**ENFORCEABLE UNDERTAKING**

This undertaking is **given** by **Electricity Networks Corporation**, trading as Western Power (ABN 18 540 492 861) and **accepted** by the Fair Work Ombudsman pursuant to s 715(2) of the *Fair Work Act 2009* in relation to the contraventions described in clause 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 Electricity Networks Corporation trading as Western Power (ABN 18 540 492 861) (**Western Power**) of 363 Wellington Street, Perth WA 6000.

**COMMENCEMENT**

1. This Undertaking comes into effect when:
   1. the Undertaking is executed by Western Power; and
   2. the FWO accepts the Undertaking so executed (**Commencement Date**).

**BACKGROUND**

1. Western Power operates the electricity network in the south-west of Western Australia. It is a statutory corporation, wholly-owned by the State Government of Western Australia and was established under the *Electricity Corporations Act 2005* (WA). Western Power has around 2700 employees.
2. On 8 August 2019, Western Power notified the FWO of non-compliance with the FW Act, relating to some current and former Western Power employees on Individual Agreements (**IAs**) and Flexibility Agreements (**FAs**), collectively referred to as Individual Flexibility Arrangements (**IFAs**). These employees had not been paid for all entitlements owed to them in accordance with the underpinning *Western Power Australian Services Union Enterprise Agreement 2017* (**ASU EA 2017**) and predecessor agreements to the ASU EA 2017, being the *Western Power Australian Services Union Enterprise Agreement 2013* (**ASU EA 2013**) and the *Western Power Australian Services Union Enterprise Agreement 2009* (**ASU EA 2009**), (collectively the **ASU EAs**).
3. These underpayments arose due to:
   * 1. the incorrect application of the Better Off Overall Test (**BOOT**) undertaken for employees on IFAs;
     2. the exclusion of entitlements that could not legitimately be varied in IFAs; namely
        1. the offsetting of superannuation contributions above the Superannuation Guarantee percentage which were paid into the total fixed remuneration of employees on IFAs, as this was not an entitlement that was permitted to be varied by IFAs under the ASU EAs; and
        2. the capping of redundancy payments payable under the ASU EAs, when this was not an entitlement that was permitted to be varied by IFAs under the ASU EAs.
4. As a result of the matters set out in clause 5 above, Western Power’s IFAs did not adequately compensate impacted employees for:
5. pay point progression payments (**Pay Point Progression Underpayments**) to meet the BOOT;
6. payments under the ASU EAs which applied from time to time depending on the work required to be done by particular employees, including allowances (higher duties, availability, and living away from home), penalty payments, and overtime (**Allowances, Penalties and Overtime Underpayments**) to meet the BOOT;
7. superannuation contributions above the percentage required by the Superannuation Guarantee legislation which were paid into the total fixed remuneration of employees on IFAs (**Varied Superannuation Underpayments**); and
8. the capped redundancy payments below those required to be made by the ASU EAs (**Redundancy Underpayments**).
9. In its letter of 8 August 2019, Western Power also informed the FWO that it was arranging for PricewaterhouseCoopers (**PwC**) to assist in conducting a review of the entitlements owing to impacted current and former employees who had entered into IFAs, and to calculate the full amounts owed (**PwC Review**).
10. Subsequent to its letter of 8 August 2019, Western Power informed the FWO that the review period (**Review Period**) for each of the underpayments described in clause 6, are as follows:
11. Review Period for Pay Point Progression Underpayments is between 25 March 2010 and 31 August 2019;
12. Review Period for Allowances, Penalties, and Overtime Underpayments and Redundancy Underpayments is between 25 August 2013 and 31 August 2019; and
13. Review Period for Varied Superannuation Underpayments is between 1 July 2015 and 19 January 2020.
14. Prior to the execution of this Undertaking, Western Power notified the FWO that the PwC Review was partially completed with respect to Pay Point Progression Underpayments and Varied Superannuation Underpayments for the current employees referred to in column A1 of Schedule A to this Undertaking (**Schedule A Employees**), specifically that it had:
15. calculated the Pay Point Progression Underpayments as identified in column A2 of Schedule A and the Varied Superannuation Underpayments as identified in column A3 of Schedule A (collectively, **Partial Underpayments**)arising from the non-compliance described in clauses 5 and 6 (a) and (c) above;
16. calculated interest as identified in column A4 of Schedule A on the Partial Underpayments using an interest rate that is 4% above the cash rate published by the Reserve Bank of Australia (RBA) at the end of the last financial year (resulting in an interest rate of 5.25%);
17. paid the Pay Point Progression Underpayments as identified in column A2 of Schedule A to each of the Schedule A Employees;
18. paid the Varied Superannuation Underpayments as identified in column A3 of Schedule A into the chosen superannuation funds of each the Schedule A Employees;
19. paid interest as identified in column A4 of Schedule A to each of the Schedule A Employees, calculated using an interest rate that is 4% above the cash rate published by the Reserve Bank of Australia (RBA) at the end of the last financial year (resulting in an interest rate of 5.25%); and
20. paid the superannuation entitlements on the Pay Point Progression Underpayments as identified in column A5 of Schedule A to each of the Schedule A employees.
21. As a part of the PwC Review, Western Power has identified all employees who have potentially been impacted by the non-compliance described in clauses 5 and 6 above. These employees are listed in Schedule B to this Undertaking (**Schedule B Employees**), noting that Schedule A Employees are a subset of Schedule B Employees. At the time of entering into this Undertaking, other than those Partial Underpayments made to current employees identified in Schedule A, Western Power has not yet quantified all non-compliance underpayments identified in clauses 5 and 6 above to each of the Schedule B Employees (**Underpayments**).

