
Fair Work Act 2009

Section 715

ENFORCEABLE UNDERTAKING

Parties

1. This Enforceable Undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:

- (a) 3CW Chinese Radio Pty Ltd (**3CW**); and
- (b) Mr Zhao Qing Jiang (**Mr Jiang**)

for the purposes of section 715 of the *Fair Work Act 2009 (Cth)* (**FW Act**).

Background

- 2. 3CW trades in Metropolitan Melbourne and operates a radio station in which radio programmes are broadcast in Chinese.
- 3. In mid-2013, the FWO commenced an investigation (**Investigation**) after it received complaints regarding allegations relating to frequency of the payment of wages, underpayment of wages and penalty rates, non-payment of wages, and the failure to issue pay slips from the following former employees of 3CW:
 - (a) [REDACTED] and
 - (b) [REDACTED] (collectively, the **Employees**).
- 4. Mr Zhao Qing Jiang (**Mr Jiang**) admits and agrees that, at all materials times, he:
 - (a) was the sole Director and Secretary of 3CW, having been a Director and Secretary of 3CW since 15 September 1999;
 - (b) was principally responsible for the overall direction, management and supervision of the operations of 3CW in relation to setting and adjusting pay rates and determining wages and conditions of employment, and specifically, responsible for establishing the 3CW business practice of characterising employees as volunteers and paying them a fixed sum per radio program regardless of the number of hours of work performed;
 - (c) the person who made decisions on behalf of 3CW, or who was ultimately responsible for 3CW's decisions, in relation to the engagement of the Employees, the terms and conditions upon which the Employees would be

engaged, the work to be performed by the Employees and the payments made to the Employees in relation to the performance of work;

- (d) was aware that employees are entitled to be paid for work performed in accordance with applicable industrial instruments and Commonwealth workplace laws; and
 - (e) at all material times, by reason of the matters set out at 4(a) to (d) above, responsible in a practical sense for ensuring 3CW complied with its legal obligations to its employees.
5. Mr Jiang is also a director of several other companies in the media and broadcast industry that operate in conjunction with 3CW, including AIMG Holdings Pty Ltd (**AIMG**) and Ostar International Media Group Pty Ltd (**Ostar**). A list of companies of which Mr Jiang is a director is listed in Schedule 1 to this Undertaking.
6. The Investigation determined that 3CW employed the Employees on a casual basis to host and produce radio programs at various times between 16 June 2008 and 30 June 2013. Specifically, [REDACTED] was employed from 2008 until 30 June 2013 and [REDACTED] was employed from 1 April 2010 until 30 June 2013.
7. The Investigation determined that the Employees were properly characterised as employees and not as volunteers because:
- (a) the Employees were performing productive work and duties for 3CW, including making announcements, reading of news or sporting results, and preparing programmes of a special nature;
 - (b) the Employees were paid for some of the work they performed, and the Employees regarded themselves as employees and not volunteers; and
 - (c) 3CW generated PAYG summaries in relation to both of the Employees.
8. 3CW purported to engage the Employees as volunteers.
9. At all material times, 1 January 2010 onwards, the terms and conditions of employment for both Employees were governed by the *Broadcasting and Recorded Entertainment Award 2010* (the **Modern Award**).
10. Schedule A.2.3 of the Modern Award states that prior to the first full pay period on or after 1 July 2010, an employee must be paid no less than the minimum wage as contained in the relevant transitional wage instrument. The relevant minimum wage instrument in this case was the *Cultural and Recreational Services Industry Minimum Wage Order – Victoria- 1997*.
11. From 1 July 2010, the rates of pay for the Employees were as set out in the Modern Award, subject to phasing in accordance with Schedule A of the Modern Award.
12. The Employees were both classified as Announcer Class 1 under the Modern Award.

This is because the duties performed by the Employees included: making announcements, reading of news or sporting results; and preparing programmes of a special nature.

13. The Employees were paid a flat rate of \$20 for each one hour radio programme.
14. The Investigation found that 3CW failed to comply with the Modern Award by failing to pay the Employees:
 - (a) the applicable minimum rate of pay for each hour that they worked;
 - (b) the required casual loading for every hour that they worked;
 - (c) for a minimum of four hours' pay on each occasion they were required to attend for work; and
 - (d) at least monthly in accordance with the applicable frequency of pay provisions in the FW Act.
15. The FWO Investigation concluded that during the period from 1 January 2010 until 30 June 2013, 3CW underpaid the Employees a total of **\$60,126.96** (gross), comprising of the following amounts owed to each of the Employees:
 - (a) [REDACTED] \$45,839.30;
 - (b) [REDACTED] \$14,287.66.

