

## ENFORCEABLE UNDERTAKING

This undertaking is **given** by Breakthru Ltd (ABN 18 097 919 607) 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 clauses 11 and 12 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 Breakthru Ltd (ABN 18 097 919 607), Ground Floor, 2 Palmer Street, Parramatta NSW 2150 (**Breakthru**).

### COMMENCEMENT

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

### BACKGROUND

3. Breakthru is a disability services provider registered as a large charity with the Australian Charities and Not-for-profits Commission. Breakthru operates in NSW, Victoria and Queensland with approximately 452 employees.
4. In 2019, Breakthru commenced negotiations with the Australian Services Union (**ASU**) with respect to a new enterprise agreement. On 18 December 2019 in the course of conducting those negotiations, Breakthru identified that it had incorrectly classified a number of employees, resulting in an underpayment of base rates for those employees.
5. On 6 March 2020, Breakthru notified the FWO of the underpayments. In response to a request for further information, Breakthru provided a response to the FWO providing further details of the underpayments. Through this correspondence, Breakthru notified the FWO that:
  - (a) it had identified that various employees had been incorrectly classified from 2014 through to 2020.
  - (b) relevantly, Breakthru has identified contraventions of the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **SCHADS Award**), the *Labour Market Assistance Industry Award 2010* (the **LMAI Award**), the *Break Thru People Solutions, Norwood Programs Collective Agreement 2013-*

2015 (the **Norwood Agreement**) and the *Break Thru – Enterprise Agreement 2016 – 2019* (the **Agreement**) (collectively the **relevant industrial instruments**).

6. On 15 May 2020, Breakthru provided further information to the FWO as to the background of the underpayments, namely that there are four categories of employees identified as having been incorrectly classified and underpaid in accordance with their entitlements under the relevant industrial instruments. These categories are as follows:
  - (a) employees of Breakthru who between 22 March 2016 and 12 April 2020 were incorrectly classified as Social & Community Services (**S&CS**) Employee Level 1 under the SCHADS Award, who should have been classified at S&CS Employee Level 2 (**Category 1**)
  - (b) employees of Breakthru who between 1 January 2014 and 26 April 2020 were otherwise incorrectly classified under the SCHADS Award or the LMAI Award resulting in incorrect classification levels being applied to them under the Agreement (**Category 2**)
  - (c) employees of Breakthru who between 1 January 2014 and 26 April 2020 had not progressed from one pay point to the next within a classification level in the LMAI Award, the SCHADS Award, the Norwood Agreement and / or the Agreement as required by the relevant industrial instruments (**Category 3**)
  - (d) employees of Breakthru who between 1 January 2014 and 26 April 2020 were incorrectly classified under the classification definitions in the LMAI Award when they should have correctly been classified under the classification definitions in the SCHADS Award, resulting in the incorrect classification level being applied under the Agreement (**Category 4**).
7. Breakthru notified the FWO that Grant Thornton Accountants (**Grant Thornton**) and Laycock Burke Castaldi Lawyers (**LBC Lawyers**) (which merged with Sparke Helmore Lawyers from 1 July 2020) have been engaged to assist its reclassification and remediation process.
8. LBC Lawyers has assisted Breakthru to validate the methodology used by Breakthru in identifying the underpayments and the calculation of underpayments.

9. Grant Thornton has provided a limited assurance review over:
- (a) the reclassification process undertaken by Breakthru in respect of Category 1 employees; and
  - (b) a 25% sample of the underpayments calculated by a specialist in-house team at Breakthru.
10. There are 275 current employees and 374 former employees that are affected and are owed \$ **2,752,922.02** in back payments, including superannuation entitlements and interest (**Underpayments**). Specifically, the 275 current employees are owed \$1,841,437.72 in back payments and the 374 former employees are owed \$911,484.30 in back payments.
11. As at 19 February 2021, Breakthru has:
- (a) paid all 275 current employees the calculated amount owing; and
  - (b) paid 341 of 374 former employees the calculated amount owing.

