

### ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

(as represented by the Office of the Fair Work Ombudsman) and

Coles Supermarkets Australia Pty Ltd (ABN 45 004 189 708)

Parties	Fair Work Ombudsman (FWO) and Coles Supermarkets Australia Pty Ltd (Coles)	
FWO	Name	Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman)
	ABN	43 884 188 232
	Address	The Fair Work Ombudsman Level 2 148 Frome Street ADELAIDE SA 5000
COLES	Name	Coles Supermarkets Australia Pty Ltd
	ABN	45 004 189 708
	Address	Wesfarmers House 40 The Esplanade PERTH WA 6000

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## RECITALS

### **Circumstances giving rise to exploitation and underpayments by third party contractors**

- A. In 2008, Coles conducted a tender process for the award of trolley collection service contracts.
- B. The tender process comprised of three phases: an audit phase, a rollover phase and a tender phase. The audit phase involved educational seminars to contractors detailing workplace laws compliance as well as audits to determine if each contractor was complying with these laws. Only contractors who passed the audit phase were eligible to win a further contract.
- C. In 2009, Coles awarded trolley collection service contracts to approximately 28 service suppliers nationwide. The value of the contracts was approximately \$30 million.
- D. One of the contracted suppliers was Starlink International Group Pty Ltd (**Starlink**). Starlink had provided trolley collection services to Coles for approximately 15 years. In 2009, Starlink was awarded about 111 stores which was a reduction from its previous service contract.
- E. There was no direct contractual relationship between Coles and the subcontractors of Starlink, or between Coles and the employees of these subcontractors. Coles had no visibility of the structure of these relationships, or the negotiated payment structures between Starlink and its subcontractors, or the subcontractors and their employees.
- F. In retrospect, as a result of this lack of visibility and transparency of the subcontracting arrangements between Starlink and its subcontractors, Coles acknowledges that its trolley collection management was unable to detect:
  - (a) that the 2008 audit had not been robust enough to ensure that its contractors and their subcontractors were compliant with workplace laws; and
  - (b) Coles' contracting model for trolley collection services was not appropriate for the trolley collection service industry as the model was vulnerable to the exploitation and underpayment of employees of trolley collection contractors and subcontractors.

### **Background to the Proceedings and Coles' subsequent internal changes as a result of the Proceedings**

- G. In late 2011, the FWO raised concerns with Coles about the exploitation and underpayment of employees of Starlink's subcontractors providing trolley collection services at various Coles sites.
- H. In February and May 2012, the FWO commenced two sets of proceedings in the Federal

Court, namely *FWO v Al Hilfi & Ors* (Federal Court proceedings No.SAD27/2012) and *FWO v Al Basry & Ors* (Federal Court proceedings No.SAD109/2012) (**Proceedings**) for contraventions of the *Fair Work Act 2009* (**FW Act**) in relation to the employment by Al Hilfi and Al Basry of trolley collectors working at a number of Coles supermarket sites in Adelaide. The Proceedings alleged that Coles engaged Starlink to provide trolley collection services at the relevant sites and that Starlink via Starlink Operations Group Pty Ltd, in turn, subcontracted those services to Mr Al Hilfi and Mr Al Basry.