Contraventions

16. The FWO has determined, and 3CW admits, that 3CW contravened section 45 of the FW Act by failing to comply with the following provisions of the Modern Award:
 - (a) clauses 14.1 by failing to:
 - (i) classify the Employees according to the structures set out in the Schedules to the Modern Award;
 - (ii) inform the Employees of their relevant classification under the Modern Award;
 - (iii) to pay the Employees the minimum rate of pay contained in clause 14.3 of the Modern Award;
 - (b) clause 10.5 by failing to pay the Employees:
 - (i) the specified casual loading in addition to the minimum hourly rate of pay; and
 - (ii) the minimum payment of four hours pay on each occasion they were required to attend work.
17. The FWO has determined and 3CW admits, that 3CW contravened subsection 535(1) of the FW Act by failing to comply with the following record-keeping provisions contained in

the *Fair Work Regulations 2009* (Cth) (**Regulations**):

- (a) regulation 3.32 by failing to make and keep employee records that specify the name of the employer, the employer's Australian Business Number, the date on which the Employee's employment began and the status of the Employee's employment; and
 - (b) regulation 3.33 by failing to make and keep employee records that specify the rate of remuneration, the gross and net amounts paid to the Employees, and a record of the hours worked.
18. The FWO has determined and 3CW admits, that 3CW contravened subsection 536(1) of the FW Act by failing to give a pay slip to each of the Employees within one working day of paying an amount to the employee in relation to the performance of work.
19. The FWO has determined, and 3CW admits, that 3CW contravened subsection 323(1) of the FW Act by failing to pay the Employees in relation to the performance of work at least monthly.
20. The FWO has determined, and Mr Jiang admits, that by reason of the matters set out in paragraph 4 above, he was involved in the contraventions set out at paragraphs 16, 17, 18 and 19 above pursuant to section 550 (c) of the FW Act.

Commencement of Undertakings

21. This Undertaking comes into effect when:

- (a) the Undertaking is executed by 3CW and Mr Jiang; and
- (b) the FWO accepts the Undertaking so executed (as evidenced by the FWO's endorsement below) (the **Commencement Date**).

UNDERTAKINGS

22. For the purposes of this Undertaking and for the purpose of section 715 of the FW Act, 3CW and Mr Jiang (both in his role as a director of 3CW and as a director of other entities where specified in the following paragraphs) give the following undertakings:

Future Workplace Relations Compliance

- (a) take all reasonable steps to ensure that 3CW and the companies listed in Schedule 1 comply at all times, and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the Modern Award and the FW Act, by developing systems and processes to promote ongoing compliance with those requirements;
- (b) in particular, develop and implement demonstrable systems and processes to:
 - (i) ensure employees receive the correct minimum rates of pay and entitlements;

- (ii) keep accurate and complete records to ensure employees receive their correct wages and entitlements; and
- (iii) issue pay slips within one (1) working day of paying an amount to each employee;
- (c) provide to the FWO, within 28 days of the Commencement Date, written details of the steps taken by 3CW to implement systems, processes and policies to satisfy the undertaking in paragraph 22(a) and (b) above;

Rectify the underpayments

- (d) within 28 days of the Commencement Date:
 - (i) rectify in full the amounts still owed by 3CW to the Employees; and
 - (ii) provide to the FWO evidence that such payments have been made;

Public Notice

- (e) within 28 days of the Commencement Date, place a public notice in the Chinese Melbourne Daily (**Public Notice**) in the terms set out in Attachment A;
- (f) provide a copy of the Public Notices to the FWO within 7 days of publication;

Workplace Notice

- (g) within 28 days of the Commencement Date, 3CW is to place a notice within the workplace (**Workplace Notice**) in the terms set out in Attachment A;
- (h) have the Workplace Notice translated into Mandarin by a National Accreditation Authority for Translators and Interpreters (**NAATI**) accredited translator;
- (i) ensure the Workplace Notice is displayed in English and Mandarin, is at least A3 size and is clearly displayed in the workplace: *Level 4, 158 City Road, Southbank VIC 3006*
 - (i) in a location to which all employees who work at that 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 workplace (for example, by placement on a staff noticeboard);
 - (iii) for a period of 28 days;
- (j) provide to the FWO a copy of the Workplace Notice and written details of how the Workplace Notice has been displayed within 7 days of display of the notice;

