

ENFORCEABLE UNDERTAKING

This undertaking is **given** by Disability Services Australia Limited (ABN: 35 002 507 655) (hereafter **DSA**), Macquarie Employment Training Service Limited (ABN 42 940 098 045) (hereafter **METS**) and DSA Mentoring Services Limited (ABN 47 629 308 881) (hereafter **DSA Mentoring**) and **accepted** by the Fair Work Ombudsman pursuant to section 715(2) of the *Fair Work Act* in relation to the contraventions described in clauses 9, 10 and 11 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 Disability Services Australia Ltd ("DSA"), ACN 002 507 655 of 104 Vanessa Street, Kingsgrove NSW 2208, Macquarie Employment Training Service Limited ("METS"), ABN 42 940 098 045 of 104 Vanessa Street, Kingsgrove NSW 2208 and DSA Mentoring Services Limited ("DSA Mentoring"), ABN 47 629 308 881 of 104 Vanessa Street, Kingsgrove NSW 2208.

COMMENCEMENT

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

BACKGROUND

3. DSA is a social enterprise registered as an Unlisted Australian Public Company that is also registered as a charity with the Australian Charities and Not for Profits Commission. DSA currently provides a range of services to persons with a disability and employs over 1,700 people, including more than 500 with a disability. METS, a company limited by guarantee, is a related body corporate of DSA as the entities share common directors.
4. DSA Mentoring is wholly owned by DSA. Between 6 July 2020 and 15 August 2020, the New South Wales Department of Communities and Justice (formerly the Department of Family and Community Services) (**Department**) transferred a number of disability services to DSA Mentoring. The employees of the Department providing those services transferred from the Department to DSA Mentoring. This resulted in a 'transfer of business' (within the meaning of section 768AD of the FW Act) from the Department (as the **old state employer**) to DSA Mentoring (as the **new employer**). For the purposes of section 768AE:
 - (a) the 'termination time' of the transferring employees was 11.59pm on the day immediately before the date referred to in 4(b); and
 - (b) the 're-employment time' of the transferring employees was the first date under the heading "Period" in column A1 of Schedule A.

5. Due to the nature of DSA's and METS' operations, and the transfer of business relating to DSA Mentoring explained in clause 4, their employees are or were covered by a range of agreements and awards including:
- (a) in respect of DSA, the:
 - Disability Services Australia Business Services Division Employees Enterprise Agreement 2001;*
 - Disability Services Australia Business Services Division Staff Workplace Agreement 2008;*
 - Social, Community, Home Care and Disability Services Industry Award 2010,*
 - Supported Employment Services Award 2010;*
 - Health Professional and Support Services Award 2010;*
 - Miscellaneous Award 2010;*
 - Labour Market Assistance Industry Award 2010;*
 - Passenger Vehicle Transportation Award 2010; and*
 - Private Sector Clerks Award 2010.*
 - (b) in respect of METS the:
 - Post Secondary Education (Educational Services) Award 2010, and*
 - (c) in respect of DSA Mentoring, the following NSW Awards, which apply as copied state awards within the meaning of section 768AI of the FW Act:
 - Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009; and*
 - Nurses' (Department of Family and Community Services – Ageing, Disability and Home Care) (State) Award 2019 (hereafter the **relevant instruments**).*
6. Between November 2019 and September 2020, DSA notified the FWO that:
- (a) DSA engaged Davidson Workplace Solutions Pty Ltd (**DWS**) in August 2019 to independently investigate an award compliance issue it had identified associated with the use of gift vouchers in lieu of overtime payments in one of its Packaging Solutions sites;
 - (b) the investigation was conducted by DWS' director, Bob Davidson, who is an experienced workplace relations consultant with over 20 years of experience working across public, not for profit and for profit sectors;
 - (c) in the course of DWS' investigation, DWS found evidence of other award compliance issues;

