

ENFORCEABLE UNDERTAKING

This undertaking is **given** by Wellways Australia Limited (ABN: 93 093 357 165) (hereafter "**Wellways**") and **accepted** by the Fair Work Ombudsman pursuant to s 715(2) of the *Fair Work Act 2009* in relation to the contraventions described in clause 8 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 Wellways, 276 Heidelberg Road, Fairfield, Victoria, 3078.

COMMENCEMENT

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

BACKGROUND

3. Wellways is a not-for-profit National Disability Insurance Scheme (**NDIS**) provider of mental health, community care and disability support services in Queensland, New South Wales, Australian Capital Territory, Victoria and Tasmania, with 97 offices and 2070 employees.
4. On 22 September 2020 and 26 October 2020, Wellways notified the FWO that it had contravened the *Social, Community, Home Care and Disability Services Industry Award 2010* (**the Award**) by:
 - (a) incorrectly classifying employees working in the Supported Independent Living (**SIL**) Program as Support Workers under Schedule E of the Award (the home care stream) rather than Schedule B of the Award (the social and community services stream)
 - (b) failing to pay employees night shift penalty rates for all hours worked either side of a sleepover shift in accordance with clause 29.3(b) of the Award
 - (c) failing to progress eligible employees from one pay point to the next within a level at the end of each 12 months' continuous employment, in accordance with clause 13.3 of the Award, and
 - (d) Following an audit of night shift penalty entitlements as referred to in 4(b) above, a further contravention was identified which is failing to pay employees for work performed during sleepover periods in accordance with clause 25.7(e) of the Award.

5. On 6 November 2020, Wellways advised that it had explored external support to undertake an audit of issues identified in paragraph 4, and an independent audit team had commenced on 4 November 2020. Wellways subsequently notified the FWO that it had:
- (a) Identified 1549 employees (current and former) whose pay history was audited with respect to 4(a), 4(b) and 4(d) above
 - (b) Identified 1,241 current employees and 1,083 former employees still to be audited for potential underpayments with respect to 4(c) above
 - (c) quantified the amount of underpayment owed to each of the employees listed in Schedule A to this Undertaking (**Schedule A Employees**) and commenced back paying these employees
 - (d) not yet quantified the amount of underpayment owed to each of the employees listed in Schedule B to this Undertaking (**Schedule B Employees**)
 - (e) rectified the incorrect classification of SIL Support Workers under Schedule E of the Award (the home care stream) rather than Schedule B of the Award (the social and community services stream), effective from 22 September 2020
 - (f) rectified the incorrect hourly rate paid to employees working sleepover shifts, and
 - (g) following the audit of night shift penalty entitlements as referred to in 4(b), rectified the failure to pay a cohort of staff their disturbance allowance in accordance with Clause 25.7(e).
6. On 6 November 2020, Wellways informed the FWO it continues to conduct its internal review and will ensure all impacted employees (both current and former) are reimbursed for any underpayment of workplace entitlements.
7. Since it became aware of the contraventions identified in paragraph 4, Wellways has:
- (a) sent a letter of apology and acknowledgment of the issues identified to all current and former affected employees
 - (b) communicated with current and former employees regarding audit processes and outcomes
 - (c) advised unions and other key stakeholders of the issues identified, and
 - (d) issued a media statement on the Wellways website.

ADMISSIONS

8. The FWO has a reasonable belief, and Wellways admits, that Wellways contravened:

(a) section 45 of the FW Act between 1 July 2014 and 22 September 2020 (**Relevant Period**) by:

- (i) failing to pay the Schedule A Employees and Schedule B Employees the amount or amounts set out in relation to each employee named in Schedule A and Schedule B of this Undertaking to which the employee was entitled under the Award due to by incorrectly classifying these employees as SIL Support Workers under Schedule E of the Award (the home care stream) rather than Schedule B of the Award (the social and community services stream)
- (ii) contravening clause 29.3(b) of the Award by failing to pay the Schedule A Employees and Schedule B Employees night shift penalty rates as set out in relation to each employee in Schedule A and Schedule B to this Undertaking for hours worked either side of a sleepover shift
- (iii) contravening clause 13.3 of the Award by failing to progress the Schedule B Employees from one pay point to the next within a level at the end of each 12 months' continuous employment as set out in relation to each employee in Schedule B to this undertaking, and
- (iv) contravening clause 25.7(e) of the Award by failing to correctly pay the Schedule A Employees for work performed during sleepovers .