**ADMISSIONS**

1. The FWO has a reasonable belief, and Western Power admits, that Western Power contravened section 50 of the FW Act over the Review Periods set out in Clause 8, by entering into IFAs with each of the impacted Schedule B Employees which:
2. varied the operation of one or both of the following provisions of the ASU EAs for the following entitlements, even though they were not permitted to be varied by Clause 16.1 Flexibility Arrangements in the ASU EAs:
3. clause 18 Superannuation; and
4. clause 23 Redundancy; and/or
5. did not result in the Schedule B Employees receiving terms and conditions of employment that were better off overall than those provided by the ASU EAs, as required by clause 16.1 of the ASU EAs, by failing to adequately take into account the following entitlements provided under the ASU EAs:
6. clause 12.1 (b) pay point progression payments; and
7. allowances, penalties and overtime which applied from time to time depending on the work required to be done by particular employees.
8. The FWO has a reasonable belief, and Western Power admits, that as a result of the conduct described at clause 11 above, it did not pay the Schedule B Employees identified with Underpayments the amounts those employees were entitled to receive under the ASU EAs.
9. The contraventions identified in clause 11 of this Undertaking do not include:
10. any contraventions which relate to or arise as a consequence of Western Power failing to correctly apply any of the ASU EAs to any employee not listed in Schedule B to this Undertaking (**Non-schedule B Employees**). For the avoidance of doubt this Undertaking is not given in respect of any Non-schedule B Employees who were underpaid as a result of Western Power failing to correctly apply any of the entitlements under the ASU EAs, 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;
11. any contraventions relating to Schedule B Employees, except as listed in clause 11 above; or
12. any contraventions which have not yet occurred at the date that this Undertaking is offered by Western Power (whether or not those contraventions are identified in the Independent Assessment described at clause 19 below or the Independent Audits described at clause 28 below). For the avoidance of doubt, this Undertaking is not given in respect of any contravention which has not occurred on the date which this Undertaking is offered by Western Power and the FWO’s acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