- I. The FWO alleged that ten trolley collectors employed by Mr Al Hilfi and Mr Al Basry were underpaid by Mr Al Hilfi and Mr Al Basry \$220,145.87. The FWO alleged that the underpayments arose from a failure of Mr Al Basry and Mr Al Hilfi to pay part time loading, shift penalty rates, weekend and public holiday penalty rates, overtime, annual leave and superannuation under the *Cleaning Services Award 2010*. The FWO also alleged record keeping and pay slip contraventions under the FW Act by Mr Al Hilfi and Mr Al Basry.
- J. The FWO alleged that Coles were involved in and liable as accessories for the alleged underpayment contraventions, pursuant to section 550 of the FW Act. Coles denied the allegations and asserted that it paid Starlink for the provision of services under its contract with Starlink and also that Coles contractually required Starlink to ensure that it and Mr Al Hilfi and Mr Al Basry complied with all of their obligations as employers under workplace laws. A former director and a former manager of Starlink (now in liquidation) were also alleged to be involved in the contraventions. The matter was listed for a 14 day hearing in the Federal Court commencing on 7 October 2014.
- K. Coles is committed to conducting its business in accordance with its Code of Ethics, which includes as its core value a commitment to being a good corporate citizen which seeks the respect of the environments and communities in which it operates.
- L. In response to the Proceedings and with the knowledge Coles obtained by fully reviewing its contracting systems Coles initiated and implemented fundamental, permanent and sustainable changes to its trolley collection services model, to meet its own charter and the expectations of the FWO.
- M. In late 2012 Coles implemented changes to its trolley contracting process from a model based on 30 lead contractors to a single national trolley provider, administered under a single payroll, conducted and operated by an independent third party.
- N. Coles required the contractor to establish bank guarantee arrangements to secure against risk of underpayments.
- O. Coles brought trolley collection services in over 400 stores "in-house" such that it is now performed by its direct employees. Coles expects to extend this model to all its stores by 30 September 2016.
- P. Coles established a Hotline requiring store managers to escalate complaints by trolley collectors directly to the Coles head office to be investigated and resolved by a dedicated Customer Trolley Manager who is tasked with investigation and resolution of



such complaints.

- Q. In acknowledgement of the positive actions taken by Coles in response to the Proceedings, the impact these actions will have in assisting to eradicate exploitation and underpayment in the trolley collection industry, and to facilitate ongoing collaboration between the FWO and Coles, the parties have agreed to enter into this Enforceable Undertaking.
- R. Coles:
- (a) is prepared to acknowledge that it is responsible for compliance with all aspects of the law across its business operations and welcomes the opportunity to work closely with the FWO to ensure ongoing compliance with Commonwealth workplace laws in respect of contractors of trolley collection services and their employees who conduct such services for and on behalf of Coles;
  - (b) is prepared to acknowledge that it has an ethical and moral responsibility to require standards of conduct from all entities and individuals directly involved in the conduct of its enterprise that comply with the law and meet Australian community and social expectations, to provide equal, fair and safe work opportunities for persons employed at its sites.
- S. Coles accepts that the traditional contracting model it formerly utilised to obtain trolley collection services from trolley contractors was highly vulnerable to exploitation and the perpetuation of poor employment practices by its trolley contractors including underpayment in the industry.
- T. Coles acknowledges that Coles' traditional model used until 2012, due to its complexity, lacked transparency and was inadequate; resulting in Coles having limited oversight of trolley contractor behaviour and eroding Coles' ability to drive compliance through the trolley contractor chain and the traditional model provided the trolley contractor and subcontractors with the opportunity to exploit and underpay workers.
- U. Coles' systems and processes relied upon to monitor compliance within that model were insufficient, lacked cohesion and were not consistently applied such that to address Coles' and the FWO's concerns required Coles to adopt and implement a completely fresh approach and model for procurement of trolley collection services as set out above, improve its internal systems and processes and make Coles' management of trolley collection services more robust.
- V. Coles' sole trolley collection contractor is party to a Deed of Proactive Compliance with the FWO and Coles will ensure that it continues to support its trolley contractor in meeting its obligations under that Deed in view of the flow on benefits to Coles.
- W. As a responsible and ethical corporate citizen and as a gesture of its commitment to the eradication of exploitation and underpayment in the trolley collection industry, Coles will make an ex gratia payment to each of Mr Al Hilfi and Mr Al Basry's employee named in the Proceedings (and as listed in **Attachment A** to this Enforceable Undertaking) as it wishes to ensure that none of these workers suffer loss.

