

## ENFORCEABLE UNDERTAKING

This undertaking is **given** by IBM Australia Ltd (ABN 79 000 024 733) and IBM Global Financing Australia Limited (ABN 27 002 955 571), and **accepted** by the Fair Work Ombudsman pursuant to section 715(2) of the *Fair Work Act 2009* in relation to the contraventions described in clauses 11 to 14 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:
  - (a) IBM Australia Ltd, ABN 79 000 024 733, 601 Pacific Highway, St Leonards NSW 2065 (**IBMA**); and
  - (b) IBM Global Financing Australia Limited, ABN 27 002 955 571, also of 601 Pacific Highway, St Leonards NSW 2065 (**IGF**) (IBMA and IGF are referred to as **IBM**).

### COMMENCEMENT

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

### BACKGROUND

3. IBM deliver a variety of information and technology services, products and software throughout Australia. Approximately 4,500 employees work for IBM.
4. On 2 May 2019, IBM notified the FWO that:
  - (a) they had become aware that: (i) IBM had failed to apply the relevant modern awards to parts of their workforce, (ii) instead of applying modern awards IBM had deployed a structure of annualised salary arrangements for their permanent workforce, (iii) the National Minimum Wage under the FW Act had been applied to their casual workforce, and (iv) as a result of not applying modern awards a significant number of employees had been underpaid; and
  - (b) IBM had commenced an assessment of amounts owed to current and former employees.
5. When they first contacted the FWO, IBM advised they had calculated that roughly \$6.6 million in underpayments was owed to approximately 1,300 current and former employees (\$7.9 million including superannuation contributions, interest and lost earnings on superannuation). However, the full assessment of amounts owed to

current and former employees was yet to be completed.

6. The underpayments mainly resulted from employees not being paid travel related entitlements under modern awards.
7. On 7 May 2019, IBM wrote to all current award-covered employees about their review, and their finding that certain policies did not fully align with modern awards.
8. As at the date of execution of this Undertaking, IBM have advised that they have commenced back paying employees, including paying interest on back payments, and have also made payments in relation to lost superannuation contributions, including in respect of lost earnings on superannuation contributions. The total amount owing to employees has yet to be determined. Specifically, IBM have notified the FWO that as at 1 February 2020 they have:
  - (a) rectified the underpayments to each of the employees referred to in column A of Schedule A to this Undertaking (**Schedule A Employees**) in the amounts referred to in column B of Schedule A;
  - (b) rectified any associated superannuation contributions as required by law to each of the Schedule A Employees, by paying any such required superannuation contributions to the chosen superannuation fund of the employee (including accounting for lost earnings on superannuation); and
  - (c) paid interest to each of the Schedule A Employees on the amount referred to in column B of Schedule A, in the sum referred to in column C of Schedule A, calculated using an interest rate of 5.5%.
9. IBM have advised the FWO that they continue to conduct their assessment and rectification program and remain committed to ensuring all impacted current and former employees are paid for any underpayment of workplace entitlements.
10. As a part of their ongoing rectification plan, IBM have identified the employees listed in Schedule B to this Undertaking (**Schedule B Employees**) to whom modern awards are likely to have applied but who may not have been paid by IBM in accordance with those awards. IBM have not yet quantified the underpayments to each of the Schedule B Employees. A number of employees are listed in both Schedule A and Schedule B.

## ADMISSIONS

11. The FWO has a reasonable belief, and IBMA admits, that IBMA contravened:

- (a) section 45 of the FW Act between 1 July 2012 and 31 January 2020 (**Relevant Period**) by failing to pay each of the Schedule A Employees identified in Part 1 the amount or amounts to which that employee was entitled to be paid under one or more of the following modern awards (together, the **Awards**) and clauses referred to in clauses (b) to (e) below, as identified in Schedule A to this Undertaking in relation to that employee;
- (b) *Business Equipment Award 2010* (clause references are as at 1 February 2020):
  - (i) Clause 13 - Casual employment;
  - (ii) Clause 20 - Classifications and adult rates;
  - (iii) Clause 22.1(b) - Motor vehicle allowances (Technical stream and Clerical stream);
  - (iv) Clause 22.1(c) - First aid allowance;
  - (v) Clause 22.1(d) - Meal allowance;
  - (vi) Clause 22.1(e) - Representation allowance;
  - (vii) Clause 26 – Superannuation;
  - (viii) Clause 27 – Ordinary hours of work and rostering;
  - (ix) Clause 28 - Special provisions for shiftworkers;
  - (x) Clause 29 – Meal breaks;
  - (xi) Clause 30.1 - Overtime rates;
  - (xii) Clause 30.3 - Work on a day off;
  - (xiii) Clause 30.4 – Call-back;
  - (xiv) Clause 30.5 - Stand-by;
  - (xv) Clause 30.7 – Technical service/support;
  - (xvi) Clause 31 - Annual leave; and
  - (xvii) Clause 34 – Public holidays;