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

- (a) any contraventions which relate to or arise as a consequence of Wellways failing to correctly apply the Award to any employee not listed in the Schedule to this Undertaking (**Non-schedule Employees**). For the avoidance of doubt this Undertaking is not given in respect of any Non-schedule Employees who were underpaid as a result of Wellways failing to correctly apply the Award and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any contravention because of any such underpayment; or
- (b) any contraventions which have not yet occurred at the date that this Undertaking is offered by Wellways (whether or not those contraventions are identified in the Independent Audits described at clause 23 below). For the avoidance of doubt this Undertaking is not given in respect of any contravention which has not occurred on the date which it is offered by Wellways and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

UNDERTAKINGS

10. Wellways will take the actions set out at clauses 11 to 49 below.

Review and rectification of underpayments

11. By 30 June 2021, Wellways will:
- (a) calculate the quantum of any underpayments, including any superannuation entitlements payable on those amounts, to each of the Schedule A Employees and Schedule B employees under the Award during the Relevant Period (**Underpayments**), and
 - (b) pay each of the Schedule A Employees and 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 in respect of the payment of the underpayment amounts being paid the Schedule A Employees and Schedule B Employees, by making payment to their chosen superannuation fund, and
 - (iii) interest on the amount referred to in (i), calculated using an interest rate that is 4% above the cash rate published by the RBA at the end of the last financial year.
12. By 30 June 2021, Wellways will provide the FWO evidence of all payments made to current and former employees to rectify the Underpayments.
13. If any of the current or former employees to whom Underpayments are owed cannot be located by 31 August 2021, Wellways will pay the net underpayment amounts owing to those employees to the Commonwealth of Australia in accordance with section 559 of the FW Act. Wellways will complete the required documents supplied by the FWO for this purpose.
14. In the event that the FWO is able to locate and contact any current or former Wellways employees to whom Underpayments are owed, the FWO will (in addition to its obligations under s 559 of the FW Act) notify Wellways in writing of the name and contact details of the current or former employee. Within 14 days of receiving any such notice Wellways will pay the current or former employee:
- (a) interest on the amount already paid by Wellways to the Commonwealth of Australia in respect of that employee, calculated up until the date on which Wellways paid the underpayment amount owing to the Commonwealth for each

financial year from the date that the employee first became entitled to that amount until the date on which that amount is paid, using an interest rate that is 4% above the cash rate published by the RBA at the end of the last financial year, and

- (b) provide evidence of such payment to the FWO.

Provision of information to the FWO

15. By 7 May 2021, Wellways will provide the FWO with any full and non-redacted reports it has received from consultants and/or third party advisers (**Independent Advisers**) in relation to the underpayments identified at clause 4.
16. The FWO requires the following information:
 - (a) methodology adopted in relation to the calculation of underpayments by the auditors
 - (b) actions (including remediation) taken by Wellways
 - (c) findings in relation to Wellways' non-compliance made by the Independent Advisers and auditors, and
 - (d) recommendations made by the Independent Advisers and auditors.
17. If any of the reports provided to the FWO under clause 15 do not already include the information requested by the FWO in clause 16 above, Wellways agrees that upon a written request by the FWO it will provide any specific additional information set out at clauses 16 (a) to 16 (d) requested.
18. If Wellways does not have the information set out at clauses (a) to (d), Wellways must, in response to a request by the FWO, obtain such information as necessary from the auditors to provide to the FWO and provide this information to the FWO within any reasonable timeframes specified by the FWO.
19. By 7 May 2021 Wellways will provide to the FWO information about the new systems and processes it has put in place to ensure compliance with its obligations under the Award and the FW Act.
20. If the information provided by Wellways is determined by the FWO to be insufficient to satisfy the FWO that the new systems and processes are compliant with Wellways' obligations under the Award and the FW Act, Wellways must, in response to a request by the FWO, provide further information as requested by the FWO within any reasonable timeframes specified by the FWO.