- (d) DSA instructed DWS to expand its investigation to cover all of DSA's, METS' and DSA Mentoring's operations and provide a report on any award, enterprise agreement and other employment related legislative compliance contraventions that it identified;
- (e) DWS provided its report in four stages and identified a range of compliance contraventions;
- (f) DSA, METS and DSA Mentoring accepted all of DWS' findings and recommendations without amendment;
- (g) DWS found compliance contraventions in the relevant instruments applying to current and former employees, resulting in underpayments as follows:
 - i. the relevant instruments may apply to a number of DSA's, METS' and DSA Mentoring's current and former employees for whom they had not been applying the relevant instrument to and the terms and conditions on which they employed those employees did not satisfy the minimum terms and conditions in the relevant instruments, resulting in underpayments such as:
 - a. gift vouchers had been provided to some DSA employees in lieu of payment for overtime worked on Sundays;
 - b. time off in lieu of overtime had, on occasions, been incorrectly utilised by DSA;
 - c. time off in lieu of penalty payments for working on a public holiday had, on occasions, been incorrectly utilised by DSA;
 - d. some DSA and METS employees had not been paid the minimum award rate of pay for their correct award classification;
 - e. overtime had not been correctly applied for some DSA and DSA Mentoring employees;
 - f. on call and sleepover provisions had not been correctly applied for some DSA employees;
 - g. DSA and METS employees in various supervisory roles had been incorrectly classified as being award-free employees; and
 - h. for DSA and METS employees that had been incorrectly classified as award free, additional compliance issues arose in relation to non-payment of additional hours of work and non-payment of other entitlements including annual leave loading, motor vehicle allowance

and first aid allowance where applicable;

- ii. DSA had failed to correctly record overtime hours worked by employees in leadership roles as required under section 535 of the FW Act and reg 3.34 of the *Fair Work Regulations 2009 (FW Regs)*;
 - iii. DSA had contravened the National Employment Standards by permitting employees to cash out annual leave on a basis contrary to the requirements of sections 92, 93 and 94 of the FW Act;
- (h) DSA engaged Deloitte to perform calculations of wage entitlements with respect to the issues identified by DWS for the remediation period from 1 July 2013 to 15 January 2020 and to assist with the calculation of any underpayments that may have occurred after 15 January 2020 for DSA, METS and DSA Mentoring employee cohorts who are, or may be, impacted by each of the issues identified by DWS;
- (i) DSA, METS and DSA Mentoring intended to rectify all underpayments in respect of the remediation period once those underpayments have been calculated;
- (j) the total quantum of the underpayments was likely to be over \$1,000,000.

7. Prior to the execution of this Undertaking, DSA (on behalf of itself, METS and DSA Mentoring) notified the FWO that it had:

- (a) advised all current employees who it had identified may have been underpaid (**Affected Current Employees**) by meeting with them, speaking to them by phone and/or writing to them;
- (b) apologised to all Affected Current Employees;
- (c) advised Affected Current Employees that DSA intends to calculate all backpay owing to them from 1 July 2013 and that DSA, METS or DSA Mentoring (as the case may be) will make these payments as soon as possible;
- (d) conducted interviews with Affected Current Employees who may not have been paid overtime for additional hours or motor vehicle allowance in accordance with the relevant instrument in order to gather information on hours worked and kilometres travelled so as to prepare an estimation of unpaid entitlements in those areas;
- (e) established an independent telephone service for employees that enables them to raise questions in a confidential way;
- (f) advised stakeholders including the National Disability Insurance Agency and the

Department that it had identified underpayment issues;

- (g) calculated the underpayments referred to in clause 6(g) above for the period 1 July 2013 to 31 October 2020, with DSA, METS or DSA Mentoring (as the case may be) to pay each of the employees referred to in column A of Schedule A to this Undertaking (**Schedule A Employees**) the amounts referred to in column C of Schedule A by 31 March 2021;
 - (h) calculated any associated superannuation underpayments as required by law for each of the Schedule A Employees, with DSA, METS or DSA Mentoring (as the case may be) to pay the amount in column F of Schedule A to this Undertaking to the chosen superannuation fund of each Schedule A Employee within 28 days of the end of the last quarter in which the relevant back payment is paid;
 - (i) calculated interest for each of the Schedule A Employees on the amount referred to in column C of Schedule A, in the sum referred to in column D of Schedule A, calculated using an interest rate that is 4% above the cash rate published by the RBA at the end of the last financial year, with the interest to be paid at the same time as the underpayments referred to in clause 7(g) above.
8. As a part of its internal review, DSA (on behalf of itself, METS and DSA Mentoring) has identified 928 employees listed in Schedule B to this Undertaking (**Schedule B Employees**) to whom the relevant instruments are likely to have applied but who may not have been paid by DSA, METS or DSA Mentoring in accordance with that instrument. DSA, METS and DSA Mentoring have not yet quantified the amount of the underpayment, if any, to each of the Schedule B Employees.