- (c) *Professional Employees Award 2010* (all clause references are as at 1 February 2020):
  - (i) Clause 11.4 – Casual employment;
  - (ii) Clause 12.1 – Notice of termination or payment instead of notice by the employer;
  - (iii) Clause 15 - Minimum wages;
  - (iv) Clause 16.2 - Vehicle allowance;
  - (v) Clause 17 - Superannuation; and
  - (vi) Clause 19.2 - Annual leave loading;
- (d) *Banking, Finance and Insurance Industry Award 2020 (BFI Award)* (clause references are as at 1 February 2020):
  - (i) Clause 18.3(a) - First aid allowance;
  - (ii) Clause 18.3(b) – Stand-by and call-back allowances;
  - (iii) Clause 18.4(a) - Meal allowance;
  - (iv) Clause 18.4(b) - Travelling expenses;
  - (v) Clause 19 – Superannuation;
  - (vi) Clause 20 - Overtime;
  - (vii) Clause 22.3 - Annual leave loading; and
  - (viii) Clause 27.4 – Public holidays;
- (e) *Nurses Award 2010* (clause references are as at 1 February 2020):
  - (i) Clause 16.5 - Travelling, transport and fares;
  - (ii) Clause 31.1 - Quantum of annual leave; and
  - (iii) Clause 31.7 - Annual leave loading;
- (f) section 535 of the FW Act by failing to make and keep employee records as required by regulation 3.34 of the *Fair Work Regulations 2009 (FW Regulations)* in respect of certain of the Schedule A Employees identified in Part 1 for the Relevant Period; and

- (g) section 536 of the FW Act by failing to include on payslips all information required by regulation 3.46 of the FW Regulations in respect of the Schedule A employees identified in Part 1 for the Relevant Period who are engaged on a casual basis.
12. The FWO also has a reasonable belief, and IBMA admits, that IBMA contravened:
- (a) section 45 of the FW Act by failing to pay certain of the Schedule B Employees identified in Part 1 any amount or amounts to which such employees were entitled under one or more of the Awards during the Relevant Period;
  - (b) section 535 of the FW Act by failing to make and keep employee records as required by regulation 3.34 of the FW Regulations in respect of certain of the Schedule B Employees identified in Part 1 for the Relevant Period;
  - (c) section 536 of the FW Act by failing to include on payslips all information required by regulation 3.46 of the FW Regulations in respect of certain of the Schedule B employees identified in Part 1 for the Relevant Period who are engaged on a casual basis; and
  - (d) section 117 of the FW Act by failing to make payments in lieu of notice at the required rate in respect of certain Schedule A and Schedule B employees identified in Part 1 for the Relevant Period.
13. The FWO has a reasonable belief, and IGF admits, that IGF contravened:
- (a) section 45 of the FW Act during the Relevant Period by failing to pay each of the Schedule A Employees identified in Part 2 the amount or amounts to which each such employee was entitled to be paid under the BFI Award in respect of the clauses referred to in clause (b) below, as identified in Schedule A to this Undertaking in relation to that employee:
  - (b) BFI Award (clause references are as at 1 February 2020):
    - (i) Clause 18.3(a) - First aid allowance;
    - (ii) Clause 18.3(b) – Stand-by and call-back allowances;
    - (iii) Clause 18.4(a) - Meal allowance;
    - (iv) Clause 18.4(b) - Travelling expenses;

- (v) Clause 19 – Superannuation;
- (vi) Clause 20 - Overtime;
- (vii) Clause 22.3 - Annual leave loading; and
- (viii) Clause 27.4 – Public holidays.

