



Australian Government

# Fair Work OMBUDSMAN

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*Fair Work Act 2009*

## Section 715 ENFORCEABLE UNDERTAKING

### PARTIES

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by Centenary Suburbs Sales & Management Pty Ltd (ACN 086 226 235) (**Company**) for the purposes of section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**).

### BACKGROUND

2. The Company operated real estate agencies at:
  - (a) Shop 4, The Courtyard, 2056-2062 Moggill Road, Kenmore, Queensland (**Harcourts Kenmore**); and
  - (b) 3/105 Dandenong Road, Mount Ommaney, Queensland (**Harcourts Centenary Suburbs**);
3. [REDACTED] worked as a Property Sales Associate and Property Sales Representative for the Company at Harcourts Kenmore from the period 24 May 2012 to October 2012 and at Harcourts Centenary Suburbs from October 2012 to 12 November 2012. Harcourts Kenmore closed in October 2012.
4. [REDACTED] was engaged by the Company by way of a Letter of Offer on 24 May 2012 offering [REDACTED] a position as a Sales Consultant. The Letter of Offer provided that the Company wished to engage [REDACTED] as a commission only contractor through ICS Services.
5. ICS Services is the trading name of the company ICS Real Estate Pty Ltd. ICS Services provided human resources services for the Company to engage workers on contracts for services as independent contractors and paid the Company's real estate agents.
6. On 24 May 2012, the Company also sent to [REDACTED] an engagement letter. That engagement letter provided amongst other things that:
  - (a) Prior to commencement of her engagement, [REDACTED] must have entered into an agreement with ICS, as a self-employed, independent contractor;

- (b) [REDACTED] was to supply her own mobile phone, and be responsible for any accounts relating to its use;
  - (c) [REDACTED] was required to be licenced as per government requirements and supply her licence for display at the office; and
  - (d) A roster was in place and that [REDACTED] would be expected to fulfil her obligations under the roster maintained by the Company.
7. On 7 June 2012, [REDACTED] accepted the offer and the terms of the engagement outlined in paragraphs 3 to 6.
  8. At the time of engagement [REDACTED] did not have any experience in the real estate industry.
  9. [REDACTED] received no income during her engagement with the Company. After her engagement ceased, she received commission on sale of one property and 9% superannuation. She received a cheque in the amount of \$1,365.84 on or about 29 November 2012.
  10. On 8 March 2013, the FWO received a complaint from [REDACTED] in which [REDACTED] alleged that she was entitled to be paid a retainer for the period of time she worked at the Company and claimed interest on the money owed.
  11. On or about 10 April 2013, the FWO commenced an investigation into the allegations made by [REDACTED].
  12. As a result of its investigation the FWO formed the view that [REDACTED] was in fact an employee despite her purported engagement as an independent contractor. The FWO formed the view that the factors indicative of employment included that [REDACTED]:
    - (a) had no prior experience as a Real Estate Sales Agent/Consultant;
    - (b) received training from experienced sales agents engaged by Harcourts Kenmore prior to obtaining her Real Estate Salesperson Certificate on 1 August 2012;
    - (c) received regular guidance during team meetings and was required to attend sales training;
    - (d) attended 'Tech Workshops' delivered by the Harcourts group;
    - (e) did not have an Australian Business Number to operate an Independent business and had no experience running her own business;
    - (f) worked to generate profit for the Company in return for payment rather than generating entrepreneurial profit for herself or a business operated by her;

- (g) was treated as an employee by being paid 9% super on the commission payment;
  - (h) worked to a roster maintained by the Company;
  - (i) was given work to do by the Company's director and other sales people;
  - (j) did not subcontract work;
  - (k) could only work for one organisation;
  - (l) was provided with office space, a desk and access to office equipment at the premises of Harcourts Kenmore and subsequently at the premises of Harcourts Centenary Suburbs;
  - (m) did not have and was not required to purchase insurance; and
  - (n) was given a name badge and a scarf with the Harcourts logo on it by the Company and was required to dress in corporate attire.
13. At all relevant times, the *Real Estate Industry Award 2010* [MA000106] (**Award**) covered and applied to the Company and its employees engaged in the classifications of Property Sales Associate and Property Sales Representative. [REDACTED]'s classification was that of a Property Sales Associate on commencement and then a Property Sales Representative from 1 August 2012.
14. The FWO determined that as a result of the incorrect classification of [REDACTED] as an independent contractor rather than an employee, [REDACTED] had been underpaid \$16,600.99.
15. The Company is now aware that [REDACTED] was incorrectly engaged as an independent contractor and ought to have been engaged as an employee. The Company has rectified the amount of the underpayments by way of three monthly instalments. The Company has provided proof of payment to the FWO, with the final payment confirmation received on 8 January 2014.