Letter of Assurance

21. By 31 May 2021, Wellways will provide the FWO a Letter of Assurance signed by the Appointed Chief Executive Officer in the terms as set out at Attachment A.
22. The FWO will accept the Letter of Assurance, the auditors' reports (and other information provided under clauses 15 to 17 above) and information about the new systems and processes (referred to in clauses 19 and 20 above), in lieu of requiring Wellways to be subject to an Independent Assessment of Wellways' quantification and rectification of underpayments to the Schedule A Employees and Schedule B Employees.

Independent Audits

23. Wellways must, at its cost, engage an appropriately qualified, experienced, external and independent accounting professional or an employment law specialist (**Independent Auditor**) to conduct two audits of Wellways' compliance with the FW Act and FW Regulations, in relation to the Award, and any future agreements that replace the Award (**Audits**).
24. Wellways will notify the FWO of its proposed Independent Auditor by no later than 30 June 2021. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require Wellways 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 Wellways.
25. Wellways must ensure that each of the Audits conducted by the Independent Auditor includes:
 - (a) an assessment of whether 10% of all employees to whom the Award (or replacement instrument(s)) applies (the **Sampled Employees**) have been correctly classified by Wellways;
 - (b) an assessment of whether the pay and conditions of the Sampled Employees to whom the Award (or replacement instrument(s)) applies during the relevant audit period is in compliance with the FW Act and the Award (or replacement instrument(s));
 - (c) direct contact with Sampled Employees to whom the Award (or replacement instrument(s)) applies by way of site visits (or, by way of virtual meetings, with the prior permission of the FWO) to at least five different sites, to ensure accuracy of hours worked;

- (e) the production of a written report on each of the Audits setting out the Independent Auditor's findings, and the facts and circumstances surrounding them, to the FWO; and
- (f) that each of the written reports referred to in (e) above contains the following declarations 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 Wellways, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from Wellways in preparing the report;
 - (iii) the report is provided in accordance with applicable professional standards (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

- 26. Wellways must ensure the Independent Auditor commences the first of the Audits by no later than 1 June 2022 (**First Audit**).
- 27. For the First Audit, the relevant pre-audit period to assess Sampled Employees is 12 months.
- 28. The relevant audit period for the First Audit must be at least two full consecutive pay periods falling within the period 1 March 2022 to 30 April 2022.
- 29. By 14 April 2022, Wellways will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the First Audit.
- 30. Wellways will use its best endeavours to ensure the Independent Auditor provides a draft written report of the First Audit directly to the FWO by 28 June 2022, setting out the draft First Audit findings, and the facts and circumstances supporting the First Audit findings. Wellways will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Wellways without the FWO's approval.
- 31. Wellways will use its best endeavours to ensure the Independent Auditor finalises the First Audit and provides a written report of the First Audit (**First Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. Wellways will ensure the Independent Auditor does not provide the First Audit Report, or a copy of the same, to Wellways without the FWO's prior

approval.

The Second Audit

32. Wellways must ensure the Independent Auditor commences the second of the Audits by no later than 1 May 2023 (**Second Audit**).
33. For the Second Audit, the relevant pre-audit period to assess Sampled Employees is 12 months.
34. The relevant audit period for the Second Audit must be at least two full consecutive pay periods falling within the period 1 March 2023 to 30 April 2023.
35. By 14 April 2023, Wellways will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Second Audit.
36. Wellways will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Second Audit directly to the FWO by 28 June 2023, setting out the draft Second Audit findings, and the facts and circumstances supporting the Second Audit findings. Wellways will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Wellways without the FWO's prior approval.
37. Wellways will use its best endeavours to ensure the Independent Auditor finalises the Second Audit and provides a written report of the Second Audit (**Second Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. Wellways will ensure the Independent Auditor does not provide the written report, or a copy of the same, to Wellways without the FWO's prior approval.