14. The FWO also has a reasonable belief, and IGF also admits, that IGF contravened:
- (a) section 45 of the FW Act by failing to pay certain of the Schedule B Employees identified in Part 2 the amount or amounts to which such employees were entitled under the BFI Award during the Relevant Period; and
  - (b) section 535 of the FW Act by failing to make and keep employee records as required by regulation 3.34 of the FW Regulations in respect of certain of the Schedule B Employees for the Relevant Period.
15. For the avoidance of doubt, this Undertaking is not given in relation to:
- (a) any contraventions affecting any employee not listed in Schedule A or Schedule B to this Undertaking (**Non-schedule Employees**); or
  - (b) any contraventions which have not yet occurred at the end of the Relevant Period (whether or not those contraventions are identified in the Independent Assessment described in clauses 21 to 28 below or the Independent Audits described in clauses 30 to 56 below).

#### **UNDERTAKINGS**

16. IBMA and IGF will each take the actions set out at clauses 17 to 78 below (as may be applicable to each of them). The respective liabilities of each of IBMA and IGF, as employers, are several and not joint.

#### **Review and rectification of underpayments**

17. By 16 October 2020, IBM will:
- (a) calculate the quantum of any underpayments, to each of the Schedule A Employees and Schedule B Employees under the Awards, during the Relevant Period (**Underpayments**), together with any additional superannuation contributions to be paid; and

- (b) pay each of the Schedule A Employees and, subject to clause 19, the Schedule B Employees to whom the Underpayments relate:
  - (i) the underpayment amount owing to them;
  - (ii) any superannuation payments which may be required by law (including any lost earnings on superannuation), by making payment to their chosen superannuation fund; and
  - (iii) interest on the amount referred to in clause (i) above, calculated using an interest rate of 5.5%.
- 18. By 11 November 2020, IBM will provide the FWO with evidence of all payments made to current and former employees to rectify the Underpayments.
- 19. If any former employees to whom Underpayments are owed cannot be located by 20 December 2020, IBM will pay the underpayment amounts owing to those employees to the Commonwealth of Australia in accordance with section 559 of the FW Act. IBM will complete the required documents supplied by the FWO for this purpose.
- 20. In the event that the FWO is subsequently able to locate and contact any former IBM employees to whom Underpayments are owed, the FWO will (in addition to its obligations under section 559 of the FW Act) notify IBM in writing of the name and contact details of the former employee. Within 28 days of receiving any such notice IBM will pay the former employee interest on the amount already paid by IBM 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 up until the date on which IBM paid the underpayment amount owing to the employee to the Commonwealth of Australia pursuant to clause 19 above, using an interest rate that is 5.5%.

#### **Independent Assessment**

- 21. IBM must, at their cost, engage an appropriately qualified, experienced, external and independent expert, approved in writing by the FWO under clause 22 (**Independent Expert**), to conduct an independent assessment of the outcomes of IBM's internal review described at clause 17 above (**Independent Assessment**). IBM must engage the



Independent Expert within one month of the FWO giving its approval pursuant to clause 22.

22. IBM must notify the FWO of their proposed Independent Expert and ensure that they are:

- (a) an accounting professional (Certified Practising Accountant, Chartered Accountant);
- (b) an auditor (Registered Company Auditor within an Authorised Audit Company); or
- (c) a lawyer (admitted, practising lawyer and employment law specialist),

by no later than 14 September 2020. The FWO may in its sole discretion approve the Independent Expert or otherwise require IBM to propose other Independent Experts until the FWO has approved in writing an Independent Expert. The Independent Expert must be approved by the FWO in writing prior to being engaged by IBM.

23. IBM must ensure the Independent Assessment commences:

- (a) two weeks after the engagement of the Independent Expert pursuant to clause 21; or
- (b) on 1 October 2020,

whichever occurs later, and that the Independent Expert assesses whether:

- (iv) a modern award applies, or previously applied, to each of the Schedule A Employees and Schedule B Employees;
- (v) the Schedule A Employees and Schedule B Employees were correctly classified by IBM under the Awards;
- (vi) the Underpayments were correctly calculated, including identifying any Schedule A Employees or Schedule B Employees to whom IBM incorrectly determined a modern award did not apply, as well as calculating any incorrect calculations, and any issues with the methodology used, and whether the calculations include any unlawful set-offs, deductions or reconciling of overpayments;