## OPERATIVE PROVISIONS:

### 1. **Promise to take Enforceable Undertaking activity**

- 1.1 Upon the commencement of this Enforceable Undertaking and for the purposes of section 715 of the FW Act Coles undertakes to do or cause to be done all those activities and things set out in Attachment A to this Enforceable Undertaking.

### 2. **Commencement of Enforceable Undertakings**

- 2.1 This Enforceable Undertaking comes into effect when:
- (a) it is executed by Coles; and
  - (b) the FWO accepts the Enforceable Undertaking so executed (as evidenced by the signature of the FWO or her delegate below).
- 2.2 The FWO consents to this Enforceable Undertaking ceasing to apply to Coles on 31 December 2018, unless it ceases earlier in accordance with clause 2.3 or the term of the FW Act.
- 2.3 If at any time during the term of the Enforceable Undertaking, Coles completes the process of bringing "in house" all trolley collection services, such that all trolley collection services are being performed by Coles employees, the consent of the FWO will be deemed to have been given pursuant to section 715(3) of the FW Act to Coles' withdrawal from this Enforceable Undertaking from the date on which the FWO receives written notification from a third party certified practising accountant (CPA) engaged by Coles that Coles is no longer engaging independent contractors to perform trolley collection services.

### 3. **Publicity**

- 3.1 The FWO agrees to provide Coles with a copy of its Media Release announcing the Enforceable Undertaking not less than 2 hours on a business day prior to publication.
- 3.2 Coles will not, directly or indirectly, provide any information about the Enforceable Undertaking to any media prior to the FWO issuing its Media Release.
- 3.3 Following publication by the FWO of its Media Release, Coles will also issue its own media release in the form of **Attachment B** to this Enforceable Undertaking.

### 4. **No Inconsistent Statements**

Coles:

- (a) must not; and
- (b) must ensure that each of its 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 content of this Enforceable Undertaking.



## 5. Enforcement by the FWO

If the FWO considers that Coles has contravened any of the terms of this Enforceable Undertaking:

- (a) the FWO may apply to any of the Courts set out in section 715(6) of the Fair Work Act for orders under section 715(7) of the FW Act;
- (b) this Enforceable Undertaking may be provided to the Court as evidence of the undertakings given by Coles and also in respect of the question of costs.

## 6. Independent Legal Advice

### 6.1 Coles acknowledges that:

- (a) before executing this Enforceable Undertaking, Coles was given the opportunity to seek independent legal and other advice of its choice;
- (a) in light of any advice provided, Coles considered its position; and
- (b) Coles fully understands the effect of this Enforceable Undertaking.

## 7. Continuing obligations

Clause 4 (No inconsistent statements) survives the expiration of this Enforceable Undertaking and is a continuing obligation of Coles.

## 8. Public Inspection

The FWO may:

- (a) make this Enforceable Undertaking available for public inspection, including by posting it on the FWO internet site at [www.fairwork.gov.au](http://www.fairwork.gov.au);
- (b) release a copy of this Enforceable Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
- (c) issue a media release in relation to this Enforceable Undertaking; and
- (d) from time to time, publicly refer to this Enforceable Undertaking.

## 9. Definitions

In this Enforceable Undertaking:

**Commonwealth workplace laws** means:

the *Fair Work Act 2009*;

the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*;

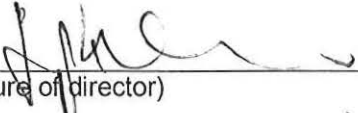
the *Fair Work Regulations 2009*;

the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

**Enforceable Undertaking** means this enforceable undertaking, including any Schedules or Attachments.

EXECUTED AS AN UNDERTAKING


EXECUTED by **Coles Supermarkets Australia Pty Ltd** in accordance with section 127(1) of the *Corporations Act 2001*:

  
(Signature of director)

John Durkan  
(Name of director)

6 OCTOBER 2014  
(Date)

in the presence of:


  
(Signature of witness)  
Andrew Peter Kanis  
800 Toorak Road, Hawthorn East Vic 3123  
an Australian Legal Practitioner  
(within the meaning of the Legal Profession Act 2004)  
(Name of witness)