ADMISSIONS

9. The FWO has a reasonable belief, and DSA and METS each admit, that between 1 July 2013 and 31 October 2020 (**Relevant Period**) they contravened:
- (a) in respect of DSA and METS, section 45 of the FW Act by failing to pay each of the Schedule A Employees employed by DSA or METS the amount or amounts to which that employee was entitled under the relevant instruments in respect of the provisions of the relevant instrument identified in Schedule A to this Undertaking in relation to that employee; and
 - (b) in respect of DSA, sections 44 of the FW Act by permitting certain employees as identified in Schedule A to this Undertaking to cash out annual leave in an inconsistent manner with sections 92, 93 and 94 of the FW Act; and

- (c) in respect of DSA, section 44 of the FW Act by incorrectly characterising penalty payments as overtime payments, resulting in non-accrual of annual leave and personal/carer's leave, and incorrect calculation of hours worked for long service leave purposes, inconsistent with sections 87, 96 and 113 of the FW Act, for certain employees as identified in Schedule A to this Undertaking; and
 - (d) in respect of DSA, 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 each of the Schedule A Employees to this Undertaking for the Relevant Period.
- 10. The FWO also has a reasonable belief, and DSA and METS each also admit, that during the Relevant Period they contravened:
 - (a) in respect of DSA and METS, section 45 of the FW Act by failing to pay each of the Schedule B Employees to this Undertaking employed by DSA or METS the amount or amounts to which that employee was entitled under the provisions of the relevant instrument set out at clause 5 above with the relevant instrument identified in Schedule B for each respective employee during the Relevant Period; and
 - (b) in respect of DSA, 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 each of the Schedule B Employees to this Undertaking during the Relevant Period.
- 11. The FWO also has a reasonable belief, and DSA Mentoring admits, that between 6 July 2020 and 11 September 2020, DSA Mentoring contravened:
 - (a) section 768AG of the FW Act by:
 - (i) failing to pay each of the Schedule A Employees to this Undertaking employed by DSA Mentoring the amount or amounts to which that employee was entitled under the relevant instruments in respect of the provisions of the relevant instrument identified in Schedule A to this Undertaking in relation to that employee; and
 - (b) section 44 of the FW Act by:
 - (i) incorrectly characterising penalty payments as overtime payments, resulting in non-accrual of annual leave for those hours, inconsistent with section 87 of the FW Act, for certain employees as identified in Schedule A to this Undertaking.
- 12. The contraventions identified in clauses 9, 10 and 11 of this Undertaking do not include:
 - (a) any contraventions which relate to or arise as a consequence of DSA, METS or

DSA Mentoring failing to correctly apply the relevant instrument to any employee not listed in Schedule A or Schedule B 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 DSA, METS or DSA Mentoring failing to correctly apply the relevant 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 DSA, METS and DSA Mentoring (whether or not those contraventions are identified in the Independent Audits described at clause 30 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 DSA, METS and DSA Mentoring and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

UNDERTAKINGS

- 13. DSA, METS and DSA Mentoring will each take the actions set out at clauses 14 to 68 below (as applicable to each of them).

Review and rectification of underpayments

- 14. DSA (on behalf of itself, METS and DSA Mentoring) will by 31 March 2021, calculate the quantum of any underpayments to each of the Schedule B Employees under the relevant instrument during the Relevant Period (**Schedule B Underpayments**), superannuation entitlements payable in respect of any Schedule B Underpayments and interest with respect of any Schedule B Underpayments, calculated using an interest rate that is 4% above the cash rate published by the RBA at the end of the last financial year.
- 15. DSA, METS and DSA Mentoring (as the case may be) will by 31 March 2021 pay to each Schedule A Employee and to Schedule B Employees to whom a Schedule B Underpayment relates:
 - (a) the underpayment amount owing to them; and
 - (b) interest on the amount referred to in (a), calculated using an interest rate that is 4% above the cash rate published by the RBA at the end of the last financial year.
- 16. DSA, METS and DSA Mentoring (as the case may be) will pay each of the Schedule A Employees and Schedule B Employees to whom the Underpayments relate any superannuation payments which may be required by law, by making payment to their chosen superannuation fund within 28 days of the end of the quarter in which the

Underpayments are rectified.

