



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia
(as represented by the Office of the Fair Work Ombudsman)

and

Joel Evans and Jayson Wilson
(in partnership as the Trustee for Evans Family Trust and the Trustee for Wilson Family Trust,
trading as Bendigo Smartplumb ABN 51 219 706 344)

and

Bendigo Smartplumb Pty Ltd ABN 35 601 042 522

ENFORCEABLE UNDERTAKING

PARTIES

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) pursuant to section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**) by:
 - a) Bendigo Smartplumb Pty Ltd trading as Bendigo Smartplumb ABN 35 601 042 522 (**the Company**), 16 Arlington Court Maiden Gully Vic 3551; and
 - b) Mr Joel Evans (**Mr Evans**) and
 - c) Mr Jayson Wilson (**Mr Wilson**)in partnership as the Trustee for Evans Family Trust and the Trustee for Wilson Family Trust, trading as Bendigo Smartplumb ABN 51 219 706 344 (**the Partnership**)

BACKGROUND:

The Partnership

2. The Partnership commenced operating Bendigo Smartplumb in September 2010. The Partnership was operating a business within the plumbing industry.
3. Mr Evans and Mr Wilson admit and agree that, at all material times, they:
 - a) were in partnership since September 2010
 - b) were each ultimately responsible for overall direction, management and supervision of the operations at Bendigo Smartplumb in relation to engaging staff, setting and adjusting pay rates and determining wages and conditions of employment;
4. The Partnership operated a small enterprise engaging approximately 3 employees in the plumbing trade across various work locations in Victoria.
5. On 3 February 2011 the Partnership engaged their first apprentice plumber. Generally the Partnership employed 1-2 apprentice plumbers at any given time.
6. Employees of the Partnership had their employment transferred to the Company on 28 June 2015.

The Company

7. The Company commenced operating Bendigo Smartplumb in June 2015. The Company operates a business within the plumbing industry.
8. Mr Evans and Mr Wilson each admit and agree that, at all material times, they:
 - a) were directors of the Company;
 - b) were 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) were responsible in a practical sense for ensuring the Company complied with its legal obligations.
- 9. The Company is a small enterprise engaging approximately 3 employees in the plumbing trade across various work locations in Victoria.
- 10. At the time of the Undertaking, the Company employed 3 employees including 1 apprentice.

The Employee

- 11. In June 2016 the FWO commenced an investigation following the receipt of a Request for Assistance from a former employee of the Partnership and the Company, listed in Attachment A (the **Employee**).
- 12. The Employee was engaged on a full time basis as an adult apprentice plumber with the Partnership from 13 January 2014 to 28 June 2015 (**Partnership Employment Period**).
- 13. The Employee was engaged on a full time basis as an adult apprentice plumber with the Company from 29 June 2015 to 19 February 2016 (**Company Employment Period**).
- 14. The FWO conducted an investigation into the allegations made by the Employee and identified contraventions of the *Plumbing and Fire Sprinklers Award 2010* [MA000036] (the **Award**), the FW Act and the *Fair Work Regulations 2009* (the **FW Regulations**).

Partnership Employment Period

- 15. The FWO has determined, and Mr Evans and Mr Wilson each admit, that, during the Partnership Employment Period, they each contravened:
 - a) Section 45 of the FW Act, by failing to comply with the following terms of the Award;
 - i. Clause 20.3(b)(iii) and Schedule A by failing to pay the Employee applicable apprentice rates of pay
 - ii. Clause 33 by underpaying the Employee the applicable penalty rates for Monday to Friday work
 - iii. Clause 33.2(a) by underpaying the Employee the applicable penalty rates for Saturday work
 - iv. Clause 33.2(b) by underpaying the Employee the applicable penalty rates for Sunday work
 - v. Clause 21.2(a) by underpaying the Employee the applicable tool allowance
 - vi. Clause 15.11 by failing to pay or reimburse the Employee for training fees
 - vii. Clause 34.2 by underpaying the Employee for annual leave loading
 - b) Section 90(1) of the FW Act by failing to pay the Employee at his base rate of pay for periods of annual leave.
 - c) Subsections 535(1) of the FW Act by failing to make, and keep for 7 years, employee records of the kind prescribed by the FW Regulations and containing information as prescribed by the FW Regulation 3.34:

- i. Regulation 3.34 of the FW Regulations states that where an employee is entitled to be paid a penalty rate or loading for overtime worked, a record must be kept that specifies either the number of overtime hours worked each day or when an employee started and ceased working the overtime hours.

16. The underpayment arising as a result of the contraventions during the Partnership Employment Period totals \$30,037.15 gross.