  
(Signature of director/company secretary)

Simon McDowell.  
(Name of director/company secretary)

6 OCTOBER 2014  
(Date)

in the presence of:

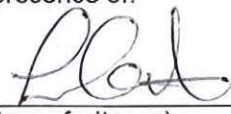
  
(Signature of witness)  
Andrew Peter Kanis  
800 Toorak Road, Hawthorn East Vic 3123  
an Australian Legal Practitioner  
(within the meaning of the Legal Profession Act 2004)  
(Name of witness)

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

  
Deputy Fair Work Ombudsman – Operations

(an authorised delegate pursuant to an instrument of delegation made pursuant to section 683 of the *Fair Work Act 2009*)

in the presence of:

  
(Signature of witness)



## Attachment A (Enforceable Undertaking Activities)

### Internal Communication

1. Within 7 days of the execution of the Enforceable Undertaking, Coles will communicate the existence of the Enforceable Undertaking to its employees and contractor, United Trolleys Collection (UTC), via an internal communication method such as email, internal memo or intranet, and direct UTC to make a copy of the Enforceable Undertaking available to all its independent contractors and employees.
2. That communication is to be in the following form:

*"Coles fully supported and endorsed the actions of UTC in entering into a Deed of Proactive Compliance with the FWO. Coles has now entered into an Enforceable Undertaking (The Enforceable Undertaking) with the Office of the FWO.*

*By entering The Enforceable Undertaking, Coles demonstrates that it is committed to working with the FWO to ensure compliance with Commonwealth workplace laws and promote a harmonious, productive and cooperative workplace at all its sites.*

*Coles accordingly requires all independent contractors engaged in its enterprise to commit to ensuring compliance with workplace laws and engage with the FWO on matters arising as a result of workplace complaints.*

*Coles has made the Enforceable Undertaking available to all independent contractors through [INSERT SITE.] You are also able to access information about entitlements and rights at work by contacting [Danny Crofts INSERT POSITION], Sam Woodbridge, at United Trolley Collections Pty Ltd as an Employee Liaison Officer, or by visiting the Fair Work Ombudsman website at [www.fairwork.gov.au](http://www.fairwork.gov.au) or speaking to a Fair Work Advisor on 13 13 94."*

### Implement Systems and Processes

3. Coles' internal division, Coles Services, will continue to build the "in-house" trolley collection model by direct employees and will extend this model to an estimated 3000 employees collecting trolleys at all stores in Australia which is estimated to be completed by 30 September 2016.
4. Coles will monitor and support its single trolley collection service contractor, UTC, to ensure UTC conducts its audit requirements as prescribed under its Deed of Proactive Compliance with the FWO and Coles will contact UTC weekly to discuss and monitor on-going compliance with correct wage payments.
5. Coles will continue its Hotline requiring store managers to escalate complaints of wage underpayment by trolley collectors directly to the Coles head office to be investigated by a dedicated Customer Trolley Manager who is tasked with investigation of such complaints.
6. At any Coles site at which trolley collection is undertaken by a trolley collection contractor, Coles will advertise the Hotline, including the Hotline number, in all sign-in books and team rooms, in the form of Attachment C to this Enforceable Undertaking.

### Investigation of Complaints

7. Coles will investigate every trolley collection wage underpayment complaint it receives from the FWO and through its hotline service within 28 days.
8. Coles will assist UTC where requested by UTC with investigation of any wage underpayment complaint that UTC receives.
9. Coles will investigate and provide the FWO with the results of all its investigations, determinations and actions taken within 28 days of the FWO advising to Coles in writing of a request received by the FWO, for assistance in respect of a trolley collector wage

underpayment (that is a complaint received by the FWO or a query received by the FWO on the Fair Work Infoline) and the FWO will provide to Coles the name of the complainant, the relevant site, the amount of alleged underpayment and the date(s) over which alleged underpayment was made.

