



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Quito Pty Ltd (ABN 65 008 957 480)

Section 715 ENFORCEABLE UNDERTAKING

Parties

This Enforceable Undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by Quito Pty Ltd trading as Benara Nurseries (**Quito**) for the purposes of section 715 of the *Fair Work Act 2009 (Cth)* (**FW Act**).

Commencement of Undertaking

1. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by Quito; and
 - (b) the FWO accepts the Undertaking so executed.
2. Upon the commencement of this Undertaking (the **Commencement Date**), and for the purposes of section 715 of the FW Act, Quito undertakes to assume the obligations as set out below.

Background

3. Quito is located at 32 Safari Place, Carabooda in Western Australia (the **Premises**) and is a horticultural business.
4. On 12 August 2014, the FWO commenced an investigation (**Investigation**) after it received Requests for Assistance (**RFA**) regarding allegations of unauthorised deductions from wages from the following former employees of Quito:

- (a) [REDACTED]
- (b) [REDACTED]
- (c) [REDACTED]
- (d) [REDACTED]
- (e) [REDACTED]
- (f) [REDACTED]
- (g) [REDACTED]
- (h) [REDACTED]

(collectively, the **Employees**).

5. The Employees were employed by Quito as Nursery Hands and their primary duties included quality control, weeding, pruning plants and labelling, stacking and preparation of stock for sale.

6. The Employees were employed on a casual basis from 7 May 2014 and their respective employment periods ended on the following dates:
- (a) [REDACTED] 12 September 2014;
 - (b) [REDACTED] 7 October 2014;
 - (c) [REDACTED] 4 July 2014;
 - (d) [REDACTED] 22 July 2014;
 - (e) [REDACTED] 26 September 2014;
 - (f) [REDACTED] 26 September 2014;
 - (g) [REDACTED] 24 October 2014; and
 - (h) [REDACTED] 12 September 2014
- (collectively, the **Employment Periods**).
7. During the Employment Periods, the terms and conditions of the Employees' employment were governed the FW Act and *Benara Nurseries Enterprise Agreement 2012 – 2015* (the **Agreement**).
8. Throughout the Employment Periods, Quito:
- (a) provided the Employees with accommodation on-site at 59 Safari Place, Carabooda in Western Australia; and
 - (b) following oral discussions with the Employees, Quito deducted \$450.00 in rent per fortnight from each Employee's wages, but omitted to enter into a written agreement with the Employees authorising the deductions.

Contravention

9. The FWO has determined, and Quito admits, that Quito contravened section 323(1) of the FW Act in respect of each of the Employees in the following circumstances:
- (a) section 323(1) of the FW Act requires that an employer must pay an employee amounts payable in relation to the performance of work in full unless any deductions are permitted pursuant to section 324 of the FW Act;
 - (b) Quito deducted \$450.00 per fortnight from each Employee's wages as a payment of rent for accommodation provided by Quito on-site;
 - (c) section 324(1)(a) of the FW Act required that the deductions made by Quito from the Employees' wages had to be authorised in writing by the Employees and is principally for the Employees' benefits;

- (d) the Employees did not authorise in writing the deduction of \$450.00 per fortnight from their wages, for rent; and
 - (e) Quito omitted to obtain written authorisation from the Employees to deduct rent and, accordingly, Quito failed to comply with its obligation to pay the Employees' in full under section 323(1) of the FW Act.
10. The total amount owing to the Employees arising from the above contraventions is **\$28,795.21**, comprising:
- (a) [REDACTED] - \$3,792.86
 - (b) [REDACTED] - \$4,388.06
 - (c) [REDACTED] - \$1,511.00
 - (d) [REDACTED] - \$2,089.29
 - (e) [REDACTED] - \$4,242.86
 - (f) [REDACTED] - \$4,242.86
 - (g) [REDACTED] - \$4,735.42
 - (h) [REDACTED] - \$3,792.86

Undertakings

11. Upon the Commencement of this EU, for the purposes of section 715 of the FW Act, Quito undertakes to:
- (a) *Rectify Deductions*
 - (i) within 28 days of the Commencement Date:
 - (A) make all reasonable efforts to pay the individual underpayment amounts as specified in subparagraph 10 to the Employees;
 - (B) only in the event Quito is unable to pay one or more Employees directly, after making all reasonable efforts to do so:
 - pay the relevant Employee(s)'s underpayment to the Commonwealth, care of the unclaimed monies fund maintained by the FWO, in accordance with the procedure to be advised by the FWO; and
 - provide to the FWO evidence of the attempts made by Quito to locate and pay each of the relevant Employee(s);
 - (ii) within 7 days of making rectification payments to the Employees in accordance with subparagraph 11(a)(i)(A), provide evidence of payment to the FWO;

