



Australian Government

# Fair Work

## OMBUDSMAN

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### ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

TDS International Investment Group Pty Ltd (ACN: 145561379)

## Section 715 ENFORCEABLE UNDERTAKING

### Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by TDS International Investment Group Pty Limited (ACN 145 561 379) (**TDS**) for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

### Background

2. Gromor Enterprises Pty Limited (**Gromor**) operates a mushroom farm near Singleton in New South Wales.
3. TDS is in the business of supplying horticultural labourers, primarily to pick, pack and weigh mushrooms.
4. In August 2013, Gromor engaged TDS to supply labour to perform the mushroom picking and packing activities initially at the rate of \$20.50 per hour, increasing to \$24.50 per hour in July 2014.
5. Between 30 September 2013 and 24 August 2014 (**Employment Period**), TDS employed 52 employees (**Employees**) on a casual basis to perform work at the mushroom farm operated by Gromor.
6. The terms and conditions of the Employees' employment with TDS were governed by the *Horticulture Award 2010* (MA000028) (**Award**). For the purposes of the transitional provisions of Schedule A to the Award, the applicable transitional instrument is the *Mushroom Industry Employees (State) Award*.
7. On or around 23 July 2014, the FWO commenced an investigation of TDS following two requests for assistance received from former employees of TDS in relation to the alleged non-payment of casual loading and public holiday penalty rates.
8. As a result of its investigation, the FWO determined that:
  - (a) the Employees' classification under the Award was Level 1;
  - (b) the Employees were entitled to be paid the following minimum rates of pay during their employment;

Period Commencing	Minimum Hourly Wage	Casual Hourly Rate	Public Holiday Rate
01/07/2013	\$16.37	\$20.14	\$33.24
01/07/2014	\$16.87	\$21.08	\$37.95

- (c) the Employees were paid a flat rate of \$16.37 per hour for all hours worked; and
  - (d) TDS had contravened provisions of the Award with respect to unpaid casual loading, penalty rates and superannuation.
9. As a result of the contraventions, the FWO assessed the total wage underpayments owed to the Employees during the Employment Period to be \$92,381.92 gross.
  10. TDS subsequently acknowledged that it had underpaid the Employees a total of **\$92,381.92** gross during the Employment Period as set out in Attachment A and has agreed to pay **\$51,974.08** to rectify the underpayments as set out in Attachment B.

11. Gromor has acknowledged that the hourly rate paid to TDS to supply the labour was insufficient to satisfy all Award entitlements including the minimum rates of pay set out in 8(b) above and has agreed to pay \$40,412.41 to rectify the underpayments as set out in Attachment B.
12. TDS have at all times co-operated with the FWO and participated fully in the FWO's investigation.

### **Contraventions**

13. The FWO has determined, and TDS admits, that TDS contravened section 45 of the FW Act by failing to comply with the following provisions of the Award:
  - (a) Clause A.7.3 of Schedule A to the Award and then from 30 September 2013, clause 10.4(b) of the Award, by failing to pay the Employees a casual loading;
  - (b) Clause A.7.3 of Schedule A to the Award and then from 30 September 2013, clause 28.3 of the Award, by failing to pay the Employees the applicable penalty rate for hours worked on public holidays; and
  - (c) Clause 21.2 of the Award by failing to make all required superannuation contributions to a superannuation fund for the benefit of the Employees.

(collectively, the **Contraventions**).

### **Commencement of Undertaking**

14. This Undertaking comes into effect when:
  - (a) the Undertaking is executed by TDS; and
  - (b) the FWO accepts the Undertaking so executed.
15. Upon the commencement of this Undertaking, TDS undertakes to assume the obligations set out below in paragraph 16.

### **Undertakings**

16. For the purposes of section 715 of the FW Act, TDS undertakes to:

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

- (a) pay the amounts owed to each employee as set out in Attachment B (less all appropriate taxation which is to be remitted to the Australian Taxation Office) and also make appropriate superannuation contributions for the benefit of each eligible employee in accordance with sub-clause 21.2 of the Horticulture Award, in the manner prescribed in Attachment B;
- (b) within 7 days of making a payment in compliance with subparagraph 16(a), provide evidence to the FWO that the payments have been made;
- (c) Within 7 days of remitting the appropriate taxation to the Australian Taxation Office provide evidence to the FWO that payments have been made;
- (d) use reasonable efforts to locate each employee listed in Attachment A for the purpose of complying with the undertaking in subparagraph 16(a), including but not limited to:



