

**ENFORCEABLE UNDERTAKING**

between

**The Commonwealth of Australia**  
**(as represented by the Office of the Fair Work Ombudsman)**

and

**Lush Australasia Retail Pty Limited**  
**ACN 077 737 663**

and

**Lush Australasia Manufacturing Pty Ltd**  
**ACN 077 778 682**

## ENFORCEABLE UNDERTAKING

### PARTIES

1. This Undertaking is given to the Fair Work Ombudsman (**FWO**) pursuant to section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**) by:
  - (a) Lush Australasia Retail Pty Limited (ACN 077 737 663) (**Lush Retail**); and
  - (b) Lush Australasia Manufacturing Pty Ltd (ACN 077 778 682) (**Lush Manufacturing**).

### INTERPRETATION

2. The meanings of terms used in this Undertaking are set out below:

<b>Affected Employees</b>	means current and former employees of Lush Retail and Lush Manufacturing who, during the Pay Error Period, received less than the wages and entitlements they were entitled to receive from Lush Retail and/or Lush Manufacturing under the Modern Award that applied to their employment and the FW Act.
<b>Commencement Date</b>	means the date determined in accordance with paragraph 3 of this Undertaking.
<b>Compliance Matters</b>	means: <ul style="list-style-type: none"><li>• employment categories;</li><li>• classifications;</li><li>• minimum weekly wages;</li><li>• junior rates;</li><li>• allowances;</li><li>• overtime and penalties;</li><li>• breaks;</li><li>• annual leave;</li><li>• personal/carer's leave; and</li><li>• public holidays.</li></ul>
<b>CRF</b>	means the Consolidated Revenue Fund of the Commonwealth of Australia.
<b>Clerks Award</b>	means the <i>Clerks - Private Sector Award 2010</i> (as in force from time to time).
<b>FW Act</b>	means the <i>Fair Work Act 2009</i> (Cth) (as in force from time to time).
<b>Manufacturing Award</b>	means the <i>Manufacturing and Associated Industries and Occupations Award 2010</i> (as in force from time to time).
<b>Pay Error Period</b>	means the period from 1 July 2010 to 17 July 2018.
<b>Retail Award</b>	means the <i>General Retail Industry Award 2010</i> (as in force from time to time).
<b>Undertaking</b>	means this enforceable undertaking.

## **COMMENCEMENT OF UNDERTAKING**

3. This Undertaking commences on the date that:
  - (a) the Undertaking is executed by Lush Retail and Lush Manufacturing; and
  - (b) the FWO accepts the executed Undertaking.

## **BACKGROUND**

4. Lush Retail and Lush Manufacturing manufacture and sell fresh handmade cosmetics through their retail stores and online.
5. Mark Graeme Lincoln has been a Director and Company Secretary of Lush Retail and Lush Manufacturing since 21 March 2005.
6. Peta Anne Granger has been a Director of Lush Retail and Lush Manufacturing since 31 May 2014.
7. Lush Retail's operations in Australia include 36 retail stores in six States and one Territory. Lush Manufacturing's operations in Australia include one factory in Sydney.
8. Lush Retail currently employs approximately 750 employees across Australia, and Lush Manufacturing employs approximately 200 employees at its factory at 74/76 Biloela St, Villawood NSW 2163.
9. In July 2018, Lush Retail and Lush Manufacturing disclosed to the FWO that:
  - (a) Lush Retail, since the commencement of the Retail Award; and
  - (b) Lush Manufacturing, since the commencement of the Manufacturing Award and the Clerks Award,did not:
  - (i) implement part-time agreements in writing for some employees;
  - (ii) pay some employees at the applicable classification level under the relevant Modern Award; and
  - (iii) pay correct rates of pay including penalties, overtime, and allowances under the relevant Modern Award.
10. The conduct resulted in contraventions of the Retail Award, Manufacturing Award, and the Clerks Award during the Pay Error Period.

11. The contraventions were caused by insufficient processes, lack of self-auditing, lack of training for staff and managers, a manual payroll system, and the absence of a human resource department.
12. Prior to the execution of this Undertaking, Lush Manufacturing has:
  - (a) identified the difference between:
    - (i) the wages and entitlements paid to an Affected Employee during the Pay Error Period; and
    - (ii) the amount an Affected Employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act during the Pay Error Period;  
as totalling \$1,166,526.94 gross (**Manufacturing Rectification Payments**);
  - (b) paid the Manufacturing Rectification Payments to the Affected Employees, plus 5.5 per cent interest, or, where Affected Employees could not be located, paid the Manufacturing Rectification Payments (excluding interest) to the CRF.
13. Prior to the execution of this Undertaking, Lush Retail has:
  - (a) identified the difference between:
    - (i) the wages and entitlements paid to an Affected Employee during the Pay Error Period; and
    - (ii) the amount an Affected Employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act during the Pay Error Period;  
as totalling \$2,446,900.35 gross (**Retail Rectification Payments**);
  - (b) paid the Retail Rectification Payments, plus 5.5 per cent interest, to the Affected Employees, or, where Affected Employees could not be located, paid the Retail Rectification Payments (excluding interest) to the CRF.
14. Lush Retail and Lush Manufacturing, as the case may be, have undertaken the following corrective actions prior to the Commencement Date:
  - (a) written to all contactable Affected Employees to notify them about the contraventions, and how they may be impacted;
  - (b) implemented new roster, time and attendance, and payroll systems;
  - (c) engaged a law firm specialising in employment law to conduct audits of five different randomly selected employees each week for a period of 16 consecutive weeks, alternating weekly between Lush Manufacturing and Lush Retail;