**UNDERTAKINGS**

1. Western Power will take the actions set out at clauses 15 to 70 below.

**Review and rectification of underpayments**

1. By 1 October 2020, Western Power will:
   1. have the PwC Review completed to calculate the quantum of all Underpayments, including any superannuation entitlements payable on those amounts, to each of the Schedule B Employees under the ASU EAs during the Review Periods and have provided the Western Australian Government Employees Superannuation Board (**GESB**) with full particulars of all Underpayments with respect to each impacted Schedule B Employee who is or was a member of a defined benefit superannuation fund. The superannuation Underpayments for employees and former employees in a defined benefit fund will be determined by GESB; and
   2. pay each of the Schedule B Employees to whom the Underpayments relate:
   3. the underpayment amount owing to them;
   4. any superannuation payments which may be required by law, by making payment to their chosen superannuation funds. Superannuation payments required by GESB in relation to Schedule B Employees in a defined benefit fund will be paid by Western Power within 28 days of being invoiced for those payments by GESB; and
   5. interest on the amount referred to in (i), calculated using an interest rate that is 4% above the last cash rate published by the RBA at the end of June 2019 (resulting in an interest rate of 5.25%).
2. By 15 October 2020, Western Power will provide the FWO with:
   1. evidence of all payments made to Schedule B Employees, including to their respective superannuation funds, to rectify the Underpayments, superannuation and interest owing to them, excluding those payments to former employees who have not been located;
   2. a letter of assurance signed by the CEO confirming that all of the payments to Schedule B Employees have been made; and
   3. a full and unredacted copy of the PwC Review of the entitlements owed by Western Power to the Schedule B Employees.
3. If any of the former employees to whom Underpayments are owed cannot be located by 1 February 2021, Western Power will pay the underpayment amounts owing to those employees (excluding interest and superannuation) to the Commonwealth of Australia in accordance with section 559 of the FW Act. Western Power will complete the required documents supplied by the FWO for this purpose.
4. In the event that the FWO is able to locate and contact any former Western Power employees to whom Underpayments are owed, the FWO will (in addition to its obligations under s 559 of the FW Act) notify Western Power in writing of the name and contact details of the former employee. Within 14 days of receiving any such notice Western Power will pay the former employee interest on the amount already paid by Western Power to the Commonwealth of Australia in respect of that employee, calculated for each financial year from the date that the employee first became entitled to that amount until the date on which that amount is paid, using an interest rate that is 4% above the last cash rate published by the RBA at the end of June 2019 (resulting in an interest rate of 5.25%).