- (vii) IBM has now paid each of the Schedule A Employees and Schedule B Employees to whom a modern award applies, or applied, any amounts payable to them under clause 17 above.
24. IBM must ensure that the Independent Expert provides a report (**Expert Report**) of its Independent Assessment directly to the FWO, and for the benefit of the FWO, setting out its findings, and the facts and circumstances supporting its findings, within six months of the commencement of the Independent Assessment pursuant to clause 23. IBM must ensure the Independent Expert does not provide the Expert Report, or a copy of the same, to IBM without the FWO's prior approval.
25. IBM must ensure that the Expert Report contains the following statements from the Independent Expert:
- (a) the Independent Expert is not aware of any actual or potential conflict of interest in providing the Expert Report on IBM to the FWO;
  - (b) notwithstanding that the Independent Expert is retained by IBM, the Independent Expert undertakes that it has acted independently, impartially, objectively and without influence from IBM in preparing the Expert Report;
  - (c) the Expert Report is provided in accordance with professional standards applicable to their role (which will be listed in the Expert Report); and
  - (d) the Expert Report is provided to the FWO for its benefit and the FWO can rely on the Expert Report.
26. If the Independent Assessment identifies that any Schedule A Employees and/or Schedule B Employees are owed amounts additional to those calculated and paid by IBM, the FWO will notify IBM and provide a copy of the Expert Report. Except where otherwise advised by the FWO following discussions between IBM and the FWO following the provision of the Expert Report, IBM will pay those additional amounts to the current and former employees, and provide evidence of such payment to the FWO within twelve weeks of receiving the Expert Report from the FWO.
27. If any of the Schedule A Employees or Schedule B Employees identified in the Expert Report as being owed amounts additional to the Underpayments calculated by IBM are

former employees who cannot be located and paid within twelve weeks of receiving the Expert Report from the FWO, then, subject to clause 26, IBM will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. IBM will complete the required documents supplied by the FWO for this purpose.

28. The FWO acknowledges that IBM does not contravene this Undertaking in the event that the Independent Expert makes a finding in relation to coverage, classification and/or additional amounts to be rectified under the Awards that is contrary to the determination made by IBM in their internal review under clause 17 above, provided IBM pays any additional amounts owing to current and former employees in accordance with clause 26 above or to the Commonwealth of Australia in accordance with clause 27 above.

#### **Workplace relations systems and processes**

29. By 30 September 2020 IBM will provide the FWO with details of systems and processes already in place or to be implemented to ensure ongoing compliance in all respects with the FW Act, the FW Regulations and all applicable modern awards. Without limitation, such systems and processes will relate to:
- (a) determining whether the correct instrument is being applied to each employee; and
  - (b) ensuring employees receive the correct minimum rates of pay and entitlements, under modern awards.

#### **Independent Audits**

30. IBM must, at their cost, engage an appropriately qualified, experienced, external and independent accounting professional or an employment law specialist (**Independent Auditor**) to conduct two audits (with a possible third) of IBM's compliance with the Awards, any further modern awards identified by the Independent Expert as covering IBM employees, and the record keeping requirement in regulation 3.34 of the FW Regulations (**Audits**).
31. IBM will notify the FWO of their proposed Independent Auditor by no later than 1 June

2021. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require IBM 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 IBM.

32. IBM must ensure that each of the Audits conducted by the Independent Auditor includes:

- (a) an assessment of whether modern awards apply to 15% of employees who either commenced employment, or whose role and function changed during the relevant pre-audit period in respect of their employment by IBM (**Sampled Employees**). The Sampled Employees will include a range of classifications and employment types (full-time, part-time and casual) and employees from a range of sites;
- (b) an assessment of whether the Sampled Employees to whom the Awards apply, and IBM employees to whom any further modern awards identified by the Independent Expert apply, have been correctly remunerated by IBM in accordance with the applicable award;
- (c) reviewing payments made to the Sampled Employees across two full pay periods;
- (d) unless the Independent Auditor and the FWO agree otherwise, direct contact with employees to whom awards apply by way of site visits to at least five different sites, to ensure accuracy of hours worked (or some other form of communication);
- (e) an assessment of whether IBM's payroll and record keeping systems and processes are compliant with the FW Act in respect of employees to whom the Awards apply and, if not, setting out any issues to be remedied;
- (f) the production of written reports on each of the Audits setting out the Independent Auditor's findings, and the facts and circumstances surrounding them, to the FWO; and
- (g) written reports, as referred to in clause (f) above, that each contain the following statements from the Independent Auditor:



- (i) the Independent Auditor has no actual, potential or perceived conflict of interest in providing the report to the FWO;
- (ii) notwithstanding that the Independent Auditor is retained by IBM, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from IBM in preparing the report;
- (iii) the report is provided in accordance with professional standards applicable to their role (which will be listed in the report); and
- (iv) the report is provided to the FWO for its benefit and the FWO can rely on the report.

