



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Naked Japan Australia Pty Ltd (ACN: 126 352 798)

and

Mr Gimo Kim

Section 715 ENFORCEABLE UNDERTAKING

PARTIES

1. This Enforceable Undertaking (the **Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:
 - (a) Naked Japan Australia Pty Ltd (ACN: 126 352 798) trading as Naked Japan (the **Company**) and
 - (b) Mr Gimo Kim (**Mr Kim**), Director, Naked Japan Australia Pty Ltdfor the purposes of section 715 of the *Fair Work Act 2009* (the **FW Act**).

COMMENCEMENT OF UNDERTAKING

2. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by the Company and Mr Kim; and
 - (b) the FWO accepts the Undertaking so executed.

Upon the commencement of this Undertaking the Company and Mr Kim undertake to assume the obligations set out below.

BACKGROUND

3. The Company operated a restaurant serving Japanese food with a take away option. The business was located 99 Victoria Avenue, Albert Park, Victoria.
4. Mr Kim admits and agrees that, at all material times, he:
 - (a) was the sole director of the Company, having been so since 3 July 2007;
 - (b) was ultimately responsible for overall direction, management and supervision of the operations at the Company in relation to engaging staff, setting and adjusting pay rates and determining wages and conditions of employment;
 - (c) by reason of the matters set out in subparagraphs (a) and (b) was responsible in a practical sense for ensuring the Company complied with its legal obligations.
5. In July 2015 the FWO received a Request for Assistance from an employee (as set out in Attachment B) (the **Employee**) concerning the Company relating to underpayment of

base rates of pay and weekend and Public Holiday penalty rates.

6. The FWO conducted an investigation into the Request for Assistance and identified contraventions of the *Restaurant Industry Award 2010* (the **Restaurant Award**), the FW Act and the *Fair Work Regulations 2009* (the **FW Regulations**).
7. The FWO identified contraventions for the period 1 July 2010 to 30 June 2013.
8. The Employee was employed on a casual basis. The duties performed by the Employee included, but were not limited to food preparation, cooking food, collecting food and supplies and some dishwashing. The Employee's classification under the Restaurant Award was Cook Grade 1 (Level 2) from 1 July 2010 to 12 February 2012 and a Cook Grade 2 (Level 3) from 13 February 2012 to 30 June 2013.
9. The Company underpaid the Employee by failing to pay the correct minimum hourly rates of pay in accordance with the Restaurant Award. The underpayments arose as a result of underpaying base hourly rates of pay for time worked Monday to Friday as well as penalty rates for Saturdays and Public Holidays. Further underpayments arose as a result of the Company not paying a casual loading.
10. The Company also failed to make and keep appropriate records and issue pay slips within one working day of payment to the Employee. When pay slips were issued, the Company failed to include the required information on the pay slips.

CONTRAVENTIONS

11. The FWO has determined and the Company and Mr Kim admit, that the Company and Mr Kim contravened:

- (a) Section 45 of the FW Act, which states a person must not contravene a term of a modern award. Those contraventions were as follows:

Restaurant Award:

- Underpayment of base hourly rate (cl. 20.1);
- Underpayment of casual loading (cl. 13.1);
- Underpayment of Saturday penalty rates, (cl. 34.1);
- Underpayment of Public Holiday penalty rates, (cl. 34.1);

- (b) Subsections 535(1) and 535(2) of the FW Act which prescribes an employer must make, and keep for 7 years, employee records of the kind prescribed by the FW Regulations and must contain information as prescribed by the FW Regulations;

- (c) Subsection 536(1) of the FW Act which states an employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work; and
- (d) Section 536(2) (b) of the FW Act which states an employer must provide the appropriate information as prescribed by the FW Regulations on the Employee's pay slip.

UNDERTAKINGS

12. Upon the commencement of this Undertaking and for the purposes of section 715 of the FW Act, the Company and Mr Kim undertakes the following:

Rectify Underpayments

- (a) pay the amount of **\$10,391.38** less taxation to the Employee via electronic funds transfer arising from the Contraventions in accordance with the following payment plan:

Date of Payment	Amount
18 March 2016	\$2,000.00
18 April 2016	\$2,000.00
18 May 2016	\$2,000.00
18 June 2016	\$2,000.00
18 July 2016	\$2,391.83
TOTAL	\$10,391.83

- (b) provide a pay slip to the Employee within one business day of each payment being made;
- (c) provide evidence of each payment to the FWO on the same date of the payment being made;

FWO My Account Registration

- (d) within 14 days of the execution of this Undertaking:
 - (i) register with the FWO 'My Account' portal at www.fairwork.gov.au and have completed the profile, minimum pay rates and Award options;
 - (ii) provide to the FWO the Company's 'My Account' Customer Registration Number (CRN);

(e) within 14 days of the execution of the Undertaking, subscribe to the following and provide evidence to the FWO of the subscriptions:

- (i) 'General information' email alerts from the FWO relating to the Restaurant Award, available at <http://www.fairwork.gov.au/website-information/staying-up-to-date/subscribe-to-email-updates>
- (ii) FWO's Employer newsletter for the relevant State and industry, available at <http://www.fairwork.gov.au/about-us/news-and-media-releases/newsletter>, selecting at least the following options:
 - i. pay updates;
 - ii. award updates;
 - iii. holiday updates;
 - iv. working hours and breaks; and
 - v. annual leave/sick leave.