**Independent Assessment**

1. By 8 November 2020, Western Power must, at its cost, engage an appropriately qualified, experienced, external and independent assessor, approved in writing by the FWO under this clause, (**Independent Expert**),to conduct an independent assessment of the outcomes of the PWC Review described at clauses 7 and 15 above (**Independent Assessment**). Western Power will notify FWO of its proposed Independent Expert no later than 1 October 2020. The FWO may in its sole discretion approve the Independent Expert or otherwise require Western Power to propose other Independent Experts until the FWO has approved in writing an Independent Expert. The Independent Expert must be approved by the FWO in writing prior to being engaged by Western Power.
2. Nothing in this Undertaking prevents Western Power from proposing, or the FWO from approving, the appointment as an Independent Expert, an appropriately qualified expert (other than PwC) whom Western Power has already consulted in respect of the methodology to be used by Western Power in finalising its calculations and making payments to the Schedule B Employees in accordance with this Undertaking. However, at the time that it proposes to FWO as an Independent Expert any person whom Western Power has consulted in accordance with this clause, Western Power shall disclose to the FWO the nature and extent of any consultation it has had with the person in accordance with this clause.
3. Western Power must ensure the Independent Assessment commences by no later than 1 December 2020 and that the Independent Expert assesses whether:
   * 1. the PwC Review has correctly determined whether IFAs entered into with Schedule B Employees:
4. varied the operation of the provisions of the ASU EAs which were not permitted to be varied by the FA clauses in the ASU EAs; and/or
5. resulted in the Schedule B Employees receiving terms and conditions of employment that were not better off overall than those provided by the ASU EAs;
   * 1. the methodology used by the PwC Review and Western Power to calculate and rectify the Underpayments to Schedule B Employees was correct;
     2. based on a sample of at least five percent of Schedule B Employees, and, if the Independent Expert considers necessary, interviews of at least 32 Schedule B Employees (unless the Independent Expert recommends, and the FWO agrees, that a lesser number of Schedule B Employees will be interviewed), Western Power has paid each of the Schedule B Employees all amounts payable to them under clause 15 above; and
     3. based on steps (a) to (c) above, Western Power is required to make any further rectification payments in accordance with clause 15 above to pay all of the resulting Underpayments, including superannuation and interest.
6. Western Power must ensure that the Independent Expert provides a report (**Expert Report**) of its Independent Assessment directly to the FWO, and for the benefit of the FWO, setting out its findings, and the facts and circumstances supporting its findings within 6 months of commencement of the review. Western Power must ensure the Independent Expert does not provide the Expert Report, or a copy of the same, to Western Power without the FWO’s approval. The FWO will provide Western Power with a copy of the Expert Report within 14 days of the FWO receiving the same from the Independent Expert.
7. Western Power must ensure that the Expert Report contains the following declarations from the Independent Expert:
   * 1. the Independent Expert has no actual, potential or perceived conflict of interest in providing the Expert Report to the FWO;
     2. notwithstanding that the Independent Expert is retained by Western Power, the Independent Expert undertakes that it has acted independently, impartially, objectively and without influence from Western Power in preparing the Expert Report;
     3. the Expert Report is provided in accordance with applicable professional standards (which will be listed in the Expert Report); and
     4. the Expert Report is provided to the FWO for its benefit and the FWO can rely on the Expert Report.
8. If the Independent Assessment identifies that any Schedule B Employees are owed amounts additional to the Underpayments (including superannuation and interest) calculated and paid by Western Power, the FWO will notify and discuss these findings with Western Power. Following such discussions, Western Power will pay those additional amounts to the Schedule B Employees, and provide evidence of such payment to the FWO, within 12 weeks after the Expert Report is provided to Western Power.
9. If any of the Schedule B Employees who are no longer employed by Western Power identified in the Expert Report as being owed amounts additional to the Underpayments calculated by Western Power cannot be located and paid within a further 12 weeks, Western Power will pay those amounts (excluding interest and superannuation) to the Commonwealth of Australia in accordance with section 559 of the FW Act. Western Power will complete the required documents supplied by the FWO for this purpose.
10. The FWO acknowledges that Western Power does not contravene this Undertaking in the event that the Independent Expert makes a finding in relation to the Schedule B Employees that is contrary to the determination made in the PwC Review, provided Western Power pays any additional amounts owing to current and former employees in accordance with clauses 24 and 25 above. For the avoidance of doubt, Western Power acknowledges that this Undertaking does not relate to any contraventions that may be identified by the Independent Expert which are not identified in clause 11 during the Review Periods.

**Workplace relations systems and processes**

27. By 1 September 2020 Western Power will provide the FWO with details of systems and processes already in place or to be implemented to ensure ongoing compliance in all respects with the FW Act, the *Fair Work Regulations 2009* (Cth) (**FW Regulations**) and the ASU EA 2017 (and any future agreements that replace ASU EA 2017). Without limitation, such systems and processes will relate to:

* + 1. ensuring employees receive the correct minimum rates of pay and entitlements, under ASU EA 2017, and any future agreements that replace ASU EA 2017; and
    2. guaranteeing that all IFAs and other individual flexibility arrangements entered into by Western Power with employees meet the requirements of the BOOT.