17. DSA, METS and DSA Mentoring (as the case may be) will provide the FWO evidence of all payments made to current and former employees to rectify the Underpayments within 28 days of making those payments.
18. If any former employees to whom Underpayments are owed cannot be located by 30 April 2021, DSA, METS and DSA Mentoring (as the case may be) will pay the underpayment amounts owing to those employees to the Commonwealth of Australia in accordance with section 559 of the FW Act. DSA, METS and DSA Mentoring (as the case may be) will complete the required documents supplied by the FWO for this purpose.
19. In the event that the FWO is able to locate former DSA, METS or DSA Mentoring employees to whom Underpayments are owed, the FWO will (in addition to its obligations under section 559 of the FW Act) notify DSA, METS and DSA Mentoring (as the case may be) in writing of the name and contact details of the current or former employee. Within 14 days of receiving any such notice DSA, METS and DSA Mentoring (as the case may be) will pay the current or former employee:
 - (a) interest on the amount already paid by DSA, METS or DSA Mentoring to the Commonwealth of Australia in respect of that employee, calculated using an interest rate that is 4% above the cash rate published by the RBA at the end of the last financial year as at the date the underpayment amounts were paid in accordance with clause 18.

Provision of information to the FWO

20. By 31 March 2021, DSA (on behalf of itself, METS and DSA Mentoring) will provide the FWO details of new systems and processes that each entity has in place to ensure future systems and process are compliant with the FW Act.
21. DSA has (on behalf of itself, METS and DSA Mentoring) engaged Deloitte to perform calculations of wage entitlements with respect to issues identified at clause 6(g) above for a remediation period from 1 July 2013 to 15 January 2020 and to assist with the calculation of any underpayments that may have occurred after 15 January 2020 for all DSA, METS and DSA Mentoring employees who are, or may be, impacted by the identified issues.
22. By 1 May 2021, DSA will (on behalf of itself, METS and DSA Mentoring) obtain a report from DWS, or another appropriately qualified, external expert approved in writing by the FWO, to assess compliance by each of DSA, METS and DSA Mentoring with the relevant instruments during the Relevant Period, taking into account the calculations performed by

Deloitte referred to in clause 21. References to DWS below refer to either DWS or another appropriately qualified external expert approved in writing by the FWO.

23. When providing the report from DWS to the FWO, DSA, METS and DSA Mentoring will each state in writing that they do so without qualification and without seeking to place any limitation on how the FWO may use that report in the lawful performance of its statutory functions and powers. Each of DSA, METS and DSA Mentoring will not assert, or seek to assert, any limitation on how the FWO may use or rely on the report in the lawful performance of its statutory functions and powers.
24. By 15 May 2021, DSA (on behalf of itself, METS and DSA Mentoring) will provide the FWO with any full and non-redacted report(s) it has received from DWS in accordance with clause 22.
25. The FWO requires the following information to be addressed in the report from DWS:
 - (a) DWS' assessment of non-compliance by each of DSA, METS and DSA Mentoring with the relevant instruments during the Relevant Period;
 - (b) DWS' assessment of DSA's, METS' and DSA Mentoring's remediation and rectification program;
 - (c) actions taken, and findings and recommendations made by DWS, in relation to assessing and quantifying any underpayments due to DSA, METS and DSA Mentoring employees.
26. If the report(s) provided to the FWO under clause 25 above do not already include the information required by the FWO referred to in clause 25 above, each of DSA, METS and DSA Mentoring agree that upon a written request by the FWO, they will provide any specific additional information set out at clauses 25(a) to 25(c) as requested. Each of DSA, METS and DSA Mentoring agrees to provide this information to the FWO within a period of 14 days.
27. If DSA, METS or DSA Mentoring does not have the information set out at clauses 25(a) to 25(c), DSA, METS and DSA Mentoring must, in response to a request by the FWO, obtain such information as necessary from DWS to provide to the FWO and provide this information to the FWO within a period of 28 days.

Independent Audits

28. DSA (on behalf of itself, METS and DSA Mentoring) 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 each of

DSA's, METS' and DSA Mentoring's compliance with the FW Act and FW Regulations, in relation to the relevant instrument, and any future agreements or instruments that replace the relevant instrument (**Audits**).