#### **COMMENCEMENT OF UNDERTAKING**

16. This Undertaking comes into effect when:
- (a) the Undertaking is executed by the Company; and
  - (b) the FWO accepts the Undertaking so executed (as evidenced by the FWO's endorsement below).
17. Upon the commencement of this Undertaking, the Company undertakes to assume the obligations set out below.

## **CONTRAVENTIONS**

18. By reason of the matters set out in paragraphs 2 to 15 above, the FWO has determined, and the Company admits that the Company contravened section 45 of the FW Act by failing to comply with the following provisions of the Award:
- (a) Clause 14.1 of the Award by failing to pay [REDACTED] the minimum wage for her period of engagement; and
  - (b) Clause 21.1(a) of the Award by failing to pay to [REDACTED] wages on a weekly, fortnightly or monthly cycle.
19. By reason of the matters set out in paragraphs 2 to 15 the FWO has determined and the Company admits that the Company contravened section 323(1) of the FW Act by failing to pay to [REDACTED] the amounts payable to her in relation to the performance of work, in a manner specified by section 323(2) of the FW Act and at least monthly.
20. By reason of the matters set out in paragraphs 2 to 15 the FWO has determined and the Company admits that the Company contravened section 90(2) of the FW Act by failing to pay [REDACTED] for accrued annual leave upon the termination of her employment.

## **UNDERTAKINGS**

21. For the purposes of section 715 of the FW Act, the Company undertakes to:

### **Future workplace relations compliance**

- (a) ensure compliance at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the Award and FW Act by developing systems and processes to ensure ongoing compliance with those requirements in relation to the employment of employees;
- (b) provide to the FWO within 28 days after the date of this Undertaking, written details of the implementation of systems and processes implemented in satisfaction of the undertaking in paragraph 21(a) above designed to ensure such ongoing compliance;

### **Apology**

- (c) send to [REDACTED] a letter in the form of Attachment A to this Undertaking;

#### **Website notice**

- (d) cause to be placed, within 28 days of the execution of this Undertaking, a notice on the website of the Company at <https://www.harcourtssouthwest.com.au> (**Website Notice**) which:
  - (i) is in the form of Attachment B to this Undertaking;
  - (ii) is displayed on the homepage of the website in at least size 12 font; and
  - (iii) contains a html link to this executed Undertaking;
- (e) keep the Website Notice on the website in accordance with paragraph 21(d) for at least 28 days;
- (f) provide a copy of the Website Notice to the FWO within seven days of posting;

#### **Workplace notice**

- (g) distribute at the offices of the Company at Harcourt Centenary Suburbs, within 28 days after the execution of this Undertaking, a notice in the form of Attachment B to this Undertaking (**Workplace Notice**);
- (h) ensure the Workplace Notice is printed in at least A3 size and is clearly displayed at the offices of the Company at Harcourts Centenary Suburbs:
  - (i) in a location to which all employees who work at the office location have access; and
  - (ii) in a manner which is reasonably capable of drawing the Workplace Notice to the general attention of all employees who work at the office location (for example, by placement on a staff noticeboard);
- (i) provide evidence to the FWO of the distribution of the Workplace Notice within seven days after its distribution;

#### **Workplace relations training**

- (j) within two months of the execution of this Undertaking, organise and ensure training is provided to all persons who have managerial responsibility for human resource, recruitment or payroll functions and who are engaged either directly or indirectly by or to perform work for the Company (**Training**);
- (k) ensure the Training relates to compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the rights and responsibilities of employers under the FW Act and the Award and the distinction between employees and independent contractors;
- (l) ensure the Training is conducted by an accredited workplace trainer; such person or organisation to be approved by the FWO and paid for by the Company;

- (m) provide the training materials to be used in the Training to the FWO no later than 14 days before the Training is to be conducted;
- (n) provide evidence of attendance at the Training to the FWO within seven days of the Training being provided (including the name and position of all attendees and the date on which the Training was attended);
- (o) for a period of 3 years from the execution of the Undertaking, ensure that training is conducted in the manner prescribed by paragraphs 21(j) to 21(n) in relation to any new or existing employees or contractors who, after the commencement of this Undertaking, acquire managerial responsibilities that include human resource, recruitment or payroll functions for the Company;

#### **Public Notice**

- (p) place a public notice in the weekly edition of Brisbane West News within 28 days of the execution of this Undertaking in terms set out in Attachment B to this Undertaking;