**Independent Audits**

1. Western Power 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 Western Power’s compliance with the FW Act and FW Regulations, in relation to employees who have entered into IFAs offered under the ASU EAs, and any future agreements that replace ASU EA 2017 (**Audits**). This includes compliance with any IFA provisions, and ensuring that any IFAs with employees are compliant with the FW Act and meet the requirements of the BOOT.
2. Western Power will notify the FWO of its proposed Independent Auditor by no later than 1 June 2021. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require Western Power 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 Western Power.
3. Western Power must ensure that each of the Audits conducted by the Independent Auditor includes:
   * 1. an assessment of whether employees who have entered into an IFA covered by ASU EA 2017 (or replacement instruments) have been correctly remunerated by Western Power during the relevant pre-audit period and whether any FAs or other flexibility arrangements pass the BOOT;
     2. a sample including the pay and conditions of at least 5% but not less than 50 employees who have entered into an IFA, including two full pay periods, containing a range of classifications and comprising employees from a range of sites;
     3. 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
     4. that each of the written reports referred to in (c) above contains the following declarations from the Independent Auditor:
4. the Independent Auditor has no actual, potential or perceived conflict of interest in providing the report to the FWO;
5. notwithstanding that the Independent Auditor is retained by Western Power, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from Western Power in preparing the report;
6. the report is provided in accordance with applicable professional standards (which will be listed in the report); and
7. the report is provided to the FWO for its benefit and the FWO can rely on the report.

The First Audit

1. Western Power must ensure the Independent Auditor commences the first of the Audits by no later than 1 July 2021 (**First Audit**).
2. For the First Audit the relevant pre-audit period to assess the sampled employees is 12 months.
3. The relevant audit period for the First Audit must be at least two full pay periods falling within the period 1 November 2020 to 31 December 2020 (and the relevant BOOT reconciliation for that period).
4. By 1 June 2021, Western Power will provide for the FWO’s approval, details of the methodology to be used by the Independent Auditor to conduct the First Audit.
5. Western Power will use its best endeavours to ensure the Independent Auditor provides a draft written report of the First Audit directly to the FWO by 15 October 2021, setting out the draft First Audit findings, and the facts and circumstances supporting the First Audit findings. Western Power will ensure the Independent Auditor does not provide the draft written report to Western Power until seven days after it is provided to the FWO.
6. Western Power 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. Western Power will ensure the Independent Auditor does not provide the First Audit Report to Western Power until seven days after it is provided to the FWO.
7. Following the finalisation of the First Audit Report and within seven days of, but not prior to, the FWO requesting it, Western Power will provide the First Audit Report to the Western Australia Minister for Energy. Western Power will provide a copy of the notification correspondence to the FWO within seven days of it being sent.

The Second Audit

1. Western Power must ensure the Independent Auditor commences the second of the Audits by no later than 1 July 2022 (**Second Audit**).
2. For the Second Audit the relevant pre-audit period to assess the sampled employees is 12 months.
3. The relevant audit period for the Second Audit must be at least two full pay periods falling within the period 1 November 2021 to 31 December 2021, and the relevant BOOT reconciliation for that period.
4. By 1 June 2022, Western Power will provide for the FWO’s approval, details of the methodology to be used by the Independent Auditor to conduct the Second Audit.
5. Western Power will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Second Audit directly to the FWO by 15 October 2022, setting out the draft Second Audit findings, and the facts and circumstances supporting the Second Audit findings. Western Power will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Western Power until seven days after it is provided to the FWO.
6. Western Power 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. Western Power will ensure the Independent Auditor does not provide the written report, or a copy of the same, to Western Power until seven days after it is provided to the FWO.
7. Following the finalisation of the Second Audit Report and within seven days of, but not prior to, the FWO requesting it, Western Power will provide the Second Audit Report to the Western Australia Minister for Energy. Western Power will provide a copy of the notification correspondence to the FWO within seven days of it being sent.

**Outcome of Audits**

1. If any of the Audits identify underpayments to any current or former employees, Western Power 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.
2. Western Power 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.
3. If any employees identified in the Audits as having underpayments owing to them cannot be located within 60 days of the conclusion of the Second Audit, Western Power will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. Western Power will complete the required documents supplied by the FWO for this purpose.
4. 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, Western Power 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 ASU EA 2017 (or its 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 Western Power.
5. If requested by the FWO, Western Power will provide the FWO with all records and documents used to conduct any or all of the Audits (including any Additional Audit), within seven days of such a request.