#### **ADMISSIONS**

12. The FWO has a reasonable belief, and Breakthru admits, that Breakthru contravened:
- (a) sections 45 and 50 of the FW Act between 1 January 2014 and 26 April 2020 (**Relevant Period**) by failing to pay each of the Schedule A Employees the amount or amounts to which that employee was entitled under the relevant industrial instruments, in respect of each provision of that instrument which is identified in Schedule A to this undertaking in relation to that employee:
    - (i) Clauses 13.1, 13.3, 15.1, 15.2, 15.3, 23.2 of the SCHADS Award
    - (ii) Clauses 13.1, 13.2, 14.1, 14.3, 14.4, 16.1, 19.2, 20.2 of the LMAI Award
    - (iii) Clauses 11, 12, 13 and Appendix 1 of the Norwood Agreement
    - (iv) Clauses 10, 11, 12, Appendix 1 and Appendix 2 of the Agreement.
13. The contraventions identified in clause 12 of this Undertaking do not include:
- (a) any contraventions which relate to or arise as a consequence of Breakthru failing to correctly apply the relevant industrial instruments to any employee not listed

in Schedule A 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 Breakthru failing to correctly apply the relevant industrial instruments 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 Breakthru (whether or not those contraventions are identified in the Independent Audits described at clause 19 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 Breakthru and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

#### **UNDERTAKINGS**

14. Breakthru will take the actions set out at clauses 15 to 46 below.

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

15. By 31 March 2021, Breakthru will:

- (a) pay each of the Schedule A Employees to whom the Underpayments relate:
  - (i) the underpayment amount owing to them;
  - (ii) any superannuation payments which may be required by law, by making payment to their chosen superannuation fund;
  - (iii) interest on the amount referred to in (i); and
  - (iv) interest on the amount referred to in (ii), calculated using an interest rate of 8%, being the average return of the HESTA Super Fund (which the majority of Schedule A Employees are members of) over the previous 5 years; and
- (b) provide a completed copy of Schedule A, detailing the underpayment quantum against each impacted employee.

16. If any of the former employees to whom Underpayments are owed cannot be located

by 31 April 2021, Breakthru will pay the underpayment amounts owing to those employees to the Commonwealth of Australia in accordance with section 559 of the FW Act. Breakthru will complete the required documents supplied by the FWO for this purpose.

#### **Provision of information to the FWO**

##### ***Grant Thornton***

17. By 31 March 2021, Breakthru will provide to the FWO the full and non-redacted report from Grant Thornton detailing the firm's assurance findings made as to the classification of Category 1 employees and the underpayment calculations.

##### ***Letters of Assurance***

18. Within 90 days of the Commencement Date, Breakthru will provide the FWO a signed letter of assurance from the CEO that:
  - (a) confirms the calculations have been conducted correctly based on professional advice and assurance;
  - (b) confirms all underpayments have been rectified as required by clause 15, including interest on all underpayments, or paid to the Commonwealth of Australia as required by clause 16;
  - (c) provides details of new systems and processes implemented by Breakthru to ensure future systems and processes comply with the FW Act; and
  - (d) provides details of how current and future relevant personnel are trained and competent in ensuring workplace relations and compliance.

#### **Independent Audits**

19. Breakthru 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 Breakthru's compliance with the FW Act and FW Regulations, in relation to the relevant industrial instruments, and any future agreements that replace the relevant industrial instruments (**Compliance Audits**).

20. Breakthru will notify the FWO of its proposed Independent Auditor by no later than 1 April 2021. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require Breakthru 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 Breakthru.
21. Breakthru must ensure that each of the Compliance Audits conducted by the Independent Auditor includes:
- (a) an assessment 10% of all employees, across a range of classifications, locations and employment types (full time, part time and casual employment), during the relevant pre-audit period (**Sampled Employees**) in respect of their employment by Breakthru;
  - (b) an assessment of whether the Sampled Employees to whom the SCHADS Award and the Agreement (or replacement instruments) apply have been correctly classified by Breakthru;
  - (c) an assessment of whether the pay and conditions of the Sampled Employees to whom the SCHADS Award and the Agreement (or replacement instruments) applies during the relevant audit period is in compliance with the FW Act and the Agreement (or replacement instruments); and
  - (d) direct contact with Sample Employees to whom the SCHADS Award and the Agreement (or replacement instruments) applies, 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 Breakthru, the



Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from Breakthru 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 Compliance Audit