Apology

- (k) within 14 days after the Commencement Date, send letters of apology to [REDACTED] and [REDACTED] in the form set out in Attachment B, which have been translated into Mandarin by a NAATI accredited translator;

Workplace Relations Training

- (l) within 12 weeks of the Commencement Date, organise and ensure training is provided to Mr Jiang and any and all persons who have managerial responsibility for, or involvement in, human resources, recruitment or payroll functions and who are engaged either directly or indirectly by or perform work for 3CW (**Training**);
- (m) ensure the Training addresses 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 Modern Award;
- (n) ensure the Training is conducted by an accredited workplace trainer, such person or organisation to be approved by the FWO and paid for by 3CW;
- (o) provide the name and qualification of the person or organisation to conduct the training, and copies of the training materials to be used in the Training, to the FWO no later than 14 days before the Training is to be conducted;
- (p) provide evidence of attendance at the Training to the FWO within 7 days of the Training taking place (including the name and position of all attendees and the date on which the Training was attended);
- (q) for a period of three years from the execution of the Undertaking, ensure that training regarding the matters set out in paragraph 22(m) is provided to any new or existing employees, after the Commencement Date, acquire managerial responsibilities that include human resource, recruitment or payroll functions for 3CW;

Audit activity and reporting to FWO

- (r) cause to have an audit of 3CW's compliance with Commonwealth workplace laws performed and subsequently endorsed by an external accounting professional (e.g. Certified Practicing Accountant), audit specialist or employment law specialist (at 3CW's expense), in relation to each six (6) month period for one (1) year after the Commencement Date (**the First Audit Period**) and subsequently in relation to each one (1) year period for two (2) years after the First Audit Period, resulting in a total of four (4) audits over a three (3) year period after the Commencement Date. Specifically, each audit must:
 - (i) demonstrate compliance relating to the wages and entitlements of its employees and the contraventions identified in this Undertaking;
 - (ii) include the classification (under the Modern Award) and engagement status (for example casual, full-time) of each

- employee engaged over the reporting period;
- (iii) include pay slips and time records of each worker engaged for the first full pay period of each reporting period;
 - (iv) include details of any proactive measures implemented over the reporting period aimed at ensuring improved compliance with Commonwealth workplace laws;
 - (v) include any contraventions identified and evidence of rectification of contraventions and/or underpayments; and
 - (vi) include the audit methodology applied;
- (s) in the event that any of the audits conducted identify contraventions of applicable Commonwealth workplace laws or instruments, 3CW must rectify each identified contravention within 28 days of the audit being provided to 3CW, including by rectifying any underpayments; and
- (t) within one month of completing the audits, 3CW must provide the FWO with an audit report that has been approved by a Certified Practising Accountant.

Acknowledgements

23. 3CW and Mr Jiang acknowledges that:

- (a) all underpayment calculations relating to the underpayments specified at paragraph 15 of this Undertaking have been based on admissions by, records provided by, and calculations confirmed by 3CW;
- (b) the FWO may make this Undertaking (including any attachments) available for public inspection, including by posting it to its website at www.fwo.gov.au (subject to the FWO taking any necessary steps to redact the names of individuals not party to the Undertaking);
- (c) the FWO may release a copy of this Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
- (d) the FWO may issue a media release in relation to this Undertaking and from time to time, publicly refer to the Undertaking and its terms;
- (f) the FWO may rely upon the acknowledgements and admissions made in this Undertaking in respect of any future decision about enforcement action to be taken in relation to any future non-compliance with Commonwealth workplace relations obligations by 3CW and/or Mr Jiang;
- (g) 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;

- (h) if the FWO considers that 3CW and/or Mr Jiang have contravened any of the terms of this Undertaking 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;
- (e) consistent with section 715(3) of the FW Act, 3CW and/or Mr Jiang may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (f) 3CW and Mr Jiang must not, and must ensure that its 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 acknowledgements contained in this Undertaking.