29. DSA (on behalf of itself, METS and DSA Mentoring) will notify the FWO of its proposed Independent Auditor by no later than 31 March 2021 or such later date as is agreed between DSA and the FWO. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require DSA (on behalf of itself, METS and DSA Mentoring) 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 DSA (on behalf of itself, METS and DSA Mentoring).
30. Each of DSA, METS and DSA Mentoring must ensure that each of the Audits conducted by the Independent Auditor includes:
 - (a) an assessment of whether the relevant instrument (or replacement instruments) applies to all employees who either commenced employment, or whose role and function changed, during the relevant pre-audit period (**Sampled Employees**) in respect of their employment by DSA, METS or DSA Mentoring. For avoidance of doubt, in relation to DSA Mentoring, a replacement instrument includes an Award or Enterprise Agreement which applies to an employee whom a copied state award applied during the Relevant Period;
 - (b) an assessment of whether the Sampled Employees to whom the relevant instrument (or replacement instruments) applies have been correctly classified by DSA, METS or DSA Mentoring;
 - (c) an assessment of whether the pay and conditions of the Sampled Employees to whom the relevant instrument (or replacement instruments) applies during the relevant audit period is in compliance with the FW Act and the relevant instrument (or replacement instruments);
 - (d) direct contact with Sampled Employees to whom the relevant instrument (or replacement instruments) applies by way of site visits 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) notwithstanding that the Independent Auditor is retained by DSA (on behalf of itself, METS and DSA Mentoring), the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from any of DSA, METS and DSA Mentoring in preparing the report;
- (ii) the report is provided in accordance with applicable professional standards (which will be listed in the report); and
- (iii) the report is provided to the FWO for its benefit and the FWO can rely on the report.

The First Audit

- 31. Each of DSA, METS and DSA Mentoring must ensure the Independent Auditor commences the first of the Audits by no later than 15 July 2021 or such later date as is agreed between DSA, METS and DSA Mentoring and the FWO (**First Audit**).
- 32. For the First Audit, the relevant pre-audit period to assess Sampled Employees is 12 months.
- 33. The relevant audit period for the First Audit must be at least two full pay periods falling within the period 1 June 2021 – 30 June 2021.
- 34. By 1 June 2021, or such later date as is agreed between DSA (on behalf of itself, METS and DSA Mentoring) and the FWO, DSA (on behalf of itself, METS and DSA Mentoring) will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the First Audit.
- 35. Each of DSA, METS and DSA Mentoring will use their best endeavours to ensure the Independent Auditor provides a draft written report of the First Audit directly to the FWO by 1 October 2021, or such later date as is agreed between DSA (on behalf of itself, METS and DSA Mentoring) and the FWO, setting out the draft First Audit findings, and the facts and circumstances supporting the First Audit findings. Each of DSA, METS and DSA Mentoring will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to DSA, METS or DSA Mentoring without the FWO's prior written approval.
- 36. DSA (on behalf of itself, METS and DSA Mentoring) 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. Each of DSA, METS and DSA Mentoring will ensure the Independent Auditor does not provide the First Audit Report, or a copy of the same, to DSA, METS or DSA Mentoring without the FWO's prior written

approval.

The Second Audit

37. Each of DSA, METS and DSA Mentoring must ensure the Independent Auditor commences the second of the Audits by no later than 15 July 2022 or such later date as is agreed between DSA (on behalf of itself, METS and DSA Mentoring and the FWO (**Second Audit**)).
38. For the Second Audit, the relevant pre-audit period to assess Sampled Employees is 12 months.
39. The relevant audit period for the Second Audit must be at least two full pay periods falling within the period 1 June 2022 – 30 June 2022.
40. By 1 December 2021, or such later date as is agreed between DSA (on behalf of itself, METS and DSA Mentoring) and the FWO, DSA (on behalf of itself, METS and DSA Mentoring) will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Second Audit.
41. DSA (on behalf of itself, METS and DSA Mentoring) will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Second Audit directly to the FWO by 1 October 2022, or such later date as is agreed between DSA (on behalf of itself, METS and DSA Mentoring) and the FWO, setting out the draft Second Audit findings, and the facts and circumstances supporting the Second Audit findings. Each of DSA, METS and DSA Mentoring will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to DSA, METS or DSA Mentoring without the FWO's approval.
42. DSA (on behalf of itself, METS and DSA Mentoring) 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. Each of DSA, METS and DSA Mentoring will ensure the Independent Auditor does not provide the written report, or a copy of the same, to DSA, METS or DSA Mentoring without the FWO's prior written approval.

Outcome of Audits

43. If any of the Audits identify underpayments to any current or former employees, DSA, METS or DSA Mentoring (as the case may be) 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.

