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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:
  - (a) Wonderkindy – Port Melbourne Pty Ltd (ABN 57 121 717 959) (WPM); and
  - (b) Allan Coman (Mr Coman);for the purposes of section 715 of the *Fair Work Act 2009* (FW Act).

**Commencement of Undertaking**

2. This Undertaking comes into effect when:
  - (a) the Undertaking is executed by WPM; and
  - (b) the FWO accepts the Undertaking so executed.
3. Upon the commencement of this Undertaking, WPM undertake to assume the obligations set out below.

**Background**

4. Mr Coman is the sole director of WPM and Wonderkindy – Tullamarine Pty Ltd (WT).

**WT**

5. WT operated a childcare facility in Tullamarine, Victoria from 16 March 2009 until it ceased trading in February 2013.
6. Between 10/01/2012 and 29/04/2013, the FWO received 15 complaints from current and former employees of WT, relating to allegations of irregular payments, unpaid wages and accrued annual leave entitlements.
7. Following an FWO audit conducted in 01/02/2012, during which Mr Coman was the relevant

WT contact person. On 20 June 2012, the FWO issued WT with a Compliance Notice pursuant to section 716 of the FW Act in relation to non-compliance with frequency of payment provisions. WT rectified \$24,295.09 gross in outstanding wages and termination of employment entitlements arising under the *Children's Services Award 2010* (Award), owed to 20 employees, by way of a payment plan between March 2012 and March 2013.

8. Following an internal audit conducted in March 2013, WT rectified a further \$26,416.84 gross in outstanding wages and termination of employment entitlements arising under the Award and FW Act, owed to 17 former employees, by way of a payment plan between March 2013 and 20 June 2014.

#### WPM

9. WPM operates a childcare facility in Port Melbourne, Victoria.
10. Between 14 December 2011 and 30 April 2014, the FWO received 18 complaints from current and former employees of WPM, mainly relating to allegations of irregular payments, unpaid wages and unpaid accrued annual leave entitlements on termination of employment. The FWO has met with Mr Coman on six separate occasions to discuss the complaints lodged by WPM's employees and to provide education concerning the Award and the FW Act.
11. Following receipt of a complaint from a current employee of WPM in December 2011 in relation to irregular payments and unpaid wages, the FWO initiated an investigation of WPM and subsequently conducted an audit for the period from 1 June 2011 to 20 March 2012 (FWO Audit) to determine WPM's compliance with the Award and FW Act.
12. WPM determined that between 1 January 2011 and 21 March 2012 WPM had contravened provisions of the Award and, as a result, underpaid 42 employees a total of \$52,791.25 gross in wages and termination of employment entitlements. On 20 June 2012, the FWO issued WPM with a Compliance Notice pursuant to section 716 of the FW Act in relation to those underpayments and WPM rectified the underpayments by way of a payment plan between March 2012 and March 2013.
13. Since the Compliance Notice was issued to WPM, complaints received by the FWO from current and former employees of WPM were directed to WPM and were rectified by WPM.
14. Between November 2013 and March 2014, WPM identified and calculated further underpayments, totalling \$32,877.91 gross, owed to 35 current and former employees with respect to unpaid wages and unpaid accrued annual leave entitlements on termination of employment for the period between 1 June 2013 and 30 May 2014. Those underpayments have been partially rectified, and the outstanding amounts set out in Attachment A and are to be rectified pursuant to the Undertakings set out below.
15. On 8 July 2014, WPM entered into a contract to sell the childcare centre in Port Melbourne. The transfer of business (Transfer of Business) is expected to occur in September 2014.

### **Contraventions**

16. The FWO has determined, and WPM admits, that WPM contravened:
- (a) section 44 of the FW Act by failing to pay accrued annual leave on termination of employment pursuant to subsection 90(2) of the FW Act; and
  - (b) section 45 of the FW Act by failing to pay its employees in accordance with the frequency of payment provisions in clause 19.2 of the Award.
17. The FWO has further determined, and Mr Coman admits, that he was involved in the contraventions committed by WPM within the meaning of section 550 of the FW Act.