- (i) taking steps to ascertain the current residential address, email address, mobile telephone number and/or social media profiles of each employee; and
  - (ii) contacting each employee, using any current or last-known contact details, to advise them they are owed money and explain the process for payment of the money owed to them;
- (e) if an employee listed in Attachment A cannot be located by the date when a payment to that employee falls due according to Attachment B:
  - (i) within 21 days of the date when the payment to the employee fell due, provide a report to the FWO on the attempts that were taken to locate the employee together with details of the amount owed to them and their last known contact details;
  - (ii) by 15 June 2016 make application to pay to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act the amounts that were required to be paid to each employee but which have not been paid due to the inability to locate the employee. TDS will complete the required documents supplied by the FWO; and

#### ***FWO MyAccount Registration***

- (f) within 7 days of the execution of this Undertaking:
  - i. register with the FWO 'MyAccount' portal at 'www.fairwork.gov.au' and complete the profile, minimum pay rates and Award options through this portal
  - ii. provide to the FWO the Company's 'My Account' registration number.
  - iii. within 28 days of the execution of the Undertaking, at a mutually agreed time and location, demonstrate to an officer of the Fair Work Ombudsman knowledge of the use of MyAccount including in relation to accessing the current Horticulture Award minimum pay rates and Public Holiday penalty rates.

#### ***Future workplace relations compliance***

- (g) ensure compliance at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the Horticulture Award and the FW Act, by developing systems and processes to ensure ongoing compliance with those requirements;
- (h) provide to the FWO, within 28 days of the execution of this Undertaking, written details of the systems and processes implemented in satisfaction of the undertakings in paragraph 16(g) above designed to ensure such ongoing compliance;

#### ***Apology***

- (i) within 14 days of the execution of this Undertaking send to each of the employees listed in Attachment A a letter apologising for the Contraventions (**Apology Letters**) in the form of Attachment C to this Undertaking and provide the FWO a copy of each Apology Letter and proof of it being sent;

### ***Workplace notices***

- (j) within 28 days of the execution of this Undertaking display, a notice in the form of Attachment D to this Undertaking (**Workplace Notice**):
  - (i) for a period of at least 28 days in locations where employees are engaged by TDS; and
  - (ii) in a manner which is reasonably capable of drawing the notice to the general attention of all persons engaged by TDS (for example, by placement on a staff noticeboard at each workplace in at least A3 size);
- (k) provide written details of the method/s of displaying or providing the Workplace Notice and photographic proof of its display to the FWO within seven days of it first being displayed.

### ***Workplace relations training***

- (l) within three months of the execution of this Undertaking, organise and ensure training of all persons engaged by TDS who have managerial responsibility for human resources, recruitment or payroll functions (**Training**);
- (m) 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 Horticulture 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 the Company;
- (o) 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;
- (p) 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);
- (q) for a period of two years from the execution of this Undertaking, ensure that training is conducted in the manner prescribed in paragraphs 16(l) to 16(m) above in relation to any new or existing employees who, after the commencement of this Undertaking, acquire managerial responsibilities that include human resources, recruitment or payroll functions on behalf of the Company;

### ***Audit Activity***

- (r) perform, or cause to have performed by a Certified Practising Accountant or employment law specialist, audits of TDS's compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the Horticulture Award and the FW Act, in respect of the pay and conditions of at least 50% of all casual employees of TDS (**Audit**), for the following periods as follows:
  - (i) the Audit for the period 1 July 2015 – 31 December 2015 is to be finalised by 29 February 2016;
  - (ii) the Audit for the period 1 January 2015 – 30 June 2016 is to be finalised by 31 August 2016; and
  - (iii) the Audit for the financial year 2016 - 2017 is to be finalised by 31 August 2017;



- (s) provide to the FWO, within 14 days of the completion of each Audit, details of the methodology used to conduct the Audit and the outcomes of the Audit certified as correct by a Certified Practising Accountant or employment law specialist;
- (t) on request, provide to the FWO all employment records relied upon to undertake the audit within 14 days of such request being made;
- (u) in the event an Audit discloses contraventions of any applicable Commonwealth workplace laws and/or instruments, rectify all such contraventions within 14 days of the Audit being provided to the Company, including any and all underpayments to employees;
- (v) provide evidence of rectification of any contraventions disclosed by an Audit to the FWO within 14 days of rectification;

## **Acknowledgements**

### **17. TDS 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](http://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 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 TDS;
- (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 TDS 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, TDS may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO;