- (d) delivered training to Store Managers engaged by Lush Retail between 18 July 2018 and 26 July 2018, dealing with compliance under the Retail Award and the FW Act;
  - (e) delivered training to all employees of Lush Manufacturing as at 19 July 2018, dealing with compliance under the Clerks Award, Manufacturing Award, and the FW Act;
  - (f) produced a series of webinars dealing with the FW Act and Retail Award, which are available to all current and future employees of Lush Retail;
  - (g) employed an experienced payroll manager;
  - (h) established a dedicated hotline and email address accessible to current and former employees of Lush Retail and Lush Manufacturing to direct any enquiries;
  - (i) engaged an external payroll provider to identify and quantify any underpayments to Affected Employees of Lush Manufacturing, and then further engaged lawyers specialising in employment law and industrial relations to conduct a comprehensive review of that payroll provider's back pay calculations;
  - (j) engaged a further external professional service provider to identify and quantify any underpayments to Affected Employees of Lush Retail;
  - (k) created a website to apologise to Affected Employees, customers, and the general public; and
  - (l) continues to cooperate with the FWO to rectify the contraventions.
15. On 13 October 2020 Lush Manufacturing provided to the FWO a Letter of Assurance signed by its Directors in the terms as set out in Attachment B.
16. On 13 October 2020 Lush Retail provided to the FWO a Letter of Assurance signed by its Directors in the terms as set out in Attachment C.

## **ADMISSIONS**

### **Lush Retail**

17. Lush Retail admits, and the FWO reasonably believes, that during the Pay Error Period Lush Retail contravened section 45 of the FW Act by contravening the following terms of the Retail Award:
- (a) **clause 12.2:** at the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:
    - (i) the hours worked each day;

- (ii) which days of the week the employee will work;
- (iii) the actual starting and finishing times of each day;
- (iv) that any variation will be in writing;
- (v) minimum daily engagement is three hours;
- (vi) the times of taking and the duration of meal breaks;
- (b) **clause 12.3:** any agreement to vary the regular pattern of work will be made in writing before the variation occurs;
- (c) **clause 12.4:** the agreement and variation to it will be retained by the employer and a copy given by the employer to the employee;
- (d) **clause 12.7:** all time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 29.2 – overtime;
- (e) **clause 17:** minimum rates of pay;
- (f) **clause 18:** junior minimum rates of pay;
- (g) **clause 28.11(a):** ordinary hours will be worked so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period;
- (h) **clause 28.13(a):** an employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday;
- (i) **clause 29.2(b):** hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 will be paid at time and a half for the first three hours and double time thereafter;
- (j) **clause 29.3(c):** where an employee and employer have agreed to the employee taking time off instead of being paid for a particular amount of overtime that has been worked, the time off must be taken:
  - (i) within the period of 6 months after the overtime is worked; and
  - (ii) at a time or times within that period of 6 months agreed by the employee and the employer; and
- (k) **clause 31.2(b):** where an employee recommences work without having 12 hours off work then the employee will be paid at double the rate they would be entitled to until such

time they are released from duty for a period of 12 consecutive hours off work without loss of pay for ordinary time hours occurring during the period of such absence.

#### **Lush Manufacturing**

18. Lush Manufacturing admits, and the FWO reasonably believes, that during the Pay Error Period Lush Manufacturing contravened section 45 of the FW Act by contravening the following terms of the Manufacturing Award:

- (a) **clause 13.3:** before commencing part-time employment, the employee and the employer must agree in writing:
  - (i) the hours to be worked by the employee, the days on which they will be worked and the commencing and finishing times for the work; and
  - (ii) on the classification applying to the work performed in accordance with Schedule B of the Manufacturing Award;
- (b) **clause 13.4:** the terms of the agreement in clause 13.3 may be varied by consent in writing;
- (c) **clause 13.5:** the agreement under clause 13.3 or any variation to it under clause 13.4 must be retained by the employer and a copy of the agreement and any variation to it must be provided to the employee by the employer;
- (d) **clause 24.1(a):** adult minimum wages;
- (e) **clause 24.1(f):** supervisor/trainer/coordinator – Levels I and II minimum wages;
- (f) **clause 32.1(a):** leading hand in charge of three or more employees must be paid an allowance;
- (g) **clause 32.2(i):** manganese dioxide and other pigments allowance;
- (h) **clause 32.4(a):** excess travelling and fares;
- (i) **clause 37.3:** afternoon and night shift allowances;
- (j) **clause 40.1(a):** except as provided for in clauses 40.1(d), 40.8, 40.9, and 40.13, for all work done outside ordinary hours on any day or shift, as defined in clauses 36.2, 36.3 and 36.4, the overtime rate is time and a half for the first three hours and double time thereafter until the completion of the overtime work. For a continuous shiftworker the rate for working overtime is double time;

- (k) **clause 40.4(a):** when overtime work is necessary it must, wherever reasonably practicable, be arranged so that an employee has at least 10 consecutive hours off duty between the work of successive working days;
  - (l) **clause 40.13(e):** where an employee and employer have agreed to the employee taking time off instead of being paid for a particular amount of overtime that has been worked, time off must be taken:
    - (i) within the period of 6 months after the overtime is worked; and
    - (ii) at a time or times within that period of 6 months agreed by the employee and the employer.
19. Lush Manufacturing admits, and the FWO reasonably believes, that Lush Manufacturing contravened section 45 of the FW Act by contravening the following terms of the Clerks Award:
- (a) **clause 15.1:** employer to advise employee of classification in writing; and
  - (b) **clause 16:** employee minimum weekly wages.

#### **Lush Retail and Lush Manufacturing**

20. Lush Retail and Lush Manufacturing admit, and the FWO reasonably believes, that during the Pay Error Period they both contravened the following section of the FW Act:
- (a) **section 535:** employer obligation to make, and keep for 7 years, employee records as prescribed by the *Fair Work Regulations 2009* (Cth) in relation to each of its employees.