10. The FWO reserves its rights to investigate any trolley wage underpayment complaint which is unable to be resolved within 28 days.
11. To assist Coles to meet the obligation in paragraphs 7 to 10 above, the FWO agrees that within 14 days of the commencement of this Enforceable Undertaking (and from time to time in the event of a change in personnel), to nominate a liaison officer for the purposes of any new complaints referred to in paragraph 7 above.

#### **Annual Report to FWO**

12. Coles is to provide the FWO a report, within 28 days after each anniversary of the execution of this Enforceable Undertaking. The report will address the following matters:
  - (a) the number of trolley collection wage underpayment complaints referred to Coles on the Hotline;
  - (b) the actions taken by Coles to investigate the trolley collection wage underpayment complaints on the Hotline;
  - (c) the average time taken to conclude the investigations about such complaints from the Hotline (average time is to be calculated by adding the number of days taken to investigate each wage underpayment complaint and dividing the total of that number by the number of wage underpayment complaints); and
  - (d) the findings with respect to each such complaint received by Coles on the Hotline;
  - (e) each instance where Coles has determined there is an underpayment and the amount of each underpayment.
13. The FWO may publish any report provided by Coles and the FWO's publishing of any such report will reflect the positive cooperation of Coles. The FWO will not publish any part of the report containing information reasonably designated by Coles as confidential or commercially sensitive information of Coles or its contractors.

#### **Resources**

14. Coles must commit all necessary resources, financial or otherwise, and meet all necessary expenses associated with the implementation of the Enforceable Undertaking.

#### **Ex gratia Payments**

15. Within 28 days from the date of execution of this Enforceable Undertaking, Coles will provide to the FWO cheques addressed to each of the trolley collectors listed below (**Trolley Collectors**) being the employees named in the Proceedings:
  - (a) [REDACTED] for the amount of \$23,595.10;
  - (b) [REDACTED] for the amount of \$30,708.59;
  - (c) [REDACTED] for the amount of \$6,129.94;
  - (d) [REDACTED] for the amount of \$18,064.70;
  - (e) [REDACTED] for the amount of \$13,239.51;
  - (f) [REDACTED] for the amount of \$28.82;



- (g) [REDACTED] for the amount of \$89,665.82;
- (h) [REDACTED] for the amount of \$24,795.94;
- (i) [REDACTED] for the amount of \$12,623.58; and
- (j) [REDACTED] for the amount of \$1,322.69.

TOTAL: \$220,174.69

- 16. If any of the Trolley Collectors cannot be located within 60 days of FWO receiving the cheques referred to in the paragraph immediately above, Coles will, upon request by the FWO and within 14 days thereafter, pay a sum equivalent to the relevant Trolley Collector's underpayment to the FWO, on behalf of the Commonwealth of Australia. The payments will be treated by the FWO as payments pursuant to section 559 of the FW Act.

#### **Establishment of Fund**

- 17. Within 28 days of the execution of the Enforceable Undertaking, Coles will establish a "Guarantee" reserve fund which will be maintained by Coles at an amount of \$500,000.00, available to be distributed to trolley collectors employed by UTC or subcontractors to UTC, in the event that those trolley collectors are found to be underpaid wages for trolley collection services carried out for Coles at a Coles site.
- 18. If Coles forms the view that there has been a wage underpayment, Coles will require UTC or the relevant subcontractor to UTC to rectify the wage underpayment, or Coles will rectify the wage underpayment within 28 days of Coles forming such view.

#### **Annual Audits of UTC and its Subcontractors**

- 19. Coles will conduct annual audits of a minimum of 20 per cent of direct sub-contractors of UTC for each year of the Enforceable Undertaking.
- 20. The audit will be conducted by Coles requiring UTC to require its subcontractors to provide written evidence in respect of their employees the subject of the audit, being:
  - (a) wages paid for each employee in a nominated one month period;
  - (b) the hourly rate paid to each employee for each hour worked by that employee in the nominated one month period;
  - (c) the roster of days and hours worked by each employee during the nominated one month period; and
  - (d) each employee's age.
- 21. Coles will, based on that written information, determine whether there has been any wage underpayment of any employee during that nominated one month period. The determination made by Coles for each audit will be independently reviewed and certified as accurate by a third party CPA (at the expense of Coles).
- 22. Coles must within 28 days of conclusion of such review by the CPA, provide the audit and the CPA report to the FWO.