### **Undertakings**

18. Upon the commencement of this Undertaking and for the purposes of section 715 of the FW Act, WPM and/or Mr Coman, both in his role within WPM as well as in regard to any future company he may become involved in that operates within the child care industry, undertake as follows:

#### ***Rectify the underpayments***

- (a) WPM to pay the underpayments set out in Attachment A by no later than two weeks after the Transfer of Business has occurred;
- (b) If any of the employees listed in Attachment A cannot be located, WPM to pay any outstanding amounts owed to those employees into the Consolidated Revenue Fund of the Commonwealth pursuant to subsection 559(1) of the FW Act;
- (c) within seven days of payment being made to each of the employees listed in Attachment A, WPM to provide evidence to the FWO that payment has been made;
- (d) in the event that any of the amounts listed in Attachment A are rectified before the date of this Undertaking, WPM to pay the balance of the amounts listed in Attachment A by no later than two weeks after the Transfer of Business has occurred;

#### ***Pay all payments owing upon termination***

- (e) WPM to pay all current employees their entitlements in respect of minimum rates of pay in accordance with the Award, or the usual rates of pay paid to those employees, whichever is higher, for work performed until the Transfer of Business;
- (f) WPM to pay all current employees their accrued annual leave entitlements on termination of employment as at the date of the Transfer of Business no later than two



weeks after the Transfer of Business;

- (g) within seven days of payment being made to each of the employees with respect to the payments referred to in paragraphs 18(e) and 18(f) above, WPM to provide evidence to the FWO that payment has been made;

***Future workplace relations compliance***

- (h) WPM and Mr Coman to ensure WPM's compliance at all times after the Transfer of Business that it is trading and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the FW Act and the Award by developing systems, policies and processes to ensure ongoing compliance with those requirements;
- (i) Mr Coman to ensure any business/s owned and/or operated by Mr Coman in the child care industry (Mr Coman's other business/s) are compliant at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the FW Act and the Award by developing systems, policies and processes to ensure ongoing compliance with those requirements;
- (j) WPM to provide the FWO within 28 days of WPM resuming trading, should it resume trading after the Transfer of Business, written details of the systems and processes implemented in satisfaction of the undertaking in paragraph 18(h) above designed to ensure such ongoing compliance;
- (k) Mr Coman to provide the FWO within 28 days of the execution of this Undertaking, and/or Mr Coman's other business/s commencing trading, written details of the systems and processes implemented in satisfaction of the undertaking in paragraph (i) above designed to ensure such ongoing compliance;

***Workplace relations training***

- (l) within six months of Mr Coman's other business/s commencing operation, Mr Coman to organise and ensure training for himself (Training);
- (m) Mr Coman to ensure the Training relates to compliance with the FW Act and all applicable Commonwealth workplace laws and instruments, including in particular the responsibilities of employers in relation to payment of entitlements under the Award;
- (n) Mr Coman to 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 relevant business;
- (o) Mr Coman to provide copies of the training materials to the FWO for approval no later than seven days before the Training is to be conducted; and
- (p) Mr Coman to provide evidence of attendance at the Training to the FWO within seven

days of the Training being provided (including the date on which the Training was attended);

#### ***Apologies***

- (q) WPM to send to each employee referred to in paragraphs 10 and 12 above within 14 days of executing this Undertaking, a letter of apology in the form of Attachment B to this Undertaking (Apology Letters);
- (r) within seven days of the Apology Letters being sent, WPM to provide proof to the FWO;

#### ***Future workplace relations compliance audit activity***

- (s) If WPM continues or recommences trading and/or employing staff on or after the date of the Transfer of Business, WPM to cause to have performed at the company's expense by either an accounting professional (for example, a Certified Practising Accountant or Chartered Accountant) or employment law specialist a further three audits (Future Audits) of WPM's compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the Award and the FW Act, relating to the pay and conditions of employees of WPM, with each audit period commencing on the anniversary of the Transfer of Business covering the preceding 12 month period (Future Audit Periods);
- (t) WPM to provide a copy of the Future Audits to the FWO within seven days of the Future Audits being provided to WPM;
- (u) In the event that the Future Audits disclose contraventions of any applicable Commonwealth workplace laws and instruments, WPM to rectify all such contraventions within 28 days of the Future Audits being provided to WPM, including rectification of any and all underpayments to employees during the Future Audit Periods;
- (v) WPM to provide evidence of rectification of any amounts to employees pursuant to the Future Audits to the FWO within seven days of the rectification occurring;
- (w) In relation to Mr Coman's other business/s, Mr Coman to:
  - (i) cause to have performed at Mr Coman's own expense by either an accounting professional (for example, a Certified Practising Accountant or Chartered Accountant) or employment law specialist three audits (Other Audits) of compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the Award and the FW Act, relating to the pay and conditions of employees of Mr Coman's other business/s, with each audit period commencing on the anniversary of the Transfer of Business covering the preceding 12 month period (Other Audit Periods);



- (ii) provide a copy of the Other Audits to the FWO within seven days of the Other Audits being provided to WPM;
- (iii) In the event that the Other Audits disclose contraventions of any applicable Commonwealth workplace laws and instruments, rectify all such contraventions within 28 days of the Other Audits being provided to WPM, including rectification of any and all underpayments to employees during the Other Audit Periods;
- (iv) provide evidence of rectification of any amounts to employees pursuant to the Other Audits to the FWO within seven days of the rectification occurring.