- 22. Breakthru must ensure the Independent Auditor commences the first of the Compliance Audits by no later than 1 June 2021 (**First Compliance Audit**).
- 23. For the First Compliance Audit, the relevant pre-audit period to assess Sampled Employees is 27 April 2020 – 31 December 2020.
- 24. The relevant audit period for the First Compliance Audit must be at least two full pay periods falling within the period 1 April 2021 – 31 May 2021.
- 25. By 15 May 2021, Breakthru will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the First Compliance Audit.
- 26. Breakthru will use its best endeavours to ensure the Independent Auditor provides a draft written report of the First Compliance Audit directly to the FWO by 15 August 2021, setting out the draft First Compliance Audit findings, and the facts and circumstances supporting the First Compliance Audit findings. Breakthru will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Breakthru without the FWO's approval.
- 27. Breakthru will use its best endeavours to ensure the Independent Auditor finalises the First Compliance Audit and provides the final written report of the First Compliance Audit (**First Compliance Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. Breakthru will ensure the Independent Auditor does not provide the First Compliance Audit Report, or a copy of the same, to Breakthru without the FWO's approval. The FWO will provide a



copy of the final First Compliance Audit Report to Breakthru within 14 days of it receiving a copy from the Independent Auditor.

#### The Second Compliance Audit

28. Breakthru must ensure the Independent Auditor commences the second of the Compliance Audits by no later than 1 June 2022 (**Second Compliance Audit**).
29. For the Second Compliance Audit, the relevant pre-audit period to assess Sampled Employees is 1 March 2021 – 31 December 2021.
30. The relevant audit period for the Second Compliance Audit must be at least two full pay periods falling within the period 1 April 2022 – 31 May 2022.
31. By 15 May 2022, Breakthru will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Second Compliance Audit.
32. Breakthru will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Second Compliance Audit directly to the FWO by 15 August 2022, setting out the draft Second Compliance Audit findings, and the facts and circumstances supporting the Second Compliance Audit findings. Breakthru will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Breakthru without the FWO's approval.
33. Breakthru will use its best endeavours to ensure the Independent Auditor finalises the Second Compliance Audit and provides the final written report of the Second Compliance Audit (**Second Compliance Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. Breakthru will ensure the Independent Auditor does not provide the written report, or a copy of the same, to Breakthru without the FWO's approval. The FWO will provide a copy of the final Second Compliance Audit Report to Breakthru within 14 days of it receiving a copy from the Independent Auditor.

#### **Outcome of Compliance Audits**

34. If any of the Compliance Audits identify underpayments to any current or former employees, Breakthru will conduct a reconciliation of the amounts paid to those

employees during the relevant pre-audit period for the Compliance Audit, and rectify any underpayments that are identified.

35. The reconciliation period for each identified employee will be, for the Compliance Audit, from the start of the relevant pre-audit period to the end of the relevant audit period.
36. Breakthru 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.
37. If any employees identified in the Compliance Audits as having underpayments owing to them cannot be located within 60 days of the conclusion of the Second Compliance Audit, Breakthru will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. Breakthru will complete the required documents supplied by the FWO for this purpose.
38. If any of the Compliance Audits identify an underpayment of minimum entitlements to one or more employees, and the FWO reasonably believes that employees not included in the Compliance Audits are also likely to have been underpaid, Breakthru will engage an accounting professional or an employment law specialist approved by the FWO to conduct a further audit of all other relevant employees the FWO reasonably believes are affected by the issue identified, as determined by the FWO (**Additional Audit**). Any Additional Audit must be paid for by Breakthru.
39. If requested by the FWO, Breakthru will provide the FWO with all records and documents used to conduct any or all of the Compliance Audits (including any Additional Audit), within 7 days of such a request.

## **Notices – Internal and External**

### Apology to Employees

40. Breakthru will provide evidence to the FWO of communications that have been sent to all affected employees that include an apology by 1 April 2021.

### Media Release

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

### Website Notice

42. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Breakthru will place a notice on its website, accessible through a hyperlink on the front page of [breakthru.org.au](http://breakthru.org.au) (**Website Notice**).
43. The Website Notice must:
- (a) be in the form of the Website Notice set out at Attachment B;
  - (b) be displayed in at least size 10 font; and
  - (c) remain on the website for a period of 1 month.
44. Within 7 days of placing the Website Notice on its website, Breakthru will provide to the FWO evidence of its placement.