#### **LUSH RETAIL UNDERTAKINGS**

21. Upon the execution of this Undertaking and for the purposes of section 715 of the FW Act, Lush Retail undertakes to do the following:

##### **Payment of interest**

22. In the event that the FWO is able to locate and contact any Affected Employees of Lush Retail in respect of whom payments have been made to the CRF in accordance with paragraph 13(b) above, the FWO will (in addition to its obligations under section 559 of the FW Act) notify Lush Retail in writing of the name and contact details of the Affected Employee. Within 14 days of receiving any such notice Lush Retail will pay the Affected Employee 5.5% interest on the applicable Retail Rectification Payment, being 5.5% interest on the amount paid to the CRF, calculated up until the date on which Lush Retail first attempted payment to the relevant employee payment in accordance with paragraph 13(b) above.



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

23. For a period of three (3) years after the execution of this Undertaking, the FWO may request in writing from Lush Retail:
- (a) an employment record required to be kept under section 535 of the FW Act pertaining to an Affected Employee; or
  - (b) the final calculation provided, or intended to be provided, by Lush Retail to an Affected Employee, detailing the final amount calculated as being owing to the Affected Employee;
- and Lush Retail shall provide those documents to the FWO within seven days of receiving such request.
24. For the avoidance of doubt, the undertaking provided at paragraph 23 does not extend to any document or record not expressly referred to within that paragraph.
25. If, upon a review by the FWO of the documents described at paragraph 23 above, the FWO determines that:
- (a) the wages and entitlements paid to an Affected Employee of Lush Retail during the Pay Error Period is less than the amount the Affected Employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act; and
  - (b) the Retail Rectification Payment (not including any amount paid as interest) paid to the Affected Employee (or to the CRF on behalf of the Affected Employee) in accordance with paragraph 13(b) above was insufficient to rectify the shortfall described in paragraph 25(a);

the FWO may notify Lush Retail in writing of the difference between:

- (c) the total of:
  - (i) wages and entitlements paid to the Affected Employee of Lush Retail during the Pay Error Period; and
  - (ii) the Retail Rectification Payment paid to the Affected Employee (or to the CRF on behalf of the Affected Employee); and
- (d) the amount the Affected Employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act;

**(the Outstanding Retail Shortfall Amount)**



and direct Lush Retail to pay the Outstanding Retail Shortfall Amount to the Affected Employee (or to the CRF on behalf of the Affected Employee), and Lush Retail shall pay the Outstanding Retail Shortfall Amount within 14 days of receipt of such notice.

#### **Future Annual Audit Activity**

26. On or before a date which is no later than eight months from the signing of this Undertaking, Lush Retail will engage an external professional services provider with expertise in accounting and/or employment law, to:
  - (a) perform an audit (**First Retail Audit**) of at least 5 per cent of employees of Lush Retail (**First Retail Sample**) for two consecutive pay periods falling within or substantially within the period 1 January 2021 to 31 January 2021, provided that the First Retail Sample includes a combination of full-time, part-time and casual employees;
  - (b) conduct site visits of at least 10 per cent of workplaces where employees of Lush Retail ordinarily perform work, for the purpose of contacting employees of the First Retail Sample; and
  - (c) assess the First Retail Sample's compliance with the Compliance Matters under the Retail Award, and the FW Act.
27. Lush Retail will notify the FWO in writing of the name of the professional services provider engaged to carry out the First Retail Audit by no later than seven days after the due date referred to in paragraph 26 above.
28. Lush Retail will provide a report of the First Retail Audit to the FWO in writing within 45 days of the due date referred to in paragraph 26 or such longer period as the FWO allows.
29. On or before a date which is no later than 20 months of the signing of this Undertaking, Lush Retail will engage an external professional services provider with expertise in accounting and/or employment law, to:
  - (a) perform an audit (**Second Retail Audit**) of at least 5 per cent of employees of Lush Retail (**Second Retail Sample**) for two consecutive pay periods falling within or substantially within the period 1 July 2021 to 31 July 2021, provided that the Second Retail Sample includes a combination of full-time, part-time and casual employees;
  - (b) conduct site visits of at least 10 per cent of workplaces where employees of Lush Retail ordinarily perform work, for the purpose of contacting employees of the Second Retail Sample; and
  - (c) assess the Second Retail Sample's compliance with the Compliance Matters under Retail Award, and the FW Act.

30. Lush Retail will notify the FWO in writing of the name of the professional services provider engaged to carry out the Second Retail Audit by no later than seven days after the due date referred to in paragraph 29 above.
31. Lush Retail will provide a report of the Second Retail Audit to the FWO in writing within 45 days of the due date referred to in paragraph 29 above.
32. On or before a date which is no later than 32 months of the signing of this Undertaking, Lush Retail will engage an external professional services provider with expertise in accounting and/or employment law, to:
  - (a) perform an audit (**Third Retail Audit**) of at least 5 per cent of employees of Lush Retail (**Third Retail Sample**) for two consecutive pay periods falling within or substantially within the period 1 July 2022 to 31 July 2022, provided that the Third Retail Sample includes a combination of full-time, part-time and casual employees;
  - (b) conduct site visits of at least 10 per cent of workplaces where employees of Lush Retail ordinarily perform work, for the purposes of contacting employees of the Third Retail Sample; and
  - (c) assess the Third Retail Sample's compliance with the Compliance Matters under the Retail Award, and the FW Act.
33. Lush Retail will notify the FWO in writing of the name of the professional services provider engaged to carry out the Third Retail Audit by no later than seven days after the due date referred to in paragraph 32 above.
34. Lush Retail will provide a report of the Third Retail Audit to the FWO in writing within 45 days of the due date referred to in paragraph 32 above.
35. Within seven days of a request of the FWO, Lush Retail will provide to the FWO all records, documents, and materials within Lush Retail's control used by the external professional services provider to conduct the Retail Audits, including any working documents, provided that the disclosure of such records, documents, or materials is not contrary to law.
36. For the removal of doubt:
  - (a) the external professional services provider engaged by Lush Retail to carry out the Retail Audits may be the same provider engaged by Lush Manufacturing to carry out the Manufacturing Audits as defined at paragraphs 49, 52 and 55 below, but will not be the provider engaged to calculate the Retail Rectification Payments referred to at paragraph 13 above; and

- (b) the external professional services provider for successive Retail Audits may be the same provider, or a different provider.