44. DSA, METS or DSA Mentoring (as the case may be) 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.
45. If any employees identified in the Audits as having underpayments owing to them cannot be located within 60 days of the conclusion of the Relevant Audit, DSA, METS or DSA Mentoring (as the case may be) will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. DSA, METS or DSA Mentoring (as the case may be) will complete the required documents supplied by the FWO for this purpose.
46. 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, DSA, METS or DSA Mentoring (as the case may be) will engage an accounting professional or an employment law specialist approved by the FWO to conduct a further audit of all its employees to whom the relevant instrument (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 DSA, METS or DSA Mentoring (as the case may be).
47. If requested by the FWO, each of DSA, METS and DSA Mentoring (as the case may be) 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

48. On 19 December 2019, at its own expense, DSA, (on behalf of itself, METS and DSA Mentoring) engaged an independent organisation to operate a dedicated telephone number for all current and former employees of DSA, METS and DSA Mentoring to whom the relevant instrument applies, or had applied, to make enquiries in relation to their entitlements, underpayments or related employment concerns (**Employee Hotline**). Employees have the option of making enquiries on a confidential basis.
49. The independent organisation has been approved by the FWO.
50. DSA (on behalf of itself, METS and DSA Mentoring) will:
 - (a) ensure the Employee Hotline remains operational until 30 June 2021;
 - (b) ensure that the telephone number is included on a communication to employees to whom the relevant instrument applies, the public notice (see clauses 54 to 56) and

the social media notice (see clauses 65 to 67);

- (c) communicate the existence and purpose of the Employee Hotline by way of letter to the last known address of all current and former employees to whom the relevant instrument applies, or had applied, known as at the Commencement Date, or identified during the period the Employee Hotline is in operation, and dating back to 1 July 2013. DSA (on behalf of itself, METS and DSA Mentoring), will provide evidence to the FWO that the letter has been mailed to all required current and former employees by 31 January 2021 or such later date as is agreed between DSA (on behalf of itself, METS and DSA Mentoring), and the FWO;
- (d) take steps to respond to each telephone 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 by the Employee Hotline to the FWO every three months from the establishment of the Employee Hotline.

Notices – Internal and External

Apology to Employees

- 51. In December 2019, DSA sent a letter of apology (**Apology Letter**) to all affected current employees found to have been underpaid by DSA in the form of Attachment A to this Undertaking. DSA, METS and DSA Mentoring (as the case may be) will send a letter of apology containing the content of Attachment A to this Undertaking to any other affected employee subsequently found to have been underpaid by 1 December 2021.
- 52. DSA, METS and DSA Mentoring will provide evidence to the FWO that the Apology Letter has been sent to all affected employees by 14 December 2021.

Media Release

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

Public Notice

- 54. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, DSA, METS and DSA Mentoring will place a combined notice in the *Sydney Morning Herald*.
- 55. The Public Notice must:
 - (a) bear the name and shared logo of DSA, METS and DSA Mentoring;

- (b) appear within the first 10 pages of the *Sydney Morning Herald*;
 - (c) be at least 10 cm x 8 cm; and
 - (d) contain wording in the form of Attachment B.
56. DSA (on behalf of itself, METS and DSA Mentoring) will inform the FWO when the Public Notice will be published and provide a copy to the FWO within seven days of its publication.

Workplace Notice

57. Within 28 days of the execution of this Undertaking, DSA, METS and DSA Mentoring will cause to be displayed within each of their respective worksites where the current Schedule A Employees or Schedule B Employees work a notice in the form of Attachment B to this Undertaking (**Workplace Notice**).
58. Each of DSA, METS and DSA Mentoring must ensure the Workplace Notice is:
- (a) at least A3 size;
 - (b) clearly displayed in a location to which all employees have access (for example, by placement on a staff noticeboard); and
 - (c) displayed for a period of 28 days.
59. Within 7 days of first displaying the Workplace Notice, DSA, METS and DSA Mentoring will provide photographic evidence to the FWO of the display and location of the Workplace Notice in each of their worksites.
60. At the end of the 28 day period referred to in paragraph 57 above, DSA, METS and DSA Mentoring will each provide confirmation to the FWO that the Workplace Notice has been continuously displayed at each location for the required period.
61. The reference to each of DSA's, METS' and DSA Mentoring's worksites referred to above means sites owned and operated by DSA, METS or DSA Mentoring where the relevant employees work and does not include, for example, the private homes of participants or any community settings.