**Executed as an undertaking**

EXECUTED by **TDS International Investment Group Pty Ltd** in accordance with section 127(1) of the *Corporations Act 2001*:



(Signature of director)

(Signature of director/company secretary)

SHAO KUA DONG

(Name of director)

(Name of director/company secretary)

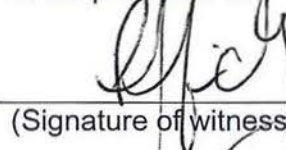
30/11/2015

(Date)

(Date)

in the presence of:

in the presence of:



(Signature of witness)

(Signature of witness)

ROBY SIDEN

(Name of witness)

(Name of witness)

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



Steve Ronson

21 DECEMBER 2015.

(Date)

Executive Director Dispute Resolution and Compliance

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:



(Signature of witness)

PIA MORGAN

(Name of Witness)

ATTACHMENT A – WAGE UNDERPAYMENTS

Employee ID	Employee Name	Wage Amounts Underpaid
		\$3,630.29
		\$584.41
		\$129.38
		\$886.56
		\$943.06
		\$1,932.54
		\$114.61
		\$144.95
		\$6,938.06
		\$886.97
		\$4,272.90
		\$1,901.24
		\$4,374.26
		\$3,105.90
		\$1,042.24
		\$669.75
		\$3,489.34
		\$752.28
		\$2,409.07
		\$2,285.24
		\$2,517.22
		\$2,374.81
		\$821.10
		\$5,730.37
		\$190.12
		\$5,572.66
		\$2,453.41
		\$702.56
		\$267.30
		\$2,812.90
		\$2,630.11
		\$2,590.28
		\$2,169.96
		\$3,159.31
		\$3,234.76
		\$1,915.09
		\$2,044.98
		\$2,113.73
		\$488.86
		\$385.19
		\$382.44
		\$1,158.02
		\$1,188.83
		\$1,152.87



					\$730.50
					\$156.26
					\$156.26
					\$712.37
					\$713.04
					\$341.91
					\$589.82
					\$431.83

<b>Total Wages Underpaid:</b>	<b>\$92,381.92</b>
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**ATTACHMENT B – SCHEDULE OF PAYMENTS****Payments will be made to employees as follows:**

1. Payment of the Amounts Underpaid to be made to the Employees listed in the Tables below in the following manner:
  - a. Employees listed in Table 1 to be paid on or before 15 December 2015;
  - b. Employees listed in Table 2 to be paid on or before 15 January 2016;
  - c. Employees listed in Table 3 to be paid on or before 15 February;
  - d. Employees listed in Table 4 to be paid on or before 15 March 2016;
  - e. Employees listed in Table 5 to be paid on or before 15 April 2016;
  - f. Employees listed in Table 6 to be paid on or before 15 May 2016.; and
  - g. Balance of superannuation outstanding to be paid to each employee's respective superannuation fund on or before 15 June 2016.

Table 1: Payable on or before 15 December 2015			
Employee ID	Employee Name	Amount Payable	TDS (56.26%)
		\$3,630.29	\$2,042.40
		\$584.41	\$328.79
		\$129.38	\$72.79
		\$886.56	\$498.78
		\$943.06	\$530.57
		\$1,932.54	\$1,087.25
		\$114.61	\$64.48
		\$144.95	\$81.55
		\$6,938.06	\$3,903.35
	<b>Sub-Total: Table 1</b>	<b>\$15,303.86</b>	<b>\$8,609.96</b>

Table 2: Payable on or before 15 January 2016			
Employee ID	Employee Name	Amount Payable	TDS
		\$886.97	\$499.01
		\$4,272.90	\$2,403.93
		\$1,901.24	\$1,069.64
		\$4,374.26	\$2,460.96
		\$3,105.90	\$1,747.38
		\$1,042.24	\$586.36
	<b>Sub-Total: Table 2</b>	<b>\$15,583.51</b>	<b>\$8,767.28</b>

Table 3: Payable on or before 15 February 2016			
Employee ID	Employee Name	Amount Payable	TDS
		\$669.75	\$376.80
		\$3,489.34	\$1963.10

		\$752.28	\$423.23
		\$2,409.07	\$1,355.34
		\$2,285.24	\$1,285.68
		\$2,517.22	\$1,416.19
		\$2,374.81	\$1,336.07
		\$821.10	\$461.95
	<b>Sub-Total: Table 3</b>	<b>\$15,318.81</b>	<b>\$8,618.36</b>