#### **Workplace Relations Training**

45. Within 90 days of the Commencement Date, organise and ensure training is provided to all persons who have responsibility for human resource, recruitment or payroll functions (**Training**):
- (a) 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 under the FW Act; the *Social, Community, Home Care and Disability Services Industry Award 2010*; *Labour Market Assistance Industry Award 2010*; and the *Break Thru – Enterprise Agreement 2016 – 2019* and any other Awards and future Enterprise Agreements covering employees of Breakthru Ltd during the life of this undertaking;
  - (b) Ensure the Training is conducted by a workplace trainer, such person or organisation to be approved by the FWO and paid for by Breakthru Ltd;
  - (c) 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;
  - (d) Provide evidence of attendance at the Training to the FWO within 7 days of the Training being provided (including the name and position of all attendees and the date on which the training was attended, and noting that remote attendance by video or telephone conferencing is permissible);

- (e) For a period of 2 years from the execution of this Undertaking, ensure that training is conducted in the manner prescribed in paragraphs 59 (a) to 59 (e) in relation to any new or existing employees or contractors who, after the Commencement Date, acquire responsibilities that include human resources, recruitment or payroll functions on behalf of Breakthru Ltd. The training must be undertaken, and evidence provided to the FWO within 90 days of the relevant employee or contractor taking on responsibility for the functions.

#### **No Inconsistent Statements**

46. Breakthru 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**

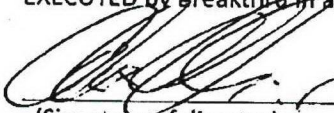
47. Breakthru acknowledges that:

- (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; and
  - (v) rely upon the admissions made by Breakthru set out in paragraphs 12 above in respect of decisions taken regarding enforcement action in the event that Breakthru is found to have failed to comply with its workplace Breakthru obligations in the future, including but not limited to any failure by Breakthru 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, Breakthru may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if Breakthru 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 Breakthru in clauses 11 and 12 above, and also in respect of the question of costs.

**Executed as an undertaking**

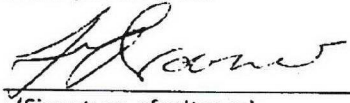
EXECUTED by Breakthru in accordance with section 127(1) of the *Corporations Act 2001*:

  
(Signature of director)

ALEX CILLIAN  
(Name of director)

9-3-21  
(Date)

in the presence of:

  
(Signature of witness)

LAM RIE DROWER  
(Name of witness)

d9 D'Ambra

(Signature of director/company secretary)

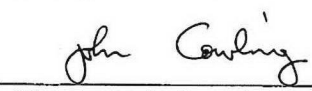
Diana D'Ambra

(Name of director/company secretary)

9 March 2021

(Date)

in the presence of:

  
(Signature of witness)

John Cowling  
(Name of witness)

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



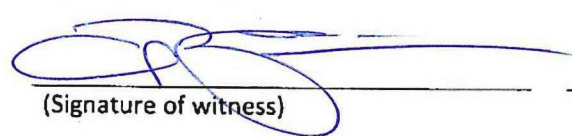
Mark Scully, Deputy Fair Work  
Ombudsman – Compliance and  
Enforcement

11 MARCH 2021

(Date)

Delegate for the FAIR WORK  
OMBUDSMAN

in the presence of:

  
(Signature of witness)

CLETUS BROWN  
(Name of Witness)



## SCHEDULE A

	Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H
No	Employee	Industrial instrument	Previous classification	Correct classification	Underpayment	Total underpayment	Superannuation	Interest
1.		SCHADS Award						
		LMAI Award						
		Norwood Agreement						
		Agreement						
2.								
3.								
4.								
5.								



## Attachment A – Form of Website Notice

Breakthru recently undertook a review of its payroll systems and processes and determined that it contravened the *Fair Work Act 2009* (Cth) by incorrectly applying classification and/or pay point levels to some of its employees under the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **SCHADS Award**), the *Labour Market Assistance Industry Award 2010* (the **LMAI Award**), the *Break Thru People Solutions, Norwood Programs Collective Agreement 2013-2015* (the **Norwood Agreement**) and the *Break Thru – Enterprise Agreement 2016 – 2019* (the **Agreement**) (collectively **the relevant industrial instruments**), resulting in underpayments to 649 current and former employees.

On 6 March 2020, Breakthru formally admitted to the Fair Work Ombudsman (**FWO**) that contraventions of the Act had occurred and has now entered into an Enforceable Undertaking, committing to a number of measures to remedy the contraventions identified and ensure ongoing compliance with Commonwealth workplace laws including back paying of the affected employees, conducting two independent audits and formally apologising to individual employees.

The Enforceable Undertaking was entered following Breakthru self-reporting the contraventions to the FWO and working towards rectifying the issues and making payments to affected employees.

Breakthru expresses its sincerest regrets and apologises for these contraventions.

If you worked for Breakthru during the period 2014 to 2020 and have queries or questions relating to your employment, please contact Breakthru directly through their enquiry line on (02) 9055 9311 or by email [hrmgt@breakthru.org.au](mailto:hrmgt@breakthru.org.au).

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