#### **Outcome of Audits**

- 37. If any Retail Audit determines that the wages and entitlements paid to an employee of Lush Retail during the relevant audit period is less than the amount the employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act, within 30 days of a request of the FWO, Lush Retail will engage an external professional services provider with expertise in accounting and/or employment law to:
  - (a) perform an audit (**Retail Audit Review**) of all employees of Lush Retail or a sample of employees as requested by the FWO for the relevant audit period (**Retail Audit Sample**); and
  - (b) assess the Retail Audit Sample's compliance with the Compliance Matters under the Retail Award, and the FW Act; and
  - (c) provide a report of the Retail Audit Review to the FWO in writing within 30 days of the completion of the Retail Audit Review.
- 38. Within 30 days of the completion of the Retail Audit Review, or such longer period as otherwise agreed between Lush Retail and the FWO, Lush Retail will pay to employees of Lush Retail (who were, as a result of the Retail Audit Review, for the relevant period determined to have received less than the wages and entitlements they were entitled to receive from Lush Retail under the Modern Award that applied to their employment and the FW Act) the difference between:
  - (a) the wages and entitlements paid to an employee of Lush Retail during the relevant audit period; and
  - (b) the amount an employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act (**Retail Audit Review Payments**).
- 39. Notwithstanding paragraph 38 above, where Lush Retail is unable to contact any employee of Lush Retail described in paragraph 38 who is no longer employed by Lush Retail within 30 days of the completion of the Retail Audit Review, or such longer period as otherwise agreed between Lush Retail and the FWO, Lush Retail will within seven days after the end of the aforementioned 30-day period:
  - (a) notify the FWO in writing of Lush Retail's attempts to contact the employee;
  - (b) comply with the requirements in section 559 of the FW Act to pay the applicable Retail Audit Review Payment to the CRF;



- (c) complete any required documents provided by the FWO to comply with the requirements of section 559 and paragraph (b) above; and
  - (d) pay the applicable additional amounts to the CRF.
40. Within seven days of a request of the FWO, Lush Retail will provide to the FWO all records, documents, and materials within Lush Retail's control used by the external professional services provider to conduct the Retail Audit Review, including any working documents, provided that the disclosure of such records, documents, or materials is not contrary to law.
41. For the removal of doubt:
- (a) the external professional services provider engaged by Lush Retail to carry out the Retail Audits may be the same provider engaged by Lush Retail to carry out the Retail Audit Review; and
  - (b) where subsequent Retail Audits determine the outcomes specified in paragraph 37 above, Lush Retail will comply with the requirements of paragraphs 37 to 40 in each instance.

#### **Compliance Review**

42. By no later than 28 days of the signing of this Undertaking, Lush Retail will review all contracts of employment issued to current employees of Lush Retail who are paid an annualised salary, to assess compliance of the contracts of employment with the Compliance Matters under Retail Award, and the FW Act (**Retail Compliance Review**).
43. By no later than 28 days of the signing of this Undertaking, Lush Retail will provide the FWO with examples of any new or varied contracts of employment resulting from the Retail Compliance Review.

#### **LUSH MANUFACTURING UNDERTAKINGS**

44. Upon the execution of this Undertaking and for the purposes of section 715 of the FW Act, Lush Manufacturing undertakes to do the following:

##### **Payment of interest**

45. In the event that the FWO is able to locate and contact any Affected Employees of Lush Manufacturing in respect of whom payments have been made to the CRF in accordance with paragraph 12(b) above, the FWO will (in addition to its obligations under section 559 of the FW Act) notify Lush Manufacturing in writing of the name and contact details of the Affected Employee. Within 14 days of receiving any such notice Lush Manufacturing will pay the Affected Employee 5.5% interest on the applicable Manufacturing Rectification Payment, being 5.5%

interest on the amount paid to the CRF, calculated up until the date on which Lush Manufacturing first attempted payment to the relevant employee in accordance with paragraph 12(b) above.

**Provision of information to the FWO**

46. If, upon inquiry by an Affected Employee of Lush Manufacturing, the FWO requests in writing from Lush Manufacturing any of:

- (a) an employment record required to be kept under section 535 of the FW Act pertaining to the Affected Employee; or
- (b) the final calculation provided, or intended to be provided, by Lush Manufacturing to the Affected Employee, detailing the final amount calculated as being owing to the Affected Employee;

Lush Manufacturing shall provide those documents to the FWO within seven days of receiving such request.

47. For the avoidance of doubt, the undertaking provided at paragraph 46 does not extend to any document or record not expressly referred to within that paragraph.