Outcome of Audits

38. If either of the Audits identify underpayments to any current or former employees, Wellways 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.
39. Wellways will provide to the FWO evidence of such rectification within 28 days of being informed by the FWO of the requirement to undertake the reconciliation.
40. If any employees identified in the Audits as having underpayments owing to them cannot be located within 60 days of the conclusion of the Third Audit, Wellways will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with

section 559 of the FW Act. Wellways will complete the required documents supplied by the FWO for this purpose.

41. If any of the Audits identify an underpayment of minimum entitlements to one or more employees, and the FWO reasonably believes that employees not included in the Audits are also likely to have been underpaid, Wellways will engage an accounting professional or an employment law specialist approved by the FWO to conduct a further audit of all its employees to the Award (or replacement instrument) applies (or a particular cohort of employees within this group), as determined by the FWO (**Additional Audit**). Any Additional Audit must be paid for by Wellways.
42. If requested by the FWO, Wellways will provide the FWO with all records and documents used to conduct any or all of the Audits (including any Additional Audit), within 7 days of such a request.

Notices – Internal

Workplace Notice

43. By 7 May 2021, Wellways will cause to be displayed to all staff a notice in the form of Attachment C to this Undertaking (**Workplace Notice**).
44. Wellways must ensure the Workplace Notice is:
 - (a) Available to all staff via electronic means, including but not limited to displaying the notice on its Intranet site (accessible through a hyperlink on the front page of its Intranet site, and
 - (b) Be displayed for a period of 28 days.
45. Within 7 days of first displaying the Workplace Notice, Wellways will provide evidence to the FWO of the communication and information provided to all employees.
46. At the end of the 28 day period referred to in paragraph 44 above, Wellways will provide confirmation to the FWO that the Workplace Notice has been continuously displayed for the required period.

Apology to Employees

47. A copy of the post payment (Further Apology) letter will be provided by Wellways by 30 July 2021 to all affected employees in the form of Attachment B to this Undertaking.
48. Wellways will provide evidence to the FWO that the Further Apology has been sent to all affected employees by 14 August 2021.

No Inconsistent Statements

49. Wellways must not, and must use its best endeavours to ensure that its officers, employees or agents do not, make any statement or otherwise imply, either orally or in writing, anything that is inconsistent with admissions or acknowledgements contained in this Undertaking.

ACKNOWLEDGEMENTS

50. Wellways acknowledges that:

- (a) the FWO may;
 - (i) make this Undertaking (including any of the Attachments) 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 (including any of the Attachments) pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth)
 - (iii) issue a media release in relation to this Undertaking
 - (iv) from time to time, publicly refer to the Undertaking (and any of the Attachments hereto) and its terms, and
 - (v) rely upon the admissions made Wellways set out in clause 8 above in respect of decisions taken regarding enforcement action in the event that Wellways is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by Wellways 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, Wellways may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if Wellways 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 Wellways in clause 8 above, and also in respect of the question of costs.

Executed as an undertaking

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



(Signature of director)

Scott Hartley

(Name of director)

23.04.2021

(Date)

in the presence of:



(Signature of witness)

Nicole Kondogiannis

(Name of witness)



(Signature of director/company secretary)

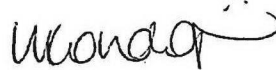
Gerard Reed

(Name of director/company secretary)

23.04.2021

(Date)

in the presence of:



(Signature of witness)

Nicole Kondogiannis

(Name of witness)

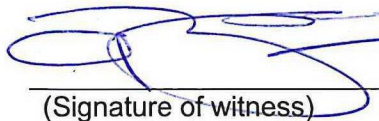
ACCEPTED by the FAIR WORK OMBUDSMAN pursuant to section 715(2) of the *Fair Work Act 2009* on:



Mark Scully, Deputy Fair Work
Ombudsman – Compliance and
Enforcement

Delegate for the FAIR WORK
OMBUDSMAN

in the presence of:



(Signature of witness)

27 APRIL 2021

(Date)



(Name of Witness)