(f) within 21 days of the execution of the Undertaking, at a mutually agreed time and location, demonstrate to a FWO Officer by using the 'Pay Calculator' in 'My Account' via www.fairwork.gov.au the current Restaurant Award minimum rates of pay for casual, part time and full time employees for all Levels for work performed:

- (i) Monday to Friday;
- (ii) Saturday;
- (iii) Sunday; and
- (iv) Public Holidays;

Apology

(g) within 14 days of the execution of this Undertaking, send a letter of apology (**Apology Letter**) in the form of Attachment A to the Employee and provide evidence of the apology sent to the Employee to the FWO on the same date;

Self-audits, Reporting and Future Workplace Relations Compliance

(h) if the Company or any entities in which Mr Kim holds the role of director, sole trader or partner, employs employees within two years of the commencement of this Undertaking:

- (i) inform the FWO within 14 days of the first employee commencing employment;

- (ii) ensure that it complies at all times and in all respects with the FW Act, FW Regulations and the Restaurant Award;
- (iii) have completed by an external accounting professional (e.g. Certified Practising Accountant), audit specialist or employment law specialist (at the expense of the Company and/or Mr Kim) an audit of the Company's and/or Mr Kim's compliance with Commonwealth workplace laws every six months for a period of two years from the commencement of this Undertaking. Specifically:
 - i. compliance must be demonstrated relating to the wages and entitlements of its employees and any Contraventions identified;
 - ii. the audit is to be of the first full pay period after the sixth and twelfth month after the engagement of the first employee and must be completed; and
 - iii. a copy of the audit must be supplied to the FWO within seven days of its completion.
- (i) Every six months from the execution of this Undertaking, report to the FWO if the Company or any entities in which Mr Kim holds the role of director, sole trader or partner, has employed or has not employed any employees.
- (j) take all reasonable steps to ensure that any entities in which Mr Kim holds the role of director, a sole trader or partner, 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. 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;
 - (iii) issue pay slips within one working day of paying an amount to each employee;

NO INCONSISTENT STATEMENTS

13. The Company and Mr Kim:

- (a) must not; and
- (b) must ensure that each of its officers, employees or agents, do not, make any statement , orally or in writing or otherwise imply anything that is inconsistent with admission or acknowledgements contained in this agreement.

ACKNOWLEDGEMENTS

14. The Company and Mr Kim acknowledges that:

(a) The FWO may:

- (i) make this Undertaking (and any of the Attachments hereto) available for public inspection, including by posting it on the FWO internet site at www.fairwork.gov.au;
- (ii) release a copy of this Undertaking (and any of the Attachments hereto) pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
- (iii) issue a media release in relation to this Undertaking;
- (iv) from time to time, publicly refer to the Undertaking (and any of the Attachments hereto) and its terms; and
- (v) rely upon the admissions made by Mr Kim set out in paragraph 11 above in respect of decision making concerning any future non-compliance with the Company's workplace relations obligations.

(b) 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 herein; and

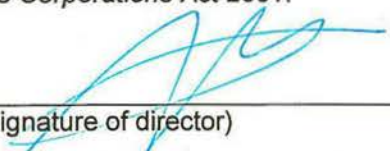
(c) Consistent with section 715(3) of the FW Act, The Company may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

15. If the Company and Mr Kim contravenes 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 FW Act, for orders under section 715(7) of the FW Act; and
- (b) This Enforceable Undertaking may be provided to the Court as evidence of the admissions made by Mr Kim in paragraph 11 above, and also in respect of the question of costs.

Executed as an Undertaking

EXECUTED by Naked Japan Australia Pty Ltd (ACN: 126 352 798) in accordance with section 127(1) of the *Corporations Act 2001*:



(Signature of director)

(Signature of director/company secretary)

Gimo Kim

(Name of director)

(Name of director/company secretary)

21 / March / 2016.

(Date)

(Date)

in the presence of:


(Signature of witness)

in the presence of:


(Signature of witness)

Juli Leo

(Name of witness)

(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
Delegate for the FAIR WORK OMBUDSMAN

23 MARCH 2016

(Date)

in the presence of:



(Signature of witness)

Pia Morgan

(Name of Witness)

Attachment A – Letter of Apology

FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEE

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I am writing to apologise on behalf of Naked Japan Australia Pty Ltd (the **Company**) for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that the Company had contravened the *Fair Work Act 2009, Fair Work Regulations and Restaurant Award 2010*:

- failing to pay your correct minimum rate of pay for time worked Monday to Friday;
- failing to pay your correct penalty rates for time worked on Saturdays;
- failing to pay your correct penalty rates for time worked on Public Holidays;
- failing to make and keep appropriate employee records;
- failing to provide you with pay slips within one working day of payment of wages;
- failing to include required information on pay slips.

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

The Company is taking steps to remedy the contraventions, including by rectifying \$10,391.83 that you have been underpaid. You will receive this payment in 5 installments via electronic funds transfer and will be provided with a pay slip for each payment made:

Date of Payment	Amount
18 March 2016	\$2,000.00
18 April 2016	\$2,000.00
18 May 2016	\$2,000.00
18 June 2016	\$2,000.00
18 July 2016	\$2,391.83
TOTAL	\$10,391.83

The Company has formally admitted to the FWO that it did not comply with its 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. As part of the Enforceable Undertaking we have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.


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

Should you have any questions, please contact me on [insert phone number].

Yours sincerely,

Mr Gimo Kim
Director – Naked Japan Australia Pty Ltd

Attachment B – The Employee

Employee A	
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