48. If, upon a review by the FWO of the documents described at paragraph 46 above, the FWO determines that:

- (a) the wages and entitlements paid to an Affected Employee of Lush Manufacturing during the Pay Error Period is less than the amount the Affected Employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act; and
- (b) the Manufacturing Rectification Payment (not including any amount paid as interest) paid to the Affected Employee (or to the CRF on behalf of the Affected Employee) in accordance with paragraph 12(b) above was insufficient to rectify the shortfall described in paragraph 48(a);

the FWO may notify Lush Manufacturing in writing of the difference between:

- (c) the total of:
  - (i) wages and entitlements paid to the Affected Employee of Lush Manufacturing during the Pay Error Period; and
  - (ii) the Manufacturing Rectification Payment paid to the Affected Employee (or to the CRF on behalf of the Affected Employee); and
- (d) the amount the Affected Employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act;



**(the Outstanding Manufacturing Shortfall Amount)**

and direct Lush Manufacturing to pay the Outstanding Manufacturing Shortfall Amount to the Affected Employee (or to the CRF on behalf of the Affected Employee), and Lush Manufacturing shall pay the Outstanding Manufacturing Shortfall Amount within 14 days of receipt of such notice.

**Future Annual Audit Activity**

49. On or before a date which is no later than eight months of the signing of this Undertaking, Lush Manufacturing will engage an external professional services provider with expertise in accounting and/or employment law, to:
- (a) perform an audit (**First Manufacturing Audit**) of at least 5 per cent of employees of Lush Manufacturing (**First Manufacturing Sample**) for two consecutive pay periods falling within or substantially within the period 1 January 2021 to 31 January 2021, provided that the First Manufacturing Sample includes a combination of full-time, part-time and casual employees;
  - (b) conduct a site visit of Unit 1A, 74 – 76 Biloela Street, Villawood in the State of New South Wales, or such other workplaces where employees of Lush Manufacturing ordinarily perform work, for the purpose of contacting employees of the First Manufacturing Sample; and
  - (c) assess the First Manufacturing Sample's compliance with the Compliance Matters under Manufacturing Award, Clerks Award, and the FW Act.
50. Lush Manufacturing will notify the FWO in writing of the name of the professional services provider engaged to carry out the First Manufacturing Audit by no later than seven days after the due date referred to in paragraph 49 above.
51. Lush Manufacturing will provide a report of the First Manufacturing Audit to the FWO in writing within 45 days of the due date referred to in paragraph 49.
52. On or before a date which is no later than 20 months of the signing of this Undertaking, Lush Manufacturing will engage an external professional services provider with expertise in accounting and/or employment law, to:
- (a) perform an audit (**Second Manufacturing Audit**) of at least 5 per cent of employees of Lush Manufacturing (**Second Manufacturing Sample**) for two consecutive pay periods falling within or substantially within the period 1 July 2021 to 31 July 2021, provided that the Second Manufacturing Sample includes a combination of full-time, part-time and casual employees;

- (b) conduct a site visit of Unit 1A, 74 – 76 Biloela Street, Villawood in the State of New South Wales, or such other workplaces where employees of Lush Manufacturing ordinarily perform work, for the purpose of contacting employees of the Second Manufacturing Sample; and
  - (c) assess the Second Manufacturing Sample’s compliance with the Compliance Matters under Manufacturing Award, Clerks Award, and the FW Act.
- 53. Lush Manufacturing will notify the FWO in writing of the name of the professional services provider engaged to carry out the Second Manufacturing Audit by no later than seven days after the due date referred to in paragraph 52 above.
- 54. Lush Manufacturing will provide a report of the Second Manufacturing Audit to the FWO in writing within 45 days of the due date referred to in paragraph 52 above.
- 55. On or before a date which is no later than 32 months of the signing of this Undertaking, Lush Manufacturing will engage an external professional services provider with expertise in accounting and/or employment law, to:
  - (a) perform an audit (**Third Manufacturing Audit**) of at least 5 per cent of employees of Lush Manufacturing (**Third Manufacturing Sample**) for two consecutive pay periods falling within or substantially within the period 1 July 2022 to 31 July 2022, provided that the Third Manufacturing Sample includes a combination of full-time, part-time and casual employees;
  - (b) conduct a site visit of Unit 1A, 74 – 76 Biloela Street, Villawood in the State of New South Wales, or such other workplaces where employees of Lush Manufacturing ordinarily perform work, for the purpose of contacting employees of the Third Manufacturing Sample; and
  - (c) assess the Third Manufacturing Sample’s compliance with the Compliance Matters under Manufacturing Award, Clerks Award, and the FW Act.
- 56. Lush Manufacturing will notify the FWO in writing of the name of the professional services provider engaged to carry out the Third Manufacturing Audit by no later than seven days of the due date referred to in paragraph 55 above.
- 57. Lush Manufacturing will provide a report of the Third Manufacturing Audit to the FWO in writing within 45 days of the due date referred to in paragraph 55 above.
- 58. Within seven days of a request of the FWO, Lush Manufacturing will provide to the FWO all records, documents, and materials within Lush Manufacturing’s control used by the external professional services provider to conduct the Manufacturing Audits, including any working

documents, provided that the disclosure of such records, documents, or materials is not contrary to law.

59. For the removal of doubt:

- (a) the external professional services provider engaged by Lush Manufacturing to carry out the Manufacturing Audits may be the same provider engaged by Lush Retail to carry out the Retail Audits, but will not be the provider engaged to calculate the Manufacturing Rectification Payment referred to in paragraph 12 above; and
- (b) the external professional services provider for successive Manufacturing Audits may be the same provider, or a different provider.

#### **Outcome of Audits**

60. If any Manufacturing Audit determines that the wages and entitlements paid to an employee of Lush Manufacturing during the relevant audit period, is less than the amount the employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act, within 30 days of a request of the FWO, Lush Manufacturing will engage an external professional services provider with expertise in accounting and/or employment law, to:

- (a) perform an audit (**Manufacturing Audit Review**) of all employees of Lush Manufacturing or a sample of employees as requested by the FWO, for the relevant audit period (**Manufacturing Audit Sample**); and
- (b) assess the Manufacturing Audit Sample's compliance with the Compliance Matters under Manufacturing Award, Clerks Award, and the FW Act; and
- (c) provide a report of the Manufacturing Audit Review to the FWO in writing within 30 days of the completion of the Manufacturing Audit Review.