#### The First Audit

- 33. IBM must ensure the Independent Auditor commences the first of the Audits by 1 August 2021 (**First Audit**).
- 34. For the First Audit, the relevant pre-audit period to assess Sampled Employees is the 12 month period prior to the commencement of the First Audit.
- 35. The relevant audit period for the First Audit must be at least two full pay periods falling within the two months preceding the commencement of the First Audit.
- 36. By no later than one month prior to the commencement of the First Audit, IBM will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the First Audit.
- 37. IBM will use their best endeavours to ensure the Independent Auditor provides a draft written report of the First Audit directly to the FWO within four months of the commencement of the First Audit, setting out the draft First Audit findings, and the facts and circumstances supporting the First Audit findings. IBM will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to IBM without the FWO's approval.
- 38. IBM will use their best endeavours to ensure the Independent Auditor finalises the First Audit and provides a written report of the First Audit (**First Audit Report**) directly to the FWO within one month of the FWO providing any comments on the draft report to the

Independent Auditor. IBM will ensure the Independent Auditor does not provide the First Audit Report, or a copy of the same, to IBM without the FWO's approval.

#### The Second Audit

39. IBM must ensure the Independent Auditor commences the second of the Audits by no later than 1 August 2022 (**Second Audit**).
40. For the Second Audit, the relevant pre-audit period to assess Sampled Employees is the 12 month period prior to the commencement of the Second Audit.
41. The relevant audit period for the Second Audit must be at least two full pay periods falling within the two months preceding the commencement of the Second Audit.
42. By no later than one month prior to the commencement of the Second Audit, IBM will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Second Audit.
43. IBM will use their best endeavours to ensure the Independent Auditor provides a draft written report of the Second Audit directly to the FWO within four months of the commencement of the Second Audit, setting out the draft Second Audit findings, and the facts and circumstances supporting the Second Audit findings. IBM will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to IBM without the FWO's approval.
44. IBM will use their best endeavours to ensure the Independent Auditor finalises the Second Audit and provides a written report of the Second Audit (**Second Audit Report**) directly to the FWO within one month of the FWO providing any comments on the draft report to the Independent Auditor. IBM will ensure the Independent Auditor does not provide the written report, or a copy of the same, to IBM without the FWO's approval.

#### The Third Audit

45. The FWO may in its absolute discretion require IBM to engage the Independent Auditor to conduct an additional third audit (**Third Audit**). Where the FWO determines this is the case, the FWO will advise IBM in writing within two months after the Second Audit Report is provided to the FWO. Where the FWO so determines (but not otherwise), clauses 46 to 51 below apply.

46. IBM must ensure the Independent Auditor commences the third of the Audits by no later than 1 August 2023.
47. For the Third Audit, the relevant pre-audit period to assess Sampled Employees is the 12 month period prior to the commencement of the Third Audit.
48. The relevant audit period for the Third Audit must be at least two full pay periods falling within the two months preceding the commencement of the Third Audit.
49. By no later than one month prior to the commencement of the Third Audit, IBM will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Third Audit.
50. IBM will use their best endeavours to ensure the Independent Auditor provides a draft written report of the Third Audit directly to the FWO within four months of the commencement of the Third Audit, setting out the draft Third Audit findings, and the facts and circumstances supporting the Third Audit findings. IBM will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to IBM without the FWO's approval.
51. IBM will use their best endeavours to ensure the Independent Auditor finalises the Third Audit and provides a written report of the Third Audit (Third Audit Report) directly to the FWO within one month of the FWO providing any comments on the draft report to the Independent Auditor. IBM will ensure the Independent Auditor does not provide the written report, or a copy of the same, to IBM without the FWO's approval.

#### **Outcome of Audits**

52. If any of the Audits identify underpayments to any current or former employees, the FWO will notify IBM and provide a copy of the relevant Audit report. Except where otherwise advised by the FWO following discussions between IBM and the FWO following the provision of the Audit report, IBM will conduct a reconciliation of the amounts paid to those employees during the relevant pre-audit period and rectify any underpayments that are identified. The reconciliation period for each identified employee will be from the start of the relevant pre-audit period to the end of the relevant audit period.