- (b) in relation to any future RFAs received by the FWO from employees or former employees of Quito alleging contraventions of Commonwealth workplace laws or instruments:
 - (i) use all reasonable endeavours to resolve the allegation(s), including rectifying any identified contraventions, within 60 days of being notified by the FWO of the RFA;
 - (ii) where an RFA has been resolved, provide the FWO with evidence of the resolution; and
 - (iii) where an RFA has not been resolved by agreement with the employee within the period specified in subparagraph 11(b)(i), report to the FWO about the nature of the allegation(s) and the steps taken to try to resolve it;
- (c) *FWO MyAccount Registration*
 - (i) within 14 days of the Commencement Date, register with the FWO 'My Account' portal at 'www.fairwork.gov.au' and have completed the profile option;
 - (ii) within 15 days of the Commencement Date, provide to the FWO the Quito 'My Account' registration number;
- (d) *Public Notices*
 - (i) within 28 days of the Commencement Date, place a public notice in the North Coast Times (**Public Notice**) in the terms set out in Attachment A;
 - (ii) within 28 days of the Commencement Date, place a notice at Quito's Carabooda operations (**Workplace Notice**) in a location which is readily accessible to all persons employed at Quito in the terms set out in Attachment A, such notice to remain in place for a total period of 7 consecutive days; and
 - (iii) provide a copy of the Workplace Notice and photographic evidence of its display to the FWO within 7 days of the display of the notice;
- (e) *Apology*
 - (i) within 7 days of the Commencement Date, send an apology to each of the Employees (**Apology**) in the terms set out in Attachment B, signed on behalf of Quito; and

- (ii) provide a copy of each Apology to the FWO within 7 days of sending such Apology;

(f) *Self-audits and Reporting*

- (i) have completed by an external accounting professional (e.g. Certified Practising Accountant), audit specialist or employment law specialist, at Quito's expense, a series of audits (**Audits**) of its compliance with sections 323 to 327 of the FW Act in relation to all of Quito's employees on the terms set out below:
- (ii) without limiting the above obligation, the Audits to include consideration of whether wages have been paid in accordance with section 323 of the FW Act and that any deductions from wages comply with applicable requirements in section 324 of the FW Act;
- (iii) the Audits are to be conducted annually for 24 months according to the following schedule:
 - (A) an Audit of the first complete pay cycle following 1 February 2016, which is to be finalised within 28 days of the last day of the pay cycle;
 - (B) an Audit of the first complete pay cycle following 1 February 2017, which is to be finalised within 28 days of the last day of the pay cycle;
- (iv) within 14 days of the completion of each Audit, provide the FWO with details of the methodology used to conduct the Audit and a copy of the certified audit report;
- (v) in the event that an Audit discloses any contraventions of the FW Act, rectify all such contraventions within 14 days of receipt of the Audit results by Quito (including by fully re-paying any deductions that do not meet the requirements of section 324 of the FW Act);
- (vi) provide evidence of rectification of all contraventions disclosed by an Audit to the FWO within 14 days of rectification; and
- (vii) upon request by the FWO, and within 14 days of receiving such a request, provide to the FWO copies of records and documents relied on by the auditor for the purposes of conducting an Audit.

(g) *Workplace Relations Training*

- (i) within 90 days of the Commencement Date, implement a training program (**Training**) so that:

- (A) all persons responsible for human resource, recruitment or payroll functions for or on behalf of Quito; and
- (B) all other persons responsible, either directly or indirectly, for Quito's compliance with Commonwealth workplace laws and instruments, including all of Quito's officers and directors,

are made aware of Quito's obligations under Commonwealth workplace laws and instruments;

- (ii) ensure the Training is conducted by an accredited workplace trainer, such person or organisation to be approved in advance by the FWO and paid for by Quito;
- (iii) provide the training materials to be used in the Training to the FWO no later than 7 days before the Training is to be conducted;
- (iv) within 14 days of the Training being conducted, provide the FWO with evidence of attendance at the Training (including the name and position of all attendees and the date on which the Training was attended);

(h) *On-Site Accommodation Inspection & Report*

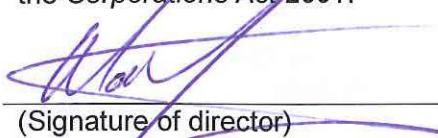
- (i) within 28 Days of the Commencement Date, provide to the FWO satisfactory evidence that any building(s) that are used by Quito for the purpose of providing accommodation to employees (**Accommodation**), including 59 Safari Place, Carabooda in Western Australia are the subject of a permit, licence, zoning or other approval that permits the Accommodation to be used for a residential purpose;
- (ii) within six weeks of the Commencement Date, provide to the FWO a letter or report (**Report**) from an independent property inspection professional (such person to be approved in advance by the FWO), certifying that the Accommodation is fit for its intended purpose as residential accommodation;
- (iii) to the extent the Report identifies any aspects in which the Accommodation is not fit for purpose or fails to comply with an applicable statute, regulation or code, within 45 days of receiving the Report:
 - (A) rectify any such identified defects; and
 - (B) provide to the FWO evidence of rectification.