**Employee Hotline**

1. By 30 August 2020, Western Power will provide a dedicated telephone number and email address for all current and former employees who were employed under an IFA during any of the Review Periods, to make enquiries in relation to their entitlements, underpayments or related employment concerns (**Employee Hotline**). Employees will have the option of making enquiries on a confidential basis.
2. Western Power will:
   1. ensure the Employee Hotline remains operational for a period of 12 months, during which adequate resources to receive and address enquiries will be maintained;
   2. ensure that the telephone number and email address are included on the public notice (see clauses 55 to 57) and the social media notice (see clauses 65 to 67);
   3. communicate the existence and purpose of the Employee Hotline by way of letter to the last known address of all potentially impacted current and former employees included in Schedule B who were employed on an IFA underpinned by any of the ASU EAs, or identified during the Independent Assessment during the Review Periods. Western Power will:
      1. ensure the letter is in the form of Attachment A to this Undertaking; and
      2. provide evidence to the FWO that the letter has been mailed to all required current and former employees by 1 October 2020 (the required employees excludes any employees who have already been informed of the Employee Hotline details via written correspondence);
   4. take steps to respond to each telephone and email enquiry and seek to resolve any issues within 30 days and notify the FWO of any issues that are not resolved within 60 days; and
   5. 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

1. Western Power will send a letter of apology (**Apology Letter**) to all affected employees found by the Independent Assessment to have been underpaid by Western Power, by 30 April 2021. The Apology Letter will be in the form of Attachment B to this Undertaking. However, if prior to the execution of this Undertaking, Western Power has sent one or more affected employees a letter in the form of Attachment B save that the letter does not refer to this Undertaking then:
2. Western Power is not required to send a further letter in the form of Attachment B to those employees; and
3. Western Power will instead ensure that those employees are notified of the execution of this Undertaking via direct email or written correspondence by 30 April 2021.
4. Western Power will provide evidence to the FWO that the Apology Letter, or alternative letter and subsequent email or written correspondence referred to in the above paragraph, has been sent to all affected employees by 7 May 2021.

Media Release

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

Public Notice

1. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Western Power will place a notice in *The Weekend West* (**Public Notice**).
2. The Public Notice must:
3. bear the name and logo of Western Power;
4. appear within the first 5 pages of The Weekend West;
5. be at least 10 cm x 8 cm; and
6. contain wording in the form of Attachment C.
7. Western Power 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

1. Within seven days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Western Power will display within each of its Australian worksites where any of the current Schedule B Employees work a notice in the form of Attachment C to this Undertaking (**Workplace Notice**).
2. Western Power must ensure the Workplace Notice is:
3. at least A3 size;
4. clearly displayed in a location to which all employees have access (for example, by placement on a staff noticeboard); and
5. displayed for a period of 28 continuous days.
6. Within seven days of first displaying the Workplace Notice, Western Power will provide photographic evidence to the FWO of the display and location of the Workplace Notice in each of its worksites.
7. At the end of the 28 day period referred to in clause 59 above, Western Power will provide confirmation to the FWO that the Workplace Notice has been continuously displayed at each location for the required period.

Website Notice

1. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Western Power will place a notice on its website, accessible through a hyperlink on the homepage of <http://www.westernpower.com.au> (**Website Notice**).
2. The Website Notice must:
3. be in the form of the Website Notice set out at Attachment C;
4. be displayed in at least size 10 font; and
5. remain on the website for a period of 28 days.
6. Within seven days of placing the Website Notice on its website, Western Power will provide to the FWO evidence of its placement.

Social Media Notice

1. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Western Power will place a post on its Facebook page (**Social Media Notice**).
2. The Social Media Notice must:
3. be posted to Western Power's timeline, pinned to the top of the Facebook page in public view;
4. remain on the Facebook page for a continuous period of at least 28 days; and
5. be in the form of the Social Media Notice set out at Attachment C.
6. Within seven days of posting the Social Media Notice to its Facebook page, Western Power will provide to the FWO evidence of the post.