53. IBM will provide to the FWO evidence of such rectification within two months of being informed by the FWO of the requirement to undertake the reconciliation.
54. If any former employees identified in the Audits as having underpayments owing to them cannot be located, IBM will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act within 90 days of being informed by the FWO of the requirement to undertake the reconciliation. IBM will complete the required documents supplied by the FWO for this purpose.
55. If any of the Audits identify material non-compliance, and the FWO reasonably believes that employees not included in the Audits are also likely to have been underpaid, IBM will engage an accounting professional or an employment law specialist approved by the FWO to conduct a further audit of all their employees to whom modern award/s apply (or a particular cohort of employees within this group), as determined by the FWO (**Additional Audit**). Any Additional Audit must be paid for by IBM.
56. If requested by the FWO, IBM will provide the FWO with all records and documents used to conduct any or all of the Audits (including any Additional Audit), within 14 days of such a request.

#### **Employee Hotline**

57. Within three business days of the FWO providing a signed copy of this Undertaking to IBM, at their own expense, IBM will engage an independent organisation to operate a dedicated telephone number and email address for all current and former employees to whom the Awards apply, or have previously applied, to make enquiries in relation to their entitlements, underpayments or related employment concerns (**Employee Hotline**). Employees will have the option of making enquiries on a confidential basis.
58. The independent organisation must be approved by the FWO prior to being engaged by IBM to operate the Employee Hotline.
59. IBM will:
  - (a) ensure the Employee Hotline remains operational for a period of 12 months;
  - (b) ensure that the telephone number and email address are included on the notices set out in clause 59(c) below;



- (c) communicate the existence and purpose of the Employee Hotline by way of the notices referred to in clauses 63 (Public Notice), 66 (Workplace Notice), 70 (Website Notice) and 73 (Social Media Notice) below;
- (d) take steps to respond to each telephone and email enquiry and seek to resolve any issues within 30 days and notify the FWO of any issues that are not resolved within 60 days; and
- (e) provide a de-identified list of enquiries received through the Employee Hotline to the FWO every three months from the establishment of the Employee Hotline.

#### **Notices – Internal and External**

##### Apology to Employees

- 60. IBM will send a letter of apology (**Apology Letter**) to all affected employees found by the Independent Assessment to be owed entitlements within twelve weeks of receiving a copy of the Expert Report (subject to the operation of clause 26). The Apology Letter will be in the form of Attachment A to this Undertaking.
- 61. IBM will provide evidence to the FWO that the Apology Letter has been sent to all affected employees within one month of the date in clause 60.

##### Media Release

- 62. Upon acceptance of the Undertaking, the FWO will publish a media release on its website in respect of this Undertaking.

##### Public Notice

- 63. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, IBM will place a notice in *The Weekend Australian* and the AFR Weekend newspaper (**Public Notice**).
- 64. IBM must ensure that the Public Notice:
  - (a) bears the name and logo of IBMA;
  - (b) appears within the first 5 pages of *The Weekend Australian* and the *AFR Weekend*;
  - (c) is at least 10 cm x 8 cm; and

- (d) is in the form of the Public Notice set out in Attachment B.
65. IBM will inform the FWO when the Public Notice will be published and provide a copy to the FWO within 7 days of its publication.

#### Workplace Notice

66. Within 7 days of the FWO providing a signed copy of this Undertaking to IBM, IBM will cause a workplace notice (**Workplace Notice**) to be displayed on IBM's Australian intranet site, accessible via a hyperlink.
67. IBM must ensure the Workplace Notice is:
- (a) in the form of the Workplace Notice set out in Attachment B;
  - (b) clearly displayed in a location on the intranet to which all employees have access (for example, by placement of notices); and
  - (c) displayed for a continuous period of 28 days.
68. Within 7 days of first displaying the Workplace Notice, IBM will provide evidence to the FWO's nominated Compliance Relationship Manager of the display and location of the Workplace Notice on its Intranet.
69. At the end of the 28 day period referred to in clause 67 above, IBM will provide confirmation to the FWO that the Workplace Notices has been continuously displayed for the required period.

#### Website Notice

70. Within 28 days of, but not prior to, the FWO publishing a media release on their website in respect of the Undertaking, IBMA will place a notice on its website, accessible through a hyperlink on the front page of [www.ibm.com.au](http://www.ibm.com.au) (**Website Notice**).
71. IBMA must ensure that the Website Notice:
- (a) is in the form of the Website Notice set out in Attachment B;
  - (b) is displayed in at least size 10 font; and
  - (c) remains on the website for a continuous period of 28 days.
72. IBMA will provide evidence of the placement of the Website Notice to the FWO within

7 days of it being published.