#### **Contractors Self-Audit**

- (q) undertake an assessment of each person currently engaged by the Company as an independent contractor to determine if they were, and continue to be, lawfully engaged as an independent contractor and if they have been misclassified to determine whether they have paid in accordance with the relevant award and the FW Act (**Contractor Self-Audit**);
- (r) within one month after the execution of this Undertaking, provide the FWO with written details regarding the methodology to be used to conduct the Contractor Self-Audit outlined in 21(q);
- (s) within one month of the FWO approving the Contractor Self-Audit methodology, commence the Contractor Self-Audit;
- (t) complete the Contractor Self-Audit within two months of commencement;
- (u) within one month of completing the Contractor Self-Audit, rectify each substantiated contravention of the relevant award and the FW Act including the payment of underpayments;
- (v) within one month of completing the Contractor Self-Audit, provide the FWO with an audit report approved by a Certified Practising Accountant or an employment law specialist relating to the Contractor Self-Audit. The report is to include the methodology applied, details of the persons audited, contraventions identified and evidence of rectification of contraventions.

#### **Employee Self-Audit**

- (w) undertake an audit of each person currently engaged by the Company as an employee to determine if they are being paid in accordance with the relevant award and the FW Act (**Employee Self-Audit**);
- (x) within one month after the execution of this Undertaking, provide the FWO with written details regarding the methodology to be used to conduct the Employee Self-Audit outlined in 21(w);
- (y) within one month of the FWO approving the Employee Self-Audit methodology, commence the Employee Self-Audit;
- (z) complete the Employee Self-Audit within two months of commencement;
- (aa) within one month of completing the Employee Self-Audit, rectify each substantiated contravention of the relevant award and the FW Act including the payment of underpayments;
- (bb) within one month of completing the Employee Self-Audit, provide the FWO with an audit report approved by a Certified Practising Accountant or an employment law specialist relating to the Employee Self-Audit. The report is to include the methodology applied, details of employees audited, contraventions identified and evidence of rectification of contraventions.

## ACKNOWLEDGEMENTS

22. The Company acknowledges that:

- (a) the FWO may:
  - (i) make this Undertaking (including any attachments) available for public inspection, including by posting it on the FWO internet site at [www.fwo.gov.au](http://www.fwo.gov.au) (subject to the FWO taking any necessary steps to redact the names of individuals not a party to the Undertaking);
  - (ii) place a media release in relation to this Undertaking on the FWO internet site at [www.fwo.gov.au](http://www.fwo.gov.au);
  - (iii) release a copy of this Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
  - (iv) disclose the existence of this Undertaking and its contents pursuant to section 718 of the FW Act;
  - (v) from time to time, publicly refer to the Undertaking and its terms;
  - (vi) rely upon the admissions made in the Undertaking in respect of any future decision about enforcement action to be taken in relation to any future non-

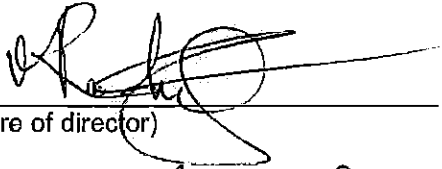
compliance with obligations under Commonwealth workplace laws by the Company;

- (b) consistent with the Note to section 715(4) of the FW Act, this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this Undertaking;
  - (c) If the FWO considers that the Company has contravened any of the terms of this Undertaking:
    - (i) the FWO may apply to any of the Courts set out in section 715(6) of the FW Act, for orders under section 715(7) of the FW Act;
    - (ii) this Undertaking may be provided to the Court as evidence of the admissions made by the Company in paragraphs 18 to 20 above, and also in respect of the issue of costs.
23. Consistent with section 715(3) of the FW Act, the Company may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.
24. No assertion or matter in this Undertaking may be relied upon as an admission by any other person to support a cause of action in any other civil penalty proceeding. However, this term does not prevent any matter in this Undertaking being relied upon in future proceedings in order to inform a relevant Court or tribunal of the details of the conduct that was the evidentiary foundation for the Company entering into this Undertaking.
25. The FWO reserves the right to rely on the terms of this Undertaking and the admissions made herein in respect of any future proceedings brought by the FWO against the Company in relation to any future contraventions of Commonwealth workplace laws.
26. The FWO reserves the right to conduct an audit or investigation if not satisfied with the conduct of any of the above self-audits or with the accuracy of any of the self-audit reports
27. The Company:
- (a) must not; and
  - (b) must ensure that their respective officers, employees or agents, do not;
- make any statement, orally or in writing, or otherwise which conveys or implies or reasonably conveys or implies anything inconsistent with the acknowledgements contained in this Undertaking.