**Contrition Payment**

1. Western Power will make the following contrition payments to the Consolidated Revenue Fund:
2. by 14 September 2020, a payment of **$400,000.00**; and
3. by 31 May 2021, a payment equal to 2% of the total amounts paid by Western Power to Schedule B Employees in accordance with clause 15(b)(i) and to the Commonwealth in accordance with clause 17 of this Undertaking (excluding any amounts paid prior to the execution of this Undertaking as identified in clause 9 and Schedule A).
4. Western Power will provide evidence to the FWO of any contrition payment within 14 days of making payment to the Consolidated Revenue Fund.

**No Inconsistent Statements**

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

**ACKNOWLEDGEMENTS**

1. Western Power acknowledges that:
2. the FWO may:
3. 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);
4. 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);
5. issue a media release in relation to this Undertaking;
6. from time to time, publicly refer to the Undertaking (and any of the Attachments hereto) and its terms; and
7. rely upon the admissions made by Western Power set out in clauses 11 and 12 above in respect of decisions taken regarding enforcement action in the event that Western Power is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by Western Power to comply with its obligations under this Undertaking;
8. 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;
9. consistent with section 715(3) of the FW Act, Western Power may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
10. if Western Power contravenes any of the terms of this Undertaking:
11. 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
12. this Undertaking may be provided to the Court as evidence of the admissions made by Western Power in clauses 11 and 12 above, and also in respect of the question of costs.

**Executed as an undertaking**

Executed by Electricity Networks Corporation, trading as Western Power (ABN 18 540 492 861) in accordance with section 135(2) of the *Electricity Corporations Act 2005* (WA):

|  |  |  |
| --- | --- | --- |
|  |  |  |
| (Signature of Chief Executive Officer) |  |  |
|  |  |  |

(Name of Chief Executive Officer)

|  |  |  |
| --- | --- | --- |
|  |  |  |

(Date)

in the presence of:

|  |  |  |
| --- | --- | --- |
|  |  |  |
| (Signature of witness) |  |  |
|  |  |  |

(Name of witness)

|  |  |  |
| --- | --- | --- |
| Accepted by the FAIR WORK OMBUDSMAN pursuant to section 715(2) of the *Fair Work Act 2009* on: | | |
| [Insert name and role of Delegate]  Delegate for the FAIR WORK OMBUDSMAN |  | (Date) |
| in the presence of: |  |  |
| (Signature of witness) |  | (Name of Witness) |

**SCHEDULE A – Partial Payments Made to Current Employees on 30 April 2020**

**(See Separate Attachment)**

**SCHEDULE B – Potentially Impacted Employees**

**(See Separate Attachment)**

**Attachment A – Letter to employees**

Dear <insert name >

As you may be aware, Western Power has self-reported to the Fair Work Ombudsman (**FWO**)that it contravened the *Fair Work Act 2009* (Cth) by failing to comply with terms of the *Western Power Australian Services Union Enterprise Agreement 2017*, and its predecessors. In particular, Western Power identified that it entered into individual flexibility arrangements with employees which:

* 1. varied the operation of provisions of the enterprise agreements which were not permitted to be varied by the flexibility arrangement clauses in the enterprise agreements; and
  2. did not result in employees receiving terms and conditions of employment that were better off overall than those provided by the enterprise agreement, as required by flexibility arrangement clauses.

As a result of its admitted conduct Western Power did not pay some employees the amounts they were entitled to receive under the relevant enterprise agreements.

Western Power understands that you may have questions and concerns relating to this and other employment issues. To address these concerns a dedicated hotline has been established for all employees to access.

Should you wish to discuss your concerns you can contact our dedicated enquiry line on 1800 450 066/[remuneration.enquiry@westernpower.com.au](mailto:remuneration.enquiry@westernpower.com.au). We will make every attempt to resolve your enquiry within 30 days of receiving it and commit to maintaining open communication with you about the progress of your enquiry.