Company Employment Period

17. The FWO has determined, and Mr Evans, Mr Wilson and the Company each admits, that the Company contravened:

- a) Section 45 of the FW Act, by failing to comply with the following terms of the Award;
 - i. Clause 20.3(b)(iii) and Schedule A by failing to pay the Employee the applicable Apprentice rates of pay
 - ii. Clause 20.3(b)(iii) and Schedule A by failing to pay the Employee the applicable Apprentice rates of pay
 - iii. Clause 33 by underpaying the Employee the applicable penalty rates for Monday to Friday work
 - iv. Clause 33.2(a) by underpaying the Employee the applicable penalty rates for Saturday work
 - v. Clause 33.2(b) by underpaying the Employee the applicable penalty rates for Sunday work
 - vi. Clause 21.2(a) by underpaying the Employee the applicable tool allowance
 - vii. Clause 15.11 by failing to pay, or reimburse, the Employee for training fees
 - viii. Clause 34.2 by underpaying the Employee for annual leave loading
- b) Section 90(1) of the FW Act, by failing to pay the Employee at his base rate of pay during a period of annual leave.
- c) Section 90(2) of the FW Act, by failing to pay the Employee his accrued untaken annual leave entitlements at the rate of pay he would have been paid had he taken the leave, when his employment ended (this includes annual leave loading in Clause 34.2 of the Award)
- d) Subsection 535(1) of the FW Act by failing to make, and keep for 7 years, employee records of the kind prescribed by the FW Regulation 3.34:
 - i. Regulation 3.34 of the FW Regulations states that where an employee is entitled to be paid a penalty rate or loading for overtime worked, a record must be kept that specifies either the number of overtime hours worked each day or when an employee started and ceased working the overtime hours.

18. The underpayment arising as a result of the contraventions during the Company Employment Period totals \$10,069.57 gross.

COMMENCEMENT OF ENFORCEABLE UNDERTAKING

19. This Enforceable Undertaking comes into effect when:

- a) the Enforceable Undertaking is executed by the Company; and
- b) the Enforceable Undertaking is executed by Joel Evans and Jayson Wilson; and
- c) the FWO accepts the Enforceable Undertaking so executed.

ENFORCEABLE UNDERTAKING

The Company

20. Upon the execution of this Undertaking and for the purposes of section 715 of the FW Act, the Company, Joel Evans and Jayson Wilson, on a joint and several basis undertakes the following:

Rectify underpayments

- a) In accordance with the payment plan in Attachment C, rectify the contraventions as identified in paragraph 17 by paying the Employee \$10,069.57 gross and provide evidence to the FWO that the payments were made by each date.

FWO My Account Registration

- b) Within 14 days of the execution of the Undertaking:
 - (i) register with the FWO My Account portal at www.fairwork.gov.au/register and fully complete the My Account profile, including information about the business and Award coverage;
 - (ii) using the FWO Pay Rates Calculator, calculate relevant minimum pay rates (and penalty rates where necessary) and save these calculations to My Account;
 - (iii) provide to the FWO the 'My Account' Customer Registration Number (CRN).
- c) Within 30 days of the execution of the Undertaking, subscribe to the following services and provide evidence to the FWO of the subscriptions;
 - (i) 'General information' email alerts from the FWO relating to the *Plumbing and Fire Sprinklers Award 2010*, 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.

Apology

- d) Send a joint letter of apology (**Apology Letter**) to the Employee in the form of Attachment B to this Undertaking and provide copies to the FWO within 14 days of the execution of this Undertaking.

Future Workplace Relations Compliance

- e) The Company undertakes to:
 - (i) ensure compliance 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, in respect of the business and any future businesses operated by the Joel Evans and/or Mr Jayson Wilson (whether as a sole trader, a partnership, a director of a company or by way of any other business structure).
- f) Provide the FWO, within 60 days of the date of execution of this Undertaking, details of systems and processes already in place or to be implemented to comply with paragraph (e) above. Without limitation, such systems and processes relating to:
 - (i) Ensuring employees receive the correct minimum rates of pay and entitlements, such as penalty rates and overtime rates;
 - (ii) Keeping accurate and complete records to ensure employees receive their correct wages and entitlements.