SCHEDULE A - List of employees and underpayments

SCHEDULE B – List of employees with underpayments yet to be quantified

Attachment A – Form of Letter of Assurance

Sandra Parker
The Fair Work Ombudsman
Fair Work Ombudsman
GPO Box 9987
MELBOURNE VIC 3001

Dear Sandra

I am writing on behalf of Wellways Australia Limited (**Wellways**) in my capacity as the Chief Executive Officer. This letter follows a process where Wellways self-reported that a number of underpayments had occurred in relation to a number of employees from 2014 to 2020 arising from Wellways' failure to comply with the *Social, Community, Home Care and Disability Services Industry Award 2010* (**the Award**) by:

- failing to pay the employees the amount or amounts to which the employee was entitled under the Award due to incorrectly classifying employees as Support Workers under Schedule E of the Award (the home care stream) rather than Schedule B of the Award (the social and community services stream)
- failing to pay employees night shift penalty rates for all hours worked during a sleepover shift, and
- failing to progress eligible employees from one pay point to the next within a level at the end of each 12 months' continuous employment.

As you are aware, Wellways has agreed to enter into an Enforceable Undertaking with the Fair Work Ombudsman in respect of these underpayments.

I write to provide the FWO with my assurance that I am satisfied:

- a. the process by which Wellways, as assisted by an audit team including an experience auditor and payroll and HR specialists, calculated the underpayments to its current and former employees affected by Wellways' failure to comply with the Award was correctly undertaken, and
- b. as of [date] all former and current employees impacted by the underpayments, apart from those who have not been able to be located by Wellways, have been paid their entitlements under the Award and the *Fair Work Act 2009* by Wellways, including the payment of interest at a rate of 4% above the RBA cash rate.

Wellways has remediated all issues as a matter of priority and is committed to minimising the risk of future non-compliance.

Sincerely

Laura Collister
Chief Executive Officer
Wellways Australia Limited

Attachment B – Form of Letter to Affected Employees

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I refer to Wellways' recent communication with you regarding underpayments of minimum entitlements under the *Social, Community, Home Care and Disability Services Industry Award 2010 (the Award)*.

We have completed the calculations of these underpayments and have recently paid outstanding amounts to you. We wish to again apologise for the impact the underpayments have made and reassure you that Wellways has and will continue to take action to ensure our ongoing compliance with the Award and the *Fair Work Act 2009 (Cth)*. We have already implemented new systems and process and improvements and will commence annual audits of our payroll from 2022.

Wellways has formally admitted to 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, a copy of which will be available 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. This includes independent annual payroll audits in 2022 and 2023 to verify that issues have been resolved and to ensure no other issues have developed.

If you have any questions or concerns about this or any other employment matter, please contact [REDACTED]

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

Yours sincerely

<Employer name>

Attachment C – Form of Workplace Notice

Wellways recently undertook a review of its payroll systems and processes and determined that it contravened the *Fair Work Act 2009* (Cth) and the Social, Community, Home Care and Disability Services Industry Award 2010 (**the Award**) by:

- failing to pay the employees the amount or amounts to which the employee was entitled under the Award due to incorrectly classifying employees as Support Workers under Schedule E of the Award (the home care stream) rather than Schedule B of the Award (the social and community services stream)
- failing to pay employees night shift penalty rates for all hours worked either side of a sleepover shift, and
- failing to progress eligible employees from one pay point to the next within a level at the end of each 12 months' continuous employment.

On 22 September 2020 and 26 October 2020, Wellways formally admitted to the Fair Work Ombudsman (**FWO**) that contraventions of the Award had occurred and consequently a number of employees had been underpaid.

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

Wellways will, as a result of the Enforceable Undertaking, commit to undertaking a number of activities to ensure its ongoing compliance such as, conducting two independent audits and formally apologising to individual employees.

Wellways expresses its sincerest regrets and apologises for these contraventions.

If you worked for Wellways during the period 2014 to 2020 and have queries or questions relating to your employment, please contact Wellways directly through their non-confidential enquiry line via [REDACTED]

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