61. Within 30 days of completion of the Manufacturing Audit Review, Lush Manufacturing will pay to employees of Lush Manufacturing (who were, as a result of the Manufacturing Audit Review, for the relevant period determined to have received less than the wages and entitlements they were entitled to receive from Lush Manufacturing under the Modern Award that applied to their employment and the FW Act) the difference between:

- (a) the wages and entitlements paid to an employee of Lush Manufacturing during the relevant audit period; and
- (b) the amount an employee was entitled to be paid under the Modern Award that applied to their employment and the FW Act (**Manufacturing Audit Review Payments**).



62. Notwithstanding paragraph 61 above, where Lush Manufacturing is unable to contact any employee of Lush Manufacturing described in paragraph 61 above who is no longer employed by Lush Manufacturing, within seven days after the end of the 30-day period specified in paragraph 61, Lush Manufacturing will:
- (a) notify the FWO in writing of Lush Manufacturing's attempts to contact the employee;
  - (b) comply with the requirements in section 559 of the FW Act to pay the applicable Manufacturing Audit Review Payment to the CRF;
  - (c) complete any required documents provided by the FWO to comply with the requirements of section 559 and paragraph (b) above; and
  - (d) pay the applicable additional amounts to the CRF.
63. Within seven days of a request of the FWO, Lush Manufacturing will provide to the FWO all records, documents, and materials within Lush Manufacturing's control used by the external professional services provider to conduct the Manufacturing Audit Review, including any working documents, provided that the disclosure of such records, documents, or materials is not contrary to law.
64. For the removal of doubt:
- (a) the external professional services provider engaged by Lush Manufacturing to carry out the Manufacturing Audits may be the same provider engaged by Lush Manufacturing to carry out the Manufacturing Audit Review; and
  - (b) where subsequent Manufacturing Audits determine the outcomes specified in paragraph 60 above, Lush Manufacturing will comply with the requirements of paragraphs 60 to 63 in each instance.

#### **Compliance Review**

65. By no later than 28 days of the signing of this Undertaking, Lush Manufacturing will review all contracts of employment issued to current employees of Lush Manufacturing who are paid an annualised salary, to assess compliance of the contracts of employment with the Compliance Matters under Manufacturing Award, Clerks Award, and the FW Act (**Manufacturing Compliance Review**).
66. By no later than 28 days of the signing of this Undertaking, Lush Manufacturing will provide the FWO with examples of any new or varied contracts of employment resulting from the Manufacturing Compliance Review.

### **Workplace Relations Training**

67. By no later than 60 days of the signing of this Undertaking, Lush Retail and Lush Manufacturing will ensure that training is provided to all employees of Lush Retail or Lush Manufacturing, as the case may be, who have primary responsibility for human resources, recruitment or payroll functions (**Training**), that:
- (a) is delivered by an external professional services provider with expertise in workplace relations and/or employment law; and
  - (b) deals with matters relevant to ensuring the compliance of Lush Retail and/or Lush Manufacturing with the Compliance Matters.
68. At least 14 days prior to the commencement of the Training or within seven days after the commencement of this Undertaking, whichever is the later, Lush Retail and/or Lush Manufacturing will:
- (a) notify the FWO in writing of the name of the external professional services provider proposed to be engaged to carry out the Training; and
  - (b) provide a copy of the training material to the FWO.
69. Lush Retail and/or Lush Manufacturing will not engage an external professional services provider to carry out the Training unless the external professional services provider has been approved by the FWO in writing, or the FWO has unreasonably refused to provide its approval.
70. By no later than 60 days of the signing of this Undertaking, Lush Retail and Lush Manufacturing will notify the FWO in writing of the names and positions of the employees of Lush Retail or Lush Manufacturing, as the case may be, who have attended the Training.
71. For the removal of doubt, the Training may be online or in person, or a combination of the two.

### **Employee Hotline and Email**

72. Lush Retail and/or Lush Manufacturing have, and will continue to:
- (a) establish a hotline and email address that will remain in operation for three years after the signing of this Undertaking, and will be accessible to any current and former employees of Lush Retail and Lush Manufacturing to deal with enquiries in relation to the Compliance Matters;
  - (b) use all reasonable endeavours to respond to each telephone and email enquiry, and seek to resolve any issues, within 30 days of an enquiry being received;
  - (c) notify the FWO of any issues that are not resolved within 30 days; and



- (d) provide a de-identified list of enquiries received by the hotline to the FWO every three months from the establishment of the hotline for three years after the signing of this Undertaking.

#### **Matters Notified to the FWO**

- 73. Where the FWO receives a request for assistance from an employee of Lush Retail or Lush Manufacturing in relation to a Compliance Matter, the FWO will, at its discretion, notify Lush Retail or Lush Manufacturing, as the case may be, of the particulars of the request.
- 74. Where a matter is notified to Lush Retail or Lush Manufacturing, Lush Retail or Lush Manufacturing will:
  - (a) determine an appropriate outcome for the matter within 45 days of being notified by FWO of the request of assistance; and
  - (b) within 60 days of being notified by FWO of the request for assistance, advise the FWO of the determination, and actions taken to resolve the matter, including:
    - (i) the reasons for the determination and any Compliance Matters identified;
    - (ii) steps taken to address the Compliance Matters identified, including for any similarly affected employees; and
    - (iii) if the matter remains unresolved, the steps taken by Lush Retail and/or Lush Manufacturing to facilitate the resolution of any such matter to the satisfaction of Lush Retail and/or Lush Manufacturing.
- 75. The FWO reserves the right to investigate any requests for assistance received from employees of Lush Retail and Lush Manufacturing.
- 76. The FWO may advise Lush Retail or Lush Manufacturing of any active investigations the FWO is undertaking. If this is the case, Lush Retail or Lush Manufacturing, as the case may be, undertake to:
  - (a) provide all requested employment records and other documentation within its control to the FWO relevant to the investigation, provided that the disclosure of such employment records or other documentation is not contrary to law;
  - (b) participate fully in any subsequent requests from the FWO for information relevant to the investigation, including participation in any formal records of interview; and
  - (c) take all reasonable steps to fully co-operate in FWO's investigative processes.