#### Social Media Notice

73. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, IBMA will place a post on its Facebook page [www.facebook.com/IBMAustralia/](http://www.facebook.com/IBMAustralia/) (**Social Media Notice**).
74. IBMA must ensure that the Social Media Notice:
- (a) is posted to IBMA's timeline, pinned to the top of the Facebook page in public view;
  - (b) remains on the Facebook page for a continuous period of at least 28 days; and
  - (c) is in the form of the Social Media Notice set out in Attachment B.
75. Within 7 days of posting the Social Media Notice to its Facebook page, IBMA will provide to the FWO evidence of the post.

#### **Contribution Payment**

76. IBM will make the following contribution payments to the Consolidated Revenue Fund:
- (a) By 27 November 2020, a payment equal to 5.25% of the total underpayments referred to in column B of Schedule A to the Schedule A Employees;
  - (b) by 27 November 2020, a payment equal to 5.25% of any underpayments to the Schedule B Employees identified during IBM's internal review set out at clause 17 above (noting this will be on the underpayment amount, excluding interest and superannuation); and
  - (c) subject to the operation of clause 26, within 12 weeks of receiving a copy of the Expert Report, a payment equal to 7% of any amounts additional to the underpayments calculated and paid by IBM to Schedule A Employees and Schedule B Employees in accordance with clauses 17 and 19 above which are identified by the Independent Expert during the Independent Assessment set out at clauses 21 to 28 above.
77. IBM will provide evidence to the FWO of any contribution payment within 14 days of making payment to the Consolidated Revenue Fund.

### **No Inconsistent Statements**

78. IBM must not, and must use their best endeavours to ensure that their 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.

### **Extensions on times for completion**

79. IBM may request of the FWO an extension on a time specified for completion of an obligation under this Undertaking. The FWO will not unreasonably withhold agreement on a request for an extension of time.
80. Where a time specified for undertaking an obligation under this Undertaking is contingent on or follows from the time specified for the completion of another obligation under this Undertaking, and that time for completion has been extended by the FWO, the time specified for completion of the later obligation is correspondingly extended by the same period.

### **ACKNOWLEDGEMENTS**

81. IBM 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](http://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;
  - (v) rely upon the admissions made by IBMA set out in clauses 11 and 12 above in respect of decisions taken regarding enforcement action against IBMA in



the event that IBMA is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by IBMA to comply with its obligations under this Undertaking; and

- (vi) rely upon the admissions made by IGF set out in clauses 13 and 14 above in respect of decisions taken regarding enforcement action against IGF in the event that IGF is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by IGF 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, IBMA and/or IGF may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO;
- (d) if IBMA 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 IBMA in clauses 11 and 12 above, and also in respect of the question of costs.;
- (e) if IGF 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
  - (i) this Undertaking may be provided to the Court as evidence of the admissions made by IGF in clauses 13 and 14 above, and also in respect of the question of costs.

**Executed as an undertaking**


EXECUTED by IBM Australia Ltd in accordance with section 127(1) of the *Corporations Act 2001*:

  
(Signature of director)

Anthony J Martinetti  
(Name of director)

7<sup>th</sup> September 2020  
(Date)

in the presence of:

  
(Signature of witness)

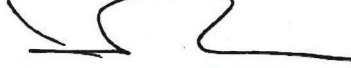
JASON PRICE  
(Name of witness)

  
(Signature of director/company secretary)

SIMON McDONALD  
(Name of director/company secretary)

7<sup>th</sup> September 2020  
(Date)

in the presence of:

  
(Signature of witness)

JASON PRICE  
(Name of witness)

EXECUTED by IBM Global Financing Australia Limited in accordance with section 127(1) of the *Corporations Act 2001*:

  
(Signature of director)

ELIZABETH JANE WILSON  
(Name of director)

7<sup>th</sup> September 2020.  
(Date)

in the presence of:


  
(Signature of witness)

  
(Signature of director/company secretary)

SIMON McDONALD  
(Name of director/company secretary)

7<sup>th</sup> September 2020  
(Date)

in the presence of:

  
(Signature of witness)

JASON PRICE  
(Name of witness)