**Table 4: Payable on or before 15 March 2016**

<b>Employee ID</b>	<b>Employee Name</b>	<b>Amount Payable</b>	<b>TDS (56.26%)</b>
		\$5,730.37	\$3,223.91
		\$190.12	\$106.96
		\$5,572.66	\$3,135.18
		\$2,453.41	\$1,380.29
		\$702.56	\$395.26
		\$267.30	\$150.38
	<b>Sub-Total: Table 4</b>	<b>\$14,916.42</b>	<b>\$8,391.98</b>

**Table 5: Payable on or before 15 April 2016**

<b>Employee ID</b>	<b>Employee Name</b>	<b>Amount Payable</b>	<b>TDS</b>
		\$2,812.90	\$1,582.54
		\$2,630.11	\$1,479.70
		\$2,590.28	\$1,457.29
		\$2,169.96	\$1,220.82
		\$3,159.31	\$1,777.43
		\$3,234.76	\$1,819.88
	<b>Sub-Total: Table 5</b>	<b>\$16,597.32</b>	<b>\$9,337.66</b>

**Table 6: Payable on or before 15 May 2016**

<b>Employee ID</b>	<b>Employee Name</b>	<b>Amount Payable</b>	<b>TDS</b>
		\$1,915.09	\$1,077.43
		\$2,044.98	\$1,150.51
		\$2,113.73	\$1,189.18
		\$488.86	\$275.03
		\$385.19	\$216.71
		\$382.44	\$215.16
		\$1,158.02	\$651.50
		\$1,188.83	\$668.84
		\$1,152.87	\$648.60
		\$730.50	\$410.98
		\$156.26	\$87.91



		\$156.26	\$87.91
		\$712.37	\$400.78
		\$713.04	\$401.16
		\$341.91	\$192.36
		\$589.82	\$331.83
		\$431.83	\$242.95
	<b>Sub-Total: Table 6</b>	<b>\$14,662.00</b>	<b>\$8,248.84</b>

<b>Total Amount Payable by 15 May 2016:</b>	<b>\$92,381.92</b>	<b>\$51,974.08</b>
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## ATTACHMENT C – LETTER OF APOLOGY

<Date>

<Employee Name & Address>

Dear <Employee Name>

We write to apologise on behalf of TDS International Investment Group Pty Ltd (**TDS**) for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that TDS contravened the *Fair Work Act 2009* by failing to pay its casual employees the following entitlements under the Horticulture Award 2010 (MA000028):

- casual loading;
- penalty rates for work performed on a public holiday; and
- superannuation.

The investigation determined that you were affected by the above contraventions.

TDS is committed to, and are taking steps to remedy the contraventions, including by:

- Paying you the amount that you have been underpaid (Insert amount); and
- Committing to future compliance.

TDS have formally admitted to the FWO that they did not comply with their obligations under Commonwealth workplace relations laws 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](http://www.fairwork.gov.au). As part of the Enforceable Undertaking, TDS has committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

We expresses sincere regret and apologise to you for failing to comply with our lawful obligations.

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

Yours sincerely

[Director/Officer]  
TDS International Investment Group Pty Ltd

## Attachment D – Form of Workplace Notice

Contraventions of the *Fair Work Act 2009* (**FW Act**) and the *Horticulture Award 2010* (**Award**) by TDS International Investment Group Pty Ltd (**TDS**).

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

The FWO has found that TDS contravened the FW Act and the Award by failing to pay casual employees engaged in picking, packing and weighing functions between 30 September 2013 and 24 August 2014 the following:

- a casual loading for all hours worked;
- penalty rates for time worked on Public Holidays; and
- all employer superannuation contributions to a superannuation fund for the benefit of employees.

TDS has formally admitted to the FWO that these contraventions occurred and have 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 to the employees affected by the contraventions and changing workplace practices.

TDS express their sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, TDS gives a commitment that such conduct will not occur again and will comply with all requirements of the Commonwealth workplace relation laws in the future.

TDS are committed to ensuring that our employees are paid at least the rates of pay as contained in the Modern Award which covers their employment. From 1 July 2015 employees covered by the *Horticulture Award 2010* are as follows:

Level	Ordinary Rate of Pay Full time and part time employees	Ordinary Rate of Pay for Casual Employees	Public Holiday Rate Casual employee
Level 1	\$17.29	\$21.61	\$38.90
Level 2	\$17.79	\$22.24	\$40.03
Level 3	\$18.30	\$22.88	\$41.18
Level 4	\$18.99	\$23.74	\$42.73

If you worked for TDS and have queries or questions relating to your employment, please contact **[insert contact]** . 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.