Website Notice

62. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, DSA and METS will each place a notice on their respective website www.dsa.org.au / www.mets.org.au, on the homepage or a link on the homepage (**Website Notice**).

63. 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 28 days.
64. Within 7 days of placing the Website Notice on its website, DSA and METS will each provide to the FWO evidence of its placement.

Social Media Notice

65. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, DSA and METS will each place a post on their respective Facebook page (**Social Media Notice**).
66. The Social Media Notice must:
- (a) be posted to each of DSA's and METS' timeline (as the case may be), pinned to the top of the Facebook page in public view;
 - (b) remain on the Facebook page for a continuous period of at least 28 days; and
 - (c) be in the form of the Social Media Notice set out at Attachment B.
67. Within 7 days of posting the Social Media Notice to its Facebook page, DSA and METS will each provide to the FWO evidence of the post.

No Inconsistent Statements

68. Each of DSA, METS and DSA Mentoring must not, and must use their best endeavours to ensure that their respective 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 to times for completion

69. Each of DSA, METS and DSA Mentoring may request of the FWO an extension of a time specified for completion of an obligation under this Undertaking. Each of DSA, METS and/or DSA Mentoring (as the case may be) will provide information setting out the basis for such a request and make a request for an extension of time at least 28 days prior to the time that each of DSA, METS and/or DSA Mentoring (as the case may be) is required to complete the action as set out in this Undertaking. The FWO will not unreasonably withhold agreement on a request for an extension of time.
70. 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

71. DSA acknowledges that:

- (a) the FWO may;
 - (i) make this Undertaking (including any of the Attachments, provided that all employee names must be redacted) 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, provided that all employee names must be redacted) 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 DSA set out in clauses 9 and 10 above in respect of decisions taken regarding enforcement action in the event that DSA is found to have failed to comply with its respective workplace relations obligations in the future, including but not limited to any failure by DSA to comply with its respective 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, DSA may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if DSA 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 DSA in clauses 9 and 10 above, and also in respect of the question of costs.

72. METS acknowledges that:

- (a) the FWO may;
 - (i) make this Undertaking (including any of the Attachments, provided that all employee names must be redacted) 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, provided that all employee names must be redacted) 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 METS set out in clauses 9 and 10 above in respect of decisions taken regarding enforcement action in the event that METS is found to have failed to comply with its respective workplace relations obligations in the future, including but not limited to any failure by METS to comply with its respective 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, METS may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if METS contravene 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 METS in clauses 9 and 10 above, and also in respect of the question of costs.

73. DSA Mentoring acknowledges that:

- (a) the FWO may;
 - (i) make this Undertaking (including any of the Attachments, provided that all

employee names must be redacted) 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, provided that all employee names must be redacted) 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 DSA Mentoring set out in clause 11 above in respect of decisions taken regarding enforcement action in the event that DSA Mentoring is found to have failed to comply with its respective workplace relations obligations in the future, including but not limited to any failure by DSA Mentoring to comply with its respective 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, DSA Mentoring may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
 - (d) if DSA Mentoring contravene 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 DSA Mentoring in clause 11 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by Disability Services Australia Limited in accordance with section 127(1) of the Corporations Act 2001 (Cth):



(Signature of director)



(Signature of director/company secretary)

Kenneth George Gabb

(Name of director)



(Name of director/company secretary)

17/12/20

(Date)

in the presence of:

17/12/20

(Date)

in the presence of:



(Signature of witness)



(Signature of witness)


ANGELINA MORAL

(Name of witness)

ANGELINA MORAL

(Name of witness)

EXECUTED by Macquarie Employment Training Service Limited in accordance with section 127(1) of the Corporations Act 2001 (Cth):


(Signature of director)


(Signature of ~~director~~/company secretary)

Kenneth George Gabb
(Name of director)


Craig Fisher
(Name of ~~director~~/company secretary)

17/12/20
(Date)


in the presence of:

17/12/20
(Date)

in the presence of:


(Signature of witness)

ANGELINA MORAL
(Name of witness)


(Signature of witness)

ANGELINA MORAL
(Name of witness)

EXECUTED by DSA Mentoring Services Limited in accordance with section 127(1) of the Corporations Act 2001 (Cth):



(Signature of director)



(Signature of ~~director~~/company secretary)

Kenneth George Gabb

(Name of director)



(Name of ~~director~~/company secretary)

17/12/20

(Date)

in the presence of:

17/12/20

(Date)

in the presence of:



(Signature of witness)



(Signature of witness)