JASON PRICE  
(Name of witness)

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



MARK SCULLY

DEPUTY FAIR WORK OMBUDSMAN - COMPLIANCE & ENFORCEMENT

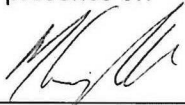
8/9/20

[Insert name and role of Delegate]

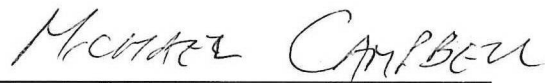
(Date)

Delegate for the FAIR WORK  
OMBUDSMAN

in the presence of:



(Signature of witness)



(Name of Witness)

**SCHEDULE A – EMPLOYEES BACK PAID AS AT 1 FEBRUARY 2020**

See attached.



**SCHEDULE B— EMPLOYEES STILL BEING ASSESSED AS AT 1 FEBRUARY 2020**

See attached.

## Attachment A – Letter of Apology

### FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEES

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

As you will be aware, a recent review of IBM Australia Ltd / IBM Global Financing Australia Limited <delete one> (IBM) employment terms found that certain policies did not fully align with modern awards and the *Fair Work Act 2009*.

IBM notified the Fair Work Ombudsman (FWO) that it contravened the *Fair Work Act 2009* (Cth) by failing to identify that the following awards applied to parts of its workforce, which resulted in some employees being underpaid specific workplace entitlements arising under those awards:

- *Business Equipment Award 2010*
- *Professional Employees Award 2010*
- *Banking, Finance and Insurance Industry Award 2010*
- *Nurses Award 2010*.

Regrettably, it was determined that you were affected. Rectification payments to remedy the shortfall identified by IBM have been made to you.

We apologise sincerely that this error occurred and thank you for your patience during the rectification process.

An independent third party review determined that you were owed a top up amount.

You received this payment in full on/by [insert date] and have been provided with pay advice including a personalised payment statement and payslip. Details of your rectification amount, type and time period can be found in the personalised statement and payslip issued to you at the time of your payment.

IBM notified the FWO that it did not comply with its obligations under Commonwealth workplace relations laws and has entered into an Enforceable Undertaking with the FWO.

As part of the Enforceable Undertaking, we have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws. A copy will be available at [www.fairwork.gov.au](http://www.fairwork.gov.au).

Should you have any questions about this there are two options available to assist you with the matter:

- (a) a hotline has been established and is being operated by <insert entity name>, an independent party that can assist you with your enquiries, on a confidential basis if required. <insert entity name> can be contacted on <insert contact number> or at <insert email address>; or
- (b) IBM's dedicated 'My IBM Pay' helpline continues to be operational to answer any enquiries you have regarding your rectification payment or employment relationship with IBM. We will make every attempt to resolve your enquiry within 30 days of receiving it and commit to maintaining open communication with you about the progress of your enquiry. You can contact the My IBM Pay team by email [myibmpay@au1.ibm.com](mailto:myibmpay@au1.ibm.com).

Alternatively, employees can contact the FWO via [www.fairwork.gov.au](http://www.fairwork.gov.au) or on 13 13 94.

Yours sincerely

<Employer name>

## **Attachment B – Form of Public, Website, Social Media and Workplace Notice**

IBM Australia recently undertook a review of its employment conditions and determined that it contravened the *Fair Work Act 2009* (Cth) by failing to identify that the *Business Equipment Award 2010*, *Professional Employees Award 2010*, *Banking, Finance and Insurance Industry Award 2010* and *Nurses Award 2010* applied to some of its employees.

IBM apologises sincerely that this error has occurred.

In May 2019, IBM notified the Fair Work Ombudsman (FWO) that contraventions of awards had occurred and consequently some employees had been underpaid.

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

IBM will commit to undertake a number of activities to ensure its ongoing compliance, such as conducting independent audits, and has formally apologised to employees.

If you worked for IBM Australia during the period July 2012 to February 2020 and have queries or questions relating to your employment, please contact either:

- The hotline being operated by independent third party <insert entity name> on <contact number>. This hotline can be contacted on a confidential basis or at <insert email address>. This hotline will be operational from <insert date>; or
- IBM's dedicated 'My IBM Pay' helpline by email [myibmpay@au1.ibm.com](mailto:myibmpay@au1.ibm.com).

Alternatively, contact the FWO via [www.fairwork.gov.au](http://www.fairwork.gov.au) or on 13 13 94.