**Executed as an undertaking**

EXECUTED by Centenary Suburbs Sales & Management Pty Ltd (ACN 086 226 235) in accordance with section 127(1) of the *Corporations Act 2001* (Cth);



(Signature of director)

Mariana Remmer Roxio (H&C).

(Name of director)

17/01/2014.

(Date)

in the presence of:



(Signature of witness)

MERRILYN GETHING

(Name of witness)

ACCEPTED by the **Fair Work Ombudsman** pursuant to section 715(2) of the *Fair Work Act 2009* (Cth) on:



Steven Ronson

31/1/2014

(Date)

Executive Director – Dispute Resolution and Compliance

as delegate of the Fair Work Ombudsman  
subject to the instrument of delegation  
made pursuant to section 683 of the FW Act  
and executed by Nicholas Paul Wilson on  
30 January 2013.

in the presence of:



(Signature of witness)

Pia Morgan

(Name of Witness)

## ATTACHMENT A: FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEE

<Date>

[REDACTED]

<[REDACTED] Address>

Dear [REDACTED]

I am writing to apologise on behalf of Centenary Suburbs Sales & Management Pty Ltd for non-compliance with Commonwealth workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (FWO) determined that Centenary Suburbs Sales & Management Pty Ltd had contravened:

- (a) section 45 of the *Fair Work Act 2009* by failing to comply with:
  - (i) Clause 14.1 of the *Real Estate Industry Award (the Award)* by failing to pay you the minimum wage for your period of engagement with the Company; and
  - (ii) Clause 21.1(a) of the Award by failing to pay you wages on a weekly, fortnightly or monthly cycle;
- (b) section 323(1) of the *Fair Work Act 2009* by failing to pay you the amounts payable to you in relation to the performance of work for the Company and on at least a monthly basis; and
- (c) section 90(2) of the *Fair Work Act 2009* by failing to pay you for accrued annual leave upon the termination of your employment.

Regrettably, the investigation determined that you were affected by the above contraventions.

Centenary Suburbs Sales & Management Pty Ltd is taking steps to remedy the contraventions and have repaid you the sum of \$16,600.99 that you have been underpaid. You will be provided with a payslip regarding the payments.

Centenary Suburbs Sales & Management Pty Ltd has formally admitted to the FWO that Centenary Suburbs Sales & Management Pty Ltd did not comply with its obligations under Commonwealth workplace relations laws and has entered into an Enforceable Undertaking with the FWO, a copy of which is available from the FWO website at [www.fairwork.gov.au](http://www.fairwork.gov.au).

As part of the Enforceable Undertaking, Centenary Suburbs Sales & Management Pty Ltd has committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Centenary Suburbs Sales & Management Pty Ltd expresses its sincere regret and apologises to you for failing to comply with its lawful obligations.

Should you have any questions, please contact [party to include contact details].

Yours sincerely

[Chief Executive Officer]

## ATTACHMENT B: FORM OF PUBLIC AND WORKPLACE NOTICE

### Contravention of Fair Work Act by Centenary Suburbs Sales & Management Pty Ltd

The Office of the Fair Work Ombudsman (FWO) has completed an investigation into compliance of Centenary Suburbs Sales & Management Pty Ltd with the *Fair Work Act 2009*. As a result of that investigation the FWO has determined that with respect to one employee during the period 24 May 2012 to 12 November 2012 Centenary Suburbs Sales & Management Pty Ltd had contravened:

- (a) section 45 of the *Fair Work Act 2009* by failing to comply with:
  - (i) Clause 14.1 of the *Real Estate Industry Award (the Award)* by failing to pay an employee the minimum wage; and
  - (ii) Clause 21.1(a) of the Award by failing to pay an employee wages on a weekly, fortnightly or monthly cycle;
- (b) section 323(1) of the *Fair Work Act 2009* by failing to pay an employee the amounts payable to the employee in relation to the performance of work for Centenary Suburbs Sales & Management Pty Ltd and on at least a monthly basis; and
- (c) section 90(2) of the *Fair Work Act 2009* by failing to pay an employee for accrued annual leave upon the termination of the employee's employment.

Centenary Suburbs Sales & Management Pty Ltd has formally admitted to FWO that these contraventions occurred and has entered into an Enforceable Undertaking with the FWO (available at [www.fwo.gov.au](http://www.fwo.gov.au)) committing to a number of measures to remedy the contraventions, including by rectifying the underpayments.

Centenary Suburbs Sales & Management Pty Ltd expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Centenary Suburbs Sales & Management Pty Ltd 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 Centenary Suburbs Sales & Management Pty Ltd and have queries or questions relating to your employment, please contact Lisa Martens. 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.