ANGELINA MORAL

(Name of witness)

ANGELINA MORAL

(Name of witness)

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



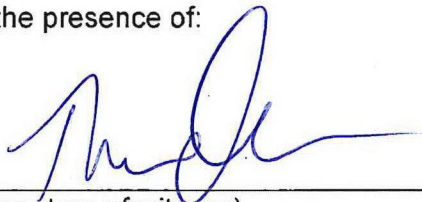
Mark Scully, Deputy Fair Work
Ombudsman – Compliance and
Enforcement

18/12/20

(Date)

Delegate for the FAIR WORK
OMBUDSMAN

in the presence of:



(Signature of witness)

TOM O'SHEA

(Name of Witness)

Attachment A – Letter of Apology

FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEES

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I am writing to you because we have identified some employee payment issues within [insert relevant Disability Services Australia (DSA)/Macquarie Education Training Services (METS)/ DSA Mentoring Services Limited (DSA Mentoring)].

Several failures to correctly apply the National Employment Standards, Awards and Enterprise Agreements have been found across [insert relevant DSA/METS/DSA Mentoring].

We have identified that your pay has been affected resulting in underpayment.

This is not acceptable and I am deeply sorry that we have let you down. The wellbeing of our employees is and always will be my priority and I assure you we are working as quickly as possible to fix this.

We have identified errors in [insert relevant DSA's/METS'/ DSA Mentoring's] systems and processes which were set up in previous years.

The errors identified in your current employment contract are as follows:

- [insert as applicable]

A consequence of these errors is that you may not have been paid correctly in the following areas:

- [insert as applicable]

This is unacceptable and we are working hard to fix the mistake and ensure that it does not happen again. I have informed the Fair Work Ombudsman and have also engaged an independent, external industrial relations expert and accounting firm to accurately identify the extent of the issues and calculate any back payments owing.

We will do everything we can to calculate and pay any money owed to you as quickly as possible. Given the complexity of the issues, I expect this will take a number of months so I ask for your patience as we complete this important and detailed work.

To ensure you are paid in line with the Award from this point on, a number of changes will take place. [insert as applicable]

I assure you that we will work with you and your team to help embed these new processes, which will become effective [insert as applicable].

As a result of the issues identified to date, [insert relevant DSA/METS/ DSA Mentoring Services Limited] is taking a number of additional steps:

- We are investigating all other employee contracts in the organisation.
- We are reviewing our systems and processes to ensure this does not occur again.

I am sure that you will have questions, so to support you as we work through this, a dedicated, independent hotline has been organised, and is contactable by calling 1800 278 772 You can also contact the [insert relevant DSA /METS/ DSA Mentoring Services Limited] payroll team via a dedicated email specifically to discuss this matter, at payrollreview@dsa.org.au.

Again, I am sorry that [insert relevant DSA/METS/ DSA Mentoring] has let you down. I am 100% committed to fixing this and appreciate your patience as we work through this process.

Kind Regards,

Leisa Hart
Chief Executive Officer

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

At the initiative of new senior management, Disability Services Australia Limited, Macquarie Employment Training Service Limited and DSA Mentoring Services Limited (collectively, **DSA**), recently undertook a review of DSA's payroll systems and processes and determined that DSA had contravened the *Fair Work Act 2009* (Cth) (**FW Act**) by failing to correctly pay some employees entitlements under the applicable awards and enterprise agreements. DSA also determined that it failed to correctly record hours worked by some employees, did not correctly accrue annual leave for some employees and permitted some employees to cash out annual leave on a basis contrary to the requirements of the FW Act.

DSA has self-reported and formally admitted to the Fair Work Ombudsman (**FWO**) that these contraventions had occurred and consequently a number of employees had been underpaid.

DSA has formally apologised to individual employees and committed to back paying those affected.

DSA has now entered into an Enforceable Undertaking with the FWO to ensure its ongoing compliance with Commonwealth workplace laws. DSA will, as a result of the Enforceable Undertaking, commit to undertake a number of activities to ensure its ongoing compliance such as conducting two independent audits.

DSA expresses its sincerest regret and apologises for these contraventions.

If you worked for DSA at any time after 1 July 2013 and have queries or questions relating to your employment, please contact either:

- the hotline being operated by independent third party Fonebox on 1800 278 772. This hotline can be contacted on a confidential basis; or
- DSA directly through their non-confidential enquiry line on payrollreview@dsa.org.au.

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