#### **Workplace Relations Training Program**

- 23. Within 60 days of the commencement of the Enforceable Undertaking, Coles will design and implement a workplace relations training program for roles identified as managing and/or procuring trolley collection services and reporting directly to the General Manager responsible for trolley collection services, so that they are made aware of employer obligations to employees pursuant to Commonwealth workplace laws (**Training**).



24. The Training will include material on:

- (a) compliance with the FW Act and Fair Work Instruments under the FW Act (**FW Instruments**);
- (b) Coles' contractors' obligations under the FW Act and FW Instruments, including their obligations under section 550 of the FW Act; and
- (c) the options available to trolley collectors to make wage underpayment complaints through the Hotline and the FWO's procedures to lodge a complaint.

## **ATTACHMENT B (Coles Media Release)**

### **Attach release**

DATE TBC

### **FAIR WORK OMBUDSMAN HELPS COLES TO CHANGE TROLLEY COLLECTION**

In partnership with the Fair Work Ombudsman (FWO), Coles has transformed its contracted trolley collection service across Australia to eradicate underpayment of trolley contractors at its workplaces.

The FWO has helped Coles effect fundamental permanent change of its trolley collection arrangements.

In late 2011, the FWO raised concerns with Coles about unfair practices involving third party employees who had contracted its trolley collection service.

The FWO's concerns motivated Coles to make changes to its trolley collection service and move away from a traditional contracting model for trolley collection.

Coles previously had more than 30 contractors but improved its operations in late 2012 by contracting to one national trolley collection provider administered under a single external payroll. Coles also established a hotline for external complaints to be escalated to senior management. Bank guarantee arrangements are in place with the sole contractor to secure against any risk of underpayments. With the assistance of the FWO the sole contractor has entered into a deed of proactive compliance which provides transparency of payments to third party employees.

Coles direct employees now collect trolleys at more than 400 of its stores and Coles aims to have employees collecting trolleys at all stores by the end of 2016. This year Coles has also established an internal division, Coles Services, with approximately 700 employees and will move to more than 3000 by the end of 2016.

In 2012 the FWO issued proceedings against three contractors of Coles for breach of the *Fair Work Act 2009* for failing to pay workers the required amount under the relevant award. Coles was also joined as a party with the FWO alleging accessorial liability.

Early this year the subcontract employers in the Proceedings admitted the contraventions alleged by the FWO.

Coles has agreed to enter an enforceable undertaking with the FWO as part of its continued partnership to ensure that all trolley collection services are brought in house by the end of 2016. Coles wants to ensure the affected workers in the proceedings are not out of pocket for their wages. As a good corporate citizen, Coles will make an ex gratia payment to these workers.

The FWO has agreed to discontinue the Proceedings against Coles.

Coles believes the FWO plays a vital role in the community by ensuring fair practices for employees and preserving the integrity of workplace relations in this country. Coles also supports the FWO in its regulatory charter and believe positive relationships with our employees are paramount to our business.

***For further information, contact Julia Balderstone at Coles on 0409 570 107 or [Julia.balderstone@coles.com.au](mailto:Julia.balderstone@coles.com.au)***

## ATTACHMENT C - Trolley Collection Wage Underpayment Hotline

### TROLLEY COLLECTION WAGE UNDERPAYMENT HOTLINE

Coles wants your employer to pay you correctly. Coles has a set up a Hotline so you can contact Coles if you believe you are not receiving the correct wage payment. Coles will investigate any wage underpayment query. The Hotline number is 1800 507 877