Audit Activity

- g) Cause to have performed by an accounting professional (for example a Certified Practising Accountant) or an employment law specialist, at the Company's expense, audits of the Company's compliance with all Commonwealth workplace laws and instruments (**Audits**), relating to the pay and conditions of all employees as follows:
 - (i) Audit 1 is to be finalised by 30 September 2017 and is to include:
 - 1. an Audit of the first complete pay cycle following 1 August 2017 in respect of pay rates, conditions, payslips and record keeping in relation to all of employees;
 - 2. an Audit of annual leave entitlements of all employees for the period 1 February 2017 to 31 July 2017. This includes verifying whether annual leave has been accrued and paid in accordance with section 90(1) and section 90(2) of the FW Act and clause 34 of the Award.
 - (ii) Audit 2 is to be finalised by 30 September 2018 and is to include:
 - 1. an Audit of the first complete pay cycle following 1 August 2018 in respect of pay rates, conditions, payslips and record keeping in relation to all of employees;
 - 2. an Audit of annual leave entitlements of all employees for the period 1 August 2017 to 31 July 2018. This includes verifying whether annual

leave has been accrued and paid in accordance with section 90(1) and section 90(2) of the FW Act and clause 34 of the Award.

- h) without limiting paragraph 11(g)(i) above, ensure that each Audit examines the Employer's compliance with any wage rate, penalty or allowance increases flowing from the Fair Work Commission's Annual Wage Reviews;
- i) Provide to the FWO within 14 days of each of the finalisation dates specified in subclause (c) above details of the methodology used to conduct the Audit and a report on the outcomes of the Audit;
- j) In the event an Audit discloses contraventions of any applicable Commonwealth workplace law and/or instruments, rectify all such contraventions within 14 days of each of the finalisation dates specified in subclause (c) above, including rectification of any and all underpayments to employees and provide evidence of rectification to the FWO;
- k) If requested, provide the FWO with all records and documents used to conduct the audit, including any working documents, within 7 days of such a request.
- l) If any Employee(s) identified as having underpayments owing to them cannot be located, within 14 days of each of the finalisation dates specified in subclause (c) above, make application to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act to pay money into the Commonwealth Revenue Fund. Bendigo Smartplumb Pty Ltd will complete the required documents supplied by the FWO.

Record Keeping

- m) Within 30 days of the date of execution of this Undertaking provide to the FWO a copy of time and wage records and payslips for one apprentice employee for the first full pay period following the execution of this undertaking. Such records are to comply with Commonwealth workplace laws.

Broader Community workplace relations education

- n) Within 90 days of the date of execution of this Undertaking make a donation of \$2,000 to the Loddon Campaspe Community Legal Centre, a program of Advocacy and Rights Centre Ltd trading as ARC Justice, ABN 23 082 541 240, 54 Mitchell Street Bendigo with the objective of assisting the promotion of compliance with Commonwealth workplace laws in the community, and provide evidence of the donation to FWO within 7 days of the donation being made.

No Inconsistent Statements

- o) The Company, Joel Evans and Jayson Wilson
 - i. must not; and
 - ii. 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.

ENFORCEABLE UNDERTAKING

The Partnership

21. Upon the execution of this Undertaking and for the purposes of section 715 of the FW Act, Joel Evans and Jayson Wilson on a joint and several basis undertake the following:

Rectify underpayments

- a) In accordance with the payment plan in Attachment C, rectify the contraventions as identified in paragraph 15 by paying the Employee \$30,037.15 gross, less applicable taxation, and provide evidence to the FWO that the payments were made by each date; and

Apology

- b) Send a joint letter of apology (**Apology Letter**) to the Employee in the form of **Attachment B** to this Undertaking and provide a copy to the FWO within 14 days of the execution of this Undertaking.

ACKNOWLEDGEMENTS

22. The Company acknowledge; and

23. Joel Evans and Jayson Wilson each acknowledge; 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 the Company and admissions made by Joel Evans and/or Jayson Wilson set out in paragraphs 15 and 17 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;
- c) Consistent with section 715(3) of the FW Act, the Company, Joel Evans and/or Jayson Wilson may withdraw from or vary this Undertaking at any time, but only with the consent

of the FWO; and

d) If the Company, Joel Evans and/or Jayson Wilson contravenes any of the terms of this Enforceable Undertaking:

- i. 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
- ii. This Enforceable Undertaking may be provided to the Court as evidence of the admissions made by the Company Joel Evans and/or Jayson Wilson in paragraphs 15 and 17 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by

Bendigo Smartplumb Pty Ltd in accordance with section 127(1) of the *Corporations Act 2001*:



(Signature of director)



(Signature of director/company secretary)

Joel Keye EVANS

(Name of director)

Jayson Wilson

(Name of director/company secretary)

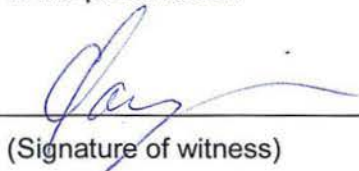
7/3/2017

(Date)

