of witness)

17/3/2020

(Name of Witness)

Attachment A – Form of Public Notice

Contravention of Fair Work Act by Activ Foundation Inc.

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) into a self-disclosure that Activ Foundation Inc. contravened the *Fair Work Act 2009 (FW Act)*, the *Activ Foundation Inc. Supported Employees Enterprise Bargaining Agreement 2014* in respect of its supported employees. The contravention concerned Section 50 of the *FW Act* relating to contraventions of an enterprise agreement. This included a failure to comply with section 206 of the *FW Act* relating to the base rates of pay in an enterprise agreement.

Activ Foundation Inc. has formally admitted to FWO that these contraventions occurred and has back paid supported employees, sending letters of apology to affected supported employees, Activ has also entered into an Enforceable Undertaking with the FWO (available at www.fairwork.gov.au) committing to a number of measures including regular audits and workplace training to ensure the contraventions will not be repeated; and will be making a total of \$20 000 donation to charities supporting persons with a disability.

Activ Foundation Inc. expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Activ Foundation Inc. 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.

If you worked for Activ Foundation Inc. and have queries or questions relating to your employment, please contact **<insert details of internal contact>**. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.

Attachment B – Form of Workplace and Website Notices

STATEMENT

A STATEMENT FROM ACTIV

Activ Foundation Inc. (Activ) is a not-for-profit, disability services provider supporting people living with intellectual disability in Western Australia.

Activ has made payments to a number of current and former supported employees in recent years, after internal reviews identified an oversight in the process of assessing wage rates and errors in rostering that led to supported employees being incorrectly paid.

By making these payment errors, Activ breached the Fair Work Act 2009 – the legislation that covers working arrangements and fairness at workplaces in Australia.

Activ disclosed the oversight to the Fair Work Ombudsman – the Government office that provides information and advice about workplace rights and rules in Australia. We then entered into an Enforceable Undertaking with the Fair Work Ombudsman, which requires external auditing, monitoring and workplace training to ensure that payment mistakes do not happen again in future.

We have put measures in place internally to prevent similar mistakes in future, and to ensure that all Activ supported employees are paid correctly.

Activ has apologised to all its supported employees and their families for these mistakes. We wish to take this opportunity to apologise again.

For impacted supported employees who currently work for Activ, wage levels have been updated and back payments have been made.

For supported employees who have left Activ, for whom Activ does not have current contact details, payments are being made as current contact details are received. Activ welcomes enquiries from former supported employees or their families about this matter.

General information about conditions of employment in Australia is available on the website of the Office of the Fair Work Ombudsman www.fairwork.gov.au or by phone on 13 13 94.

More information about Activ is available at www.activ.asn.au

Attachment C - 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***

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

- ***Leave Overview***

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

- ***Ending Employment Overview***

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

- ***Employee Entitlements Overview***

- Types of employees Page Ref No. _____ date completed: _____
- National Employment Standards Page Ref No. _____ date completed: _____

- ***Awards & Agreements Overview***

- Awards Page Ref No. _____ date completed: _____

- Date and signature: _____

Attachment D - Employee Reporting

During the period ___/___/___ to ___/___/___ the following supported employees were employed by Activ Foundation Inc:

[illegible]

I, _____ declare that all supported employees are receiving at least their minimum entitlements under the Fair Work Act 2009, and the *Supported Employment Services Award 2010*. Superannuation payments have been made on behalf of all supported 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.

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: _____