#### Acknowledgements

19. WPM and Mr Coman acknowledge that:

- (a) 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](http://www.fwo.gov.au) (subject to the FWO taking any necessary steps to redact the names of individuals not party to the Undertaking);
- (b) the FWO may release a copy of this Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
- (c) 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;
- (d) the admissions made in the Undertaking may be relied upon by the FWO 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 WPM or Mr Coman;
- (e) 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;
- (f) if the FWO considers that WPM and/or Mr Coman has 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;
- (g) consistent with section 715(3) of the FW Act, WPM and/or Mr Coman may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO;
- (h) 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 WPM and/or Mr Coman entering into this Undertaking;

- (i) 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 WPM and/or Mr Coman in relation to any future contraventions of Commonwealth workplace laws;

- (j) WPM and/or Mr Coman:

- (i) must not; and

- (ii) must ensure their respective officers, employees or agents do not;

make any statement, orally, 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 Wonderkindy – Port Melbourne Pty Ltd in accordance with section 127(1) of the Corporations Act 2001:

  
(Signature of director)

\_\_\_\_\_  
(Signature of director/company secretary)

ALLAN JOHN COMAN  
(Name of director)

\_\_\_\_\_  
(Name of director/company secretary)

6-8-14  
(Date)

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

In the presence of:

In the presence of:

  
(Signature of witness)

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

Sally McLeod  
(Name of witness)

\_\_\_\_\_  
(Name of witness)

EXECUTED by Allan Coman:

  
(Signature of Allan Coman)

6-8-14  
(Date)

In the presence of:

In the presence of:

  
(Signature of witness)

Sally McLeod  
(Name of witness)



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

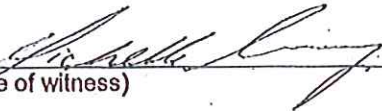


(Fair Work Ombudsman) MICHAEL CAMPBELL  
DEPUTY FAIR WORK OMBUDSMAN - OPERATIONS

6/8/2014

(Date)

In the presence of:



(Signature of witness)

NICHOLLE CAREY

(Name of Witness)

## ATTACHMENT A – Underpayments

Underpayments for the period from 1 June 2013 to 28 July 2014

EMPLOYEE	OUTSTANDING ENTITLEMENTS
	\$1,573.31
	\$3,156.88
	\$768.63
	\$1,270.26
	\$2,854.56
	\$554.00
	\$756.96
	\$928.00
	\$1,284.09
	\$305.10
	\$1,091.61
	\$1,115.18
	\$753.00
	\$625.40
<b>TOTAL</b>	<b>\$17,036.98</b>

**ATTACHMENT B – Letter of Apology**

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I am writing to apologise on behalf of Wonderkindy – Port Melbourne 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 Wonderkindy – Port Melbourne Pty Ltd had contravened the *Fair Work Act 2009* (FW Act) by failing to comply with the following provisions of the *Children's Services Award 2010* (Award) and the FW Act:

- (a) Subsection 90(2) of the FW Act – payment of accrued annual leave on termination of employment; and
- (b) Section 45 of the FW Act – contravening a term of a modern award by contravening clause 19.2 of the Award – frequency of payment provisions.

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

Wonderkindy – Port Melbourne Pty Ltd is taking steps to remedy the contraventions, including by rectifying \$[Insert amount] that you have been underpaid. You will receive this payment on [Insert date] and will be provided with payment advice regarding the payment. / Wonderkindy – Port Melbourne Pty Ltd has paid this amount to you on [date]. [Delete as appropriate]

Wonderkindy – Port Melbourne Pty Ltd has formally admitted to the FWO that Wonderkindy – Port Melbourne 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 we have committed to paying your correct entitlements until the business transfers to the new owners.

Wonderkindy – Port Melbourne Pty Ltd expresses its sincere regret and apologises to you for failing to comply with our lawful obligations.

Should you have any questions, please contact Allan Coman on (03) 9681 8022.

Yours sincerely

Allan Coman  
Director