### **Workplace Notice**

77. Within 28 days of the signing of this Undertaking, Lush Manufacturing will display a notice in each workplace where employees of Lush Manufacturing ordinarily perform work, in the form of Attachment A (**Workplace Notice**).
78. Within 28 days of the signing of this Undertaking, or Lush Retail stores reopening, whichever is later, Lush Retail will display a Workplace Notice in the form of Attachment A, in each workplace where employees of Lush Retail ordinarily perform work.
79. Lush Retail and/or Lush Manufacturing will provide the FWO with photographic evidence of the display of the Workplace Notice, and the location of the notice in each workplace.
80. Lush Retail and Lush Manufacturing, as the case may be, will ensure that the Workplace Notice will be printed in at least A4 size and is clearly displayed:
- (a) in locations to which all employees of Lush Retail or Lush Manufacturing, as the case may be, have access;
  - (b) in a manner which is reasonably capable of drawing the attention of employees of Lush Retail or Lush Manufacturing who perform work at the workplace where the Workplace Notice is displayed, including by placement on a staff noticeboard; and
  - (c) for a period of 30 continuous days.
81. Lush Retail and/or Lush Manufacturing, at the end of the 30-day period in paragraph 80(c) above, will notify the FWO in writing that the Workplace Notice has been continuously displayed for the required period.

### **Public Notice**

82. Not before, and no later than 28 days after, the FWO has published a Media Release on its website in respect of this Undertaking, Lush Retail and/or Lush Manufacturing will cause to be placed a public notice (**Public Notice**) in the following publications:

Queensland  
New South Wales  
Victoria  
South Australia  
Tasmania  
Australian Capital Territory  
Western Australia

The Courier Mail  
Daily Telegraph  
Herald Sun  
The Advertiser  
The Mercury  
The Canberra Times  
The West Australian

83. Lush Retail and/or Lush Manufacturing will ensure that the Public Notice requested to be placed in the publications prescribed at paragraph 82 above:

- (a) bear the name "Lush Fresh Handmade Cosmetics";
- (b) bear the logos (if any) of Lush Retail and/or Lush Manufacturing;
- (c) appear within the first 5 pages of the publication;
- (d) be at least 10 cm x 8 cm; and
- (e) be in the form of Attachment A.

84. Lush Retail and/or Lush Manufacturing will provide a copy of each publication of the Public Notice to the FWO within seven days of its publication.

#### **Contribution Payment**

85. By no later than 28 days of the signing of this Undertaking, Lush Retail and Lush Manufacturing will, jointly and severally, make a total payment of \$60,000.00 into the CRF, and notify the FWO in writing of the payment, and complete any required documents provided by the FWO to comply with the requirements of this paragraph.

#### **No Inconsistent Statements**

86. Lush Retail and Lush Manufacturing must not, and must use all reasonable endeavours to ensure that each of their officers, employees or agents, does not, make any statement, orally or in writing, or otherwise imply anything, that is inconsistent with the admissions or acknowledgements contained in this Undertaking.

#### **ACKNOWLEDGEMENTS**

87. For the avoidance of doubt, if Lush Retail and Lush Manufacturing have made payments otherwise required under this Undertaking prior to its execution, they may rely on those payments in full or partial satisfaction of those requirements.

88. Lush Retail and Lush Manufacturing each acknowledge 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 Lush Manufacturing or Lush Retail set out in paragraphs 17 to 20 above in respect of decision making concerning any future non-compliance with Lush Retail and/or Lush Manufacturing's workplace relations obligations.
89. 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.
90. Consistent with section 715(3) of the FW Act, Lush Retail and Lush Manufacturing may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.
91. If Lush Retail or Lush Manufacturing contravene any of the terms of this Undertaking:
- (a) 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
  - (b) this Undertaking may be provided to the Court as evidence of the admissions made by Lush Retail or Lush Manufacturing in paragraphs 17 to 20, and also in respect of the question of costs.



**Executed as an undertaking**

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


  
(Signature of director – Lush Manufacturing)

PETA ANNE GRANGER

Name of Director

10.11.2020  
(Date)

in the presence of:

  
(Signature of witness)  
Lisa Morrison  
(Name of witness)

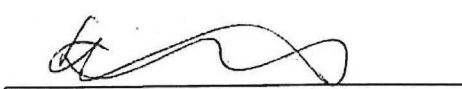
  
(Signature of director – Lush Manufacturing)

MARK GRAEME LINCOLN

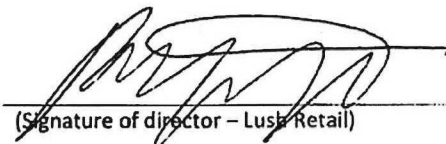
Name of Director

11 November 2020  
(Date)

in the presence of:

  
(Signature of witness)  
Elisia Richards  
(Name of witness)

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


  
(Signature of director – Lush Retail)

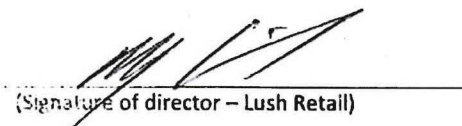
PETA ANNE GRANGER

Name of Director

10.11.2020  
(Date)

in the presence of:

  
(Signature of witness)  
Lisa Morrison  
(Name of witness)


  
(Signature of director – Lush Retail)

MARK GRAEME LINCOLN

Name of Director

11 November 2020  
(Date)

in the presence of:

  
(Signature of witness)  
Elisia Richards  
(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

\_\_\_\_\_  
(Date)

16/11/20

Delegate for the FAIR WORK OMBUDSMAN  
In the presence of:



\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Name of Witness)

TOM O'SHEA 16/11/20

## **ATTACHMENT A – Form of Public and Workplace Notice**

### **FORM OF PUBLIC AND WORKPLACE NOTICE**

#### **Contravention of the Fair Work Act by Lush Australasia Retail Pty Limited and Lush Australasia Manufacturing Pty Ltd.**

We refer to the self-disclosure made to the Office of the Fair Work Ombudsman (FWO) by Lush that it had contravened the *Fair Work Act 2009* (Cth) and the *General Retail Industry Award 2010*, *Manufacturing and Associated Industries and Occupations Award 2010* and *Clerks - Private Sector Award 2010* in relation to its former and current employees engaged at Lush Retail Stores and Lush Manufacturing:

Lush admits to:

- failing to pay minimum rates of pay;
- failing to pay penalties for weekend and overtime work;
- failing to implement part time agreements;
- failing to observe allowance obligations; and
- failing to make and keep employment records for all employees

Lush has formally admitted to the FWO that these contraventions occurred and has entered into an Enforceable Undertaking with the FWO (available at [www.fairwork.gov.au](http://www.fairwork.gov.au)).

Lush has committed to a number of measures to remedy the contraventions, including: rectifying the underpayments and paying 5.5% interest on the underpayments; establishing a hotline for employees and former employees; and committing to future independent wage audits to verify that employees are being paid correctly.

Lush expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Lush gives a commitment that such conduct will not occur again and that it will comply with all requirements of the Commonwealth workplace relations laws in the future.

If you worked for Lush and have queries or questions relating to your employment, please contact the Payroll Manager (by email at [staffbackpay@lush.com.au](mailto:staffbackpay@lush.com.au)). Alternatively, anyone can contact the FWO via the website at [www.fairwork.gov.au](http://www.fairwork.gov.au) or the Infoline on 13 13 94.

**ATTACHMENT B – Letter of Assurance (Lush Manufacturing)**

Sandra Parker  
The Fair Work Ombudsman  
Office of the Fair Work Ombudsman  
GPO Box 9887  
MELBOURNE VIC 3001

Dear Sandra

In July 2018 Lush Australasia Manufacturing Pty Ltd (**Lush Manufacturing**) self-reported that it had contravened the *Fair Work Act 2009* (Cth) the *Manufacturing and Associated Industries and Occupations Award 2010* and *Clerks - Private Sector Award 2010* in relation to its former and current employees engaged at Lush Manufacturing.

In particular Lush Manufacturing has admitted to contravening:

- sub-clauses 13.3, 13.4, 13.5, 24.1(a), 24.1(f), 32.1(a), 32.2(i), 32.4(a), 37.3, 40.1(a), 40.4(a) and 40.13(e) of the *Manufacturing and Associated Industries and Occupations Award 2010*;
- sub-clause 15.1 and clause 16 of the *Clerks - Private Sector Award 2010*; and
- section 535 of the *Fair Work Act 2009*.

As you are aware, Lush Manufacturing has agreed to enter into an Enforceable Undertaking with the Fair Work Ombudsman (**FWO**) in respect of these underpayments.

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

- a. the process by which Lush Manufacturing, as assisted by its professional advisors, calculated and rectified the underpayments was correctly undertaken; and
- b. as of 28 September 2020 all former and current employees impacted by the underpayments, apart from those who have not been able to be located by Lush Manufacturing, have been paid their entitlements (plus interest) under the relevant industrial instrument by Lush Manufacturing.

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

Sincerely

Mark Lincoln  
Director  
Lush Australasia Manufacturing Pty Limited

Peta Granger  
Director  
Lush Australasia Manufacturing Pty Limited

**ATTACHMENT C – Letter of Assurance (Lush Retail)**

Sandra Parker  
The Fair Work Ombudsman  
Office of the Fair Work Ombudsman  
GPO Box 9887  
MELBOURNE VIC 3001

Dear Sandra

In July 2018 Lush Australasia Retail Pty Limited (**Lush Retail**) self-reported that it had contravened the *Fair Work Act 2009* (Cth) and the *General Retail Industry Award 2010* in relation to its former and current employees engaged at Lush Retail.

In particular Lush Retail has admitted to contravening:

- sub-clauses 12.2, 12.3, 12.4, and 12.7, clauses 17 and 18 and sub-clauses 28.11(a), 28.13(a), 29.2(b), 29.3(c) and 31.2(b) of the *General Retail Industry Award 2010* and
- section 535 of the *Fair Work Act 2009*.

As you are aware, Lush Retail has agreed to enter into an Enforceable Undertaking with the Fair Work Ombudsman (**FWO**) in respect of these underpayments.

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

- a. the process by which Lush Retail, as assisted by its professional advisors, calculated and rectified the underpayments was correctly undertaken; and
- b. as of 28 September 2020 all former and current employees impacted by the underpayments, apart from those who have not been able to be located by Lush Retail, have been paid their entitlements (plus interest) under the relevant industrial instrument by Lush Retail.

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

Sincerely

Mark Lincoln  
Director  
Lush Australasia Retail Pty Limited

Peta Granger  
Director  
Lush Australasia Retail Pty Limited