Executed as an undertaking

EXECUTED by 3CW Chinese Radio Pty Ltd in accordance with section 127(1) of the *Corporations Act 2001*:



(Signature of director)

(Signature of director/company secretary)

ZHAO QING JIANG

(Name of director)

(Name of director/company secretary)

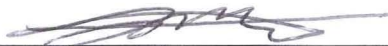
21/07/2014

(Date)

(Date)

in the presence of:

in the presence of:



(Signature of witness)

(Signature of witness)

DONGYING FAN

(Name of witness)

(Name of witness)

EXECUTED by Zhao Qing Jiang:



Signature of Zhao Qing Jiang

21/07/2014

(Date)



(Signature of Witness)

DONGYING FAN

(Name of witness)

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



Steven Ronson
Executive Director – Dispute Resolution and Compliance

23 JULY 2014

(Date)

(an authorised delegate pursuant to an instrument of delegation made pursuant to section 683 of the FW Act)

in the presence of:



(Signature of witness)

PIA MORGAN

(Name of Witness)

Schedule 1 (List of Companies)

Entity Name	ABN/ACN
TRED Family Trust	96640329275
TRED Nominees P/L Ltd IIOC	124463403
Oriental Communications Pty Ltd	63134329249
CAMG Pty Ltd	41139253599
Austhong International Group Pty Ltd	86097012658
PRINCES DOMAIN PTY LTD	136551543
Australian Natural Biotechnology P/L	140318255
Austina International Investment Group Pty Ltd	29110937490
AIMG Holdings P/L	31131960239
AIMG BQ P/L	97148012284
E&E EVENT P/L	13149760378
ACT Radio Net Pty Ltd	94133217615
FM104.9 Network Pty Ltd	83122804648
Ostar International Media Group Pty Ltd	161944725
C&W Kings Way Pty Ltd	158222274
Nan Yang Electronics (Australia) Pty Ltd	81479638
The Chinese Weekly Pty Ltd	87064630413
Australian Legend Group Pty Ltd	125342896
Perth Community Television Pty Ltd	79134035653
Australian Oriental Film & Television Production Pty Ltd	17154546611
Australian Chinese Business Elite Awards Pty Ltd	19164792385
Canberra Chinese Radio Pty Ltd	59163768778
Sydney Chinese Radio Pty Ltd	75164156754

Attachment A –Form of Public and Workplace Notice

Contraventions of Fair Work Act by 3CW Chinese Radio Pty Ltd

The Office of the Fair Work Ombudsman (**FWO**) has completed an investigation into 3CW Chinese Radio Pty Ltd (**3CW**) and its failure to comply with the *Fair Work Act* 2009 (Cth) (**FW Act**). As a result of that investigation, the FWO has determined that 3CW contravened the FW Act by failing to:

- classify the employees under the classification structure in the Modern Award;
- pay the employees the applicable minimum rate of pay and casual loading;
- pay the employees the minimum payment of four hours pay on each occasion that the employees were required to attend work;
- give the employees payslips;
- pay the employees at least monthly; and
- make and keep appropriate records relating to the employees' employment.

3CW and director Mr Zhao Jiang, have admitted to the FWO that these contraventions occurred and entered into an Enforceable Undertaking with the FWO (available at www.fwo.gov.au) committing to a number of measures to remedy the contraventions.

3CW and Mr Jiang express their sincere regret and apologise for the conduct which resulted in the contraventions. Furthermore, 3CW commits to current and prospective employees that it will comply with all requirements of the Modern Award, the FW Act and all other applicable Commonwealth workplace relations laws and instruments in the future.

If you have worked or currently work for 3CW and have queries or questions relating to your employment, please contact [party to include contact details]. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Fair Work Infoline on 13 13 94.

Attachment B – Letter of Apology

[REDACTED]
<Employee Address>

Dear [REDACTED]

I am writing to apologise on behalf of 3CW Chinese Radio Pty Ltd (**3CW**) for failure to comply with Commonwealth workplace laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that 3CW contravened the *Fair Work Act 2009* (**FW Act**) by failing to:

- correctly classify you or pay you the correct rate of pay and entitlements under the *Broadcasting and Recorded Entertainment Award 2010* (**Modern Award**);
- give you payslips as required under the FW Act;
- pay you at least monthly; and
- make and keep appropriate records relating to your employment as required under the FW Act.

3CW is taking steps to remedy the contraventions, including by rectifying the amount that you have been underpaid ([insert amount] gross) and committing to future compliance. 3CW has paid you [insert amount] to rectify this underpayment, and has undertaken to pay you the remaining [insert amount] by [insert date].

3CW and its director, Mr Zhao Qing Jiang, have admitted to the FWO that 3CW and Mr Jiang contravened their obligations under the Modern Award and the FW Act and have entered into an Enforceable Undertaking with the FWO, a copy of which is available from the FWO website at www.fairwork.gov.au. As part of the Enforceable Undertaking 3CW has committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

3CW and Mr Jiang express their sincere regret and apologises to you for failing to comply with their obligations under the FW Act and the Modern Award.

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

Yours sincerely

[Director/Officer]