Acknowledgements

12. Quito acknowledges that:
 - (a) the FWO may make this Undertaking (including any attachments) available for public inspection, including by posting it to its website at www.fairwork.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 and acknowledgments 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 law or instruments by Quito;
 - (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 Quito 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, Quito may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.
13. FWO reserves the right to rely on the terms of this Undertaking and the admissions and acknowledgments made herein in respect of any future proceedings brought by the FWO against Quito in relation to any future contraventions of Commonwealth workplace laws.
14. Quito must not, and must take all reasonable steps to ensure that its officers, agents and employees do not, make any statements, orally or in writing or otherwise, which convey or imply anything inconsistent with the admissions and acknowledgments contained in this Undertaking.

Executed as an undertaking

EXECUTED by Quito Pty Ltd (ABN: 65 008 957 480) in accordance with section 127(1) of the Corporations Act 2001:


(Signature of director)


MATTHEW ADAM JANET

(Name of director)

21/4/15

(Date)

in the presence of:


(Signature of witness)

DARREN JOHN SMYKE

(Name of witness)


(Signature of director/company secretary)

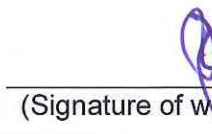
GAVIN MICHAEL JANET

(Name of director/company secretary)

21/4/15

(Date)


in the presence of:


(Signature of witness)

DARREN JOHN SMYKE

(Name of witness)

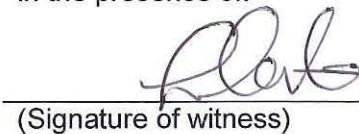
ACCEPTED by the FAIR WORK OMBUDSMAN pursuant to section 715(2) of the Fair Work Act 2009 on:


Michael Campbell

~~Group Manager~~ DEPUTY FAIRWORK OMBUDSMAN
Operations
Delegate for the FAIR WORK
OMBUDSMAN

27/4/15
(Date)

in the presence of:


(Signature of witness)

LOUISE CATO
(Name of Witness)

Attachment A – Form of Public and Workplace Notice

Contravention of the *Fair Work Act 2009* by Quito Pty Ltd trading as Benara Nurseries (Quito).

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) into allegations that Quito contravened the *Fair Work Act 2009* (**FW Act**).

Quito runs a horticultural business in Australia. No previous contraventions of Commonwealth workplace laws have been determined against Quito.

The FWO has determined that Quito contravened section 323(1) of the FW Act by omitting to obtain written authorisation from the employees to deduct rent payments from the affected employees as required under section 324(1) of the FW Act (**Contraventions**).

Quito has formally acknowledged to the FWO that these Contraventions occurred and has entered into an Enforceable Undertaking with the FWO (available at www.fwo.gov.au) committing to a number of measures to remedy the Contraventions and prevent them from occurring in the future.

Quito expresses its sincere regret and apologises for the conduct which resulted in the Contraventions. Furthermore, Quito 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 Quito and have queries or questions relating to your employment, please contact Roberta Dinnie in the first instance on telephone 08 9561 9000. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.

Attachment B – Letter of Apology

[Affected Employee name]

address

address

Day Month 2015

Dear [Affected Employee],

I am writing to apologise on behalf of Quito Pty Ltd trading as Benara Nurseries (**Quito**) for non-compliance with Commonwealth workplace laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that Quito contravened the *Fair Work Act 2009* (**FW Act**).

The FWO has determined that Quito contravened section 323(1) of the FW Act by deducting money for rent without first having entered into a written agreement with you authorising the deduction as required under section 324(1) of the FW Act (**Contravention**).

Quito is taking steps to remedy the Contravention, including reimbursing \$XXXXXXX.XX to you as result of the unauthorised deductions.

Quito has formally acknowledged to the FWO that it omitted to obtain written authorisation from you before deducting rent payments from an amount payable to you, thereby contravening its obligations under section 323(1) of the FW Act. Accordingly, Quito has 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, Quito has committed to a number of measures to ensure future compliance with Commonwealth workplace laws.

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

Should you have any questions, please contact Roberta Dinnie in the first instance on telephone 08 9561 9000 or by email at pays@benara.com.au.

Yours sincerely,

Mr Gavin James
Director – Quito Pty Ltd