15-03-2017

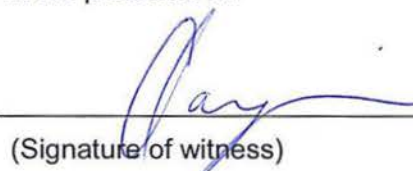
(Date)

in the presence of:



(Signature of witness)

in the presence of:



(Signature of witness)

Charee Gemma O'Dwyer

(Name of witness)

Charee Gemma O'Dwyer

(Name of witness)

EXECUTED by Joel Evans:

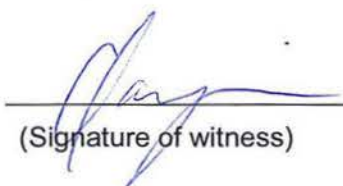


(Signature of Joel Evans)

7/3/2017

(Date)

in the presence of:



(Signature of witness)

Charee Gemma O'Dwyer

(Name of witness)

EXECUTED by Jayson Wilson:

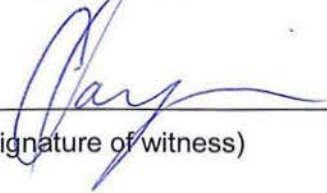


(Signature of Jason Wilson)

15-03-2017

(Date)

in the presence of:

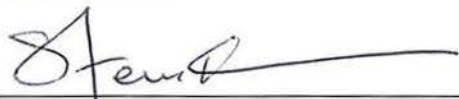


(Signature of witness)

Charee Gemma O'Dwyer.

(Name of witness)

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



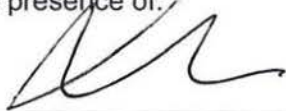
Steven Ronson, Executive Director –
Dispute Resolution and Compliance

Delegate for the FAIR WORK
OMBUDSMAN

24 MARCH 2017

(Date)

in the presence of:




(Signature of witness)

LISA-MARIE OLIVER

(Name of Witness)

Attachment A – Affected Employee

Employee Name	Classification	Status
	Plumbing Apprentice	Full time

Attachment B – 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 Joel Evans, Jayson Wilson and Bendigo Smartplumb 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 Joel Evans and Jayson Wilson in partnership trading as Bendigo Smartplumb had contravened the *Fair Work Act 2009* by:

- Failing to pay your minimum wages as an adult apprentice
- Failing to correctly pay you overtime penalty rates, tool allowance and annual leave
- Failing to pay you annual leave loading
- Failing to reimburse your TAFE fees
- Failing to keep records of overtime worked; and
- Unlawfully cashing out your annual leave entitlements.

The investigation found that Bendigo Smartplumb Pty Ltd had contravened the *Fair Work Act 2009* by:

- Failing to pay you your minimum wages as an adult apprentice
- Failing to correctly pay you overtime penalty rates, tool allowance, annual leave and annual leave loading
- Failing to reimburse your TAFE fees; and
- Failing to keep records of overtime worked.

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

Joel Evans and Jayson Wilson are taking steps to remedy the contraventions, including by making back payment to you of \$30,037.15 that you have been underpaid.

Bendigo Smartplumb Pty Ltd is taking steps to remedy the contraventions, including by making back payment to you of \$10,069.57 that you have been underpaid.

You will receive payment in 12 instalments in accordance with the attached payment plan. The first payment will be made on 14 March 2017. You will be provided with payment advice regarding each payment.

Joel Evans and Jayson Wilson have formally admitted to the FWO that they and Bendigo Smartplumb Pty Ltd 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. As part of the Enforceable Undertaking we have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Joel Evans, Jayson Wilson and Bendigo Smartplumb Pty Ltd express their 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

[Joel Evans and/or Jayson Wilson]

Attachment C – Payment Plan

Company payment plan

Instalment	Payment date	Amount (gross)
First Instalment	14 March 2017	\$3,356.52
Second Instalment	31 March 2017	\$3,356.52
Third Instalment	30 April 2017	\$3,356.52

Partnership payment plan

Instalment	Payment Date	Amount (gross)
Fourth Instalment	31 May 2017	\$3,337.46
Fifth Instalment	30 June 2017	\$3,337.46
Sixth Instalment	31 July 2017	\$3,337.46
Seventh Instalment	31 August 2017	\$3,337.46
Eighth Instalment	30 September 2017	\$3,337.46
Ninth Instalment	31 October 2017	\$3,337.46
Tenth Instalment	30 November 2017	\$3,337.46
Eleventh Instalment	31 December 2017	\$3,337.46
Twelfth Instalment	31 January 2018	\$3,337.46