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

Western Power expresses its sincere regret and apologises to you for failing to comply with our lawful obligations.

Yours sincerely

### <Employer name>

**Attachment B – Letter of Apology**

**FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEES**

**<Date>**

**<Employee Name>**

**<Employee Address>**

Dear **<Employee Name>**

I’m writing to apologise on behalf of Western Power for non-compliance with Commonwealth workplace relations laws.

Western Power self-reported to the Fair Work Ombudsman (**FWO**) that we contravened the *Fair Work Act 2009* (Cth) by failing to comply with terms of the *Western Power Australian Services Union Enterprise Agreement 2017*, and its predecessors (**ASU EA**).

In particular, we identified that we entered into individual flexibility arrangements with employees which:

1. varied the operation of provisions of the **ASU EA** which were not permitted to be varied by the flexibility arrangement clauses in the **ASU EA**; and
2. resulted in employees not receiving terms and conditions of employment that were better off overall than those provided by the **ASU EA**, as required by flexibility arrangement clauses.

Regrettably, it has been determined that you were affected by these contraventions.

We are taking steps to remedy the contraventions. A review has determined that you are owed an additional amount, being:

* 1. $[insert amount] (gross) in respect of ‘better off overall’ test entitlements;
  2. $[insert amount] in respect of superannuation;
  3. $[insert amount](gross) in respect of payments made to you upon termination and
  4. $[insert amount] in respect of interest.

You will receive this payment on or about [insert date]. Attached is a statement providing a more detailed breakdown of the above amounts. This is in addition to the amount previously paid to you in April 2020.

Western Power formally self-reported to the FWO that we did not comply with our obligations under Commonwealth workplace relations laws and have entered into an Enforceable Undertaking with the FWO, a copy of which will be available at [www.fairwork.gov.au](http://www.fairwork.gov.au/).

As part of the Enforceable Undertaking, we have committed to several measures to ensure future compliance with Commonwealth workplace relations laws.

We expresses our sincere regret and apologise to you for failing to comply with our lawful obligations.

We have more information about the unintentional underpayments, including FAQs, on our website at [www.westernpower.com.au](http://www.westernpower.com.au).

Should you have any questions or concerns about this or any other employment matter the following options are available to you to assist:

* you can contact Western Power directly. We will make every attempt to resolve your enquiry within 30 days of receiving it and commit to maintaining open communication with you about the progress of your enquiry. Enquiries may be made on a confidential basis if required. You can contact us on 1800 450 066 or email us at [remuneration.enquiry@westernpower.com.au](mailto:remuneration.enquiry@westernpower.com.au)
* Alternatively, anyone can contact the FWO via www.fairwork.gov.au or on 13 13 94 or an Industrial Organiser from the Australian Services Union on XXXXXXXXXXXX or XXXXXXXXXXX.

Yours sincerely

### <Employer name>

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

Western Power recently determined that it contravened the *Fair Work Act 2009* (Cth) by failing to correctly apply the flexibility agreement provisions in the *Western Power Australian Services Union Enterprise Agreement 2017* and previous agreements.

In August 2019, Western Power formally self-reported to the Fair Work Ombudsman (**FWO**) that contraventions of Agreements had occurred and consequently some employees on Individual Agreements or Flexibility Agreements had been underpaid.

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

Western Power will, as a result of the Enforceable Undertaking, undertake several activities to ensure its ongoing compliance such as, conducting three independent audits and formally apologising to individual employees.

Western Power expresses its sincerest regrets and apologises for these contraventions.

If you worked for Western Power on an Individual or Flexible Agreement during the period August 2013 to September 2019 and have queries or questions relating to your employment, please contact Western Power directly on 1800 450 066/[remuneration.enquiry@westernpower.com.au](mailto:remuneration.enquiry@westernpower.com.au). This contact will be on a confidential basis if required.

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