



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Yuns Healing Spirit Pty Ltd (ABN 47 601 067 761)

Section 715 Enforceable Undertaking

Parties

1. This enforceable undertaking (Undertaking) is given to the Fair Work Ombudsman (**FWO**) by:

- (a) Yuns Healing Spirit (ABN: 47 601 067 761);
- (b) Xiao Xiao Gang; and
- (c) Yuan Bo Qu

for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

Background

2. Yuns Healing Spirit Pty Ltd (**the Company**) trading as Sen's Body & Mind operates a franchise business providing Chinese therapeutic massage located at Melbourne Central Shopping Centre in the Melbourne CBD. The Company engaged 11 workers during the period 21 December 2015 to 10 January 2016 of which 10 were on student or holiday visas. At the time of the FWO investigation 5 workers had returned to China.
3. In September 2015, the FWO self-initiated an audit of record keeping and pay slip obligations under the FW Act. The Company advised the FWO they only engage independent contractors. The FWO then began an investigation to determine whether the workers were properly engaged as independent contractors, and if any breach of the FW Act had occurred.
4. The investigation focused on six purported independent contractors (**Affected Persons**) who performed massage on walk in customers and were paid 45% of each massage service fee. The service fee is dependent upon the length of time of the massage. Each service is charged at \$1.00 per minute.
5. As a result of the investigation the FWO formed the view that the six Affected Persons were not only vulnerable Chinese non-English speaking visa holders, they should have been engaged as employees, on the basis that each:
 - (a) Performed the massages on the days rostered by the Company;
 - (b) worked within the shop trading hours;
 - (c) attended for shifts instead of for massage appointments;
 - (d) performed the work personally and did not subcontract the work;
 - (e) could not further subcontract the work due to the rates received from the Company
 - (f) received less than the applicable minimum hourly rate of pay for this type of work;
 - (g) performed work which was an integral part of the business;
 - (h) the rate was set by the Company and they controlled the payments to the Affected Persons;
 - (i) did not provide invoices to receive payment for work performed for the Company;
 - (j) used tools and equipment supplied by the Company; and
 - (k) didn't incur their own business costs associated with the running of a business.
6. At all relevant times, the Affected Persons terms and conditions of employment were governed by the *Hair & Beauty Award 2010* (**Award**).
7. The FWO determined that the Affected Persons were casual employees and that each of the Affected Persons were classified at Level 2 as per the Award.

8. As a result of the investigation, the FWO has determined that the Company contravened provisions of the Award and the FW Act. In particular, the FWO found the Company had underpaid all Affected Persons a combined total of \$5,152.88 (gross) based on a three week sample period – 21 December 2015 to 10 January 2016. Refer to **Attachment A** for details of the underpayments for each Affected Person.

Contraventions

9. Based on the evidence received during the investigation, the FWO has determined and the Company admits, that the Company contravened:
- (a) section 535 (2) of the FW Act by failing to ensure that the employee records were in English, a requirement of regulation 3.31 (1)(a) of the *Fair Work Regulations 2009 (Regulations)*;
 - (b) section 536 (1) of the FW Act by failing to give a pay slip to each of its employees within one working day of paying an amount to the employees in relation to the performance of work;
 - (c) clause 17 of the Award by failing to pay the applicable minimum hourly rate of pay to employees;
 - (d) clause 13.2 of the Award by failing to pay 25% of the ordinary hourly rate for time worked between 7.00 am to 9.00 pm Monday to Friday to casual employees;
 - (e) clause 13.3 of the Award by failing to pay a 50% loading for time worked after 9.00 pm Monday to Friday and after 6.00 pm Saturday to casual employees;
 - (f) clause 13.6 of the Award failing to pay casual employees the minimum engagement of 3 hours;
 - (g) clause 31.2 (b) of the Award by failing to pay a loading of 33% for time worked between 7.00 am to 6.00 pm Saturday to casual employees;
 - (h) clause 31.2 (c) of the Award by failing to pay a loading of 100% for all time worked on a Sunday to casual employees; and
 - (i) clause 35.3 of the Award by failing to pay double time and a half for all time worked on public holidays to casual employees.

Commencement of Undertaking

10. This Undertaking comes into effect when:
- (a) the Undertaking is executed by the Company; and
 - (b) the FWO accepts the Undertaking so executed.
11. Upon the commencement of this Undertaking, the Company undertake to assume the obligations set out below.

Undertakings

12. For the purposes of section 715 of the FW Act, the Company undertakes to:

Rectify Affected Persons' wages and entitlements

- (a) pay to the Affected Person the amounts arising from the Contraventions as stipulated in **Attachment A** of this Undertaking less taxation within 28 days of the execution of the Undertaking;
- (b) within 7 days of payments being made as per paragraph 12 (a) provide evidence to the FWO that these payments have been made;

Changes to labour engagement practices

- (c) within 28 days of the execution of this undertaking, the Company will change their operations so that all individuals who perform massage services for the Company are employed as employees and not engaged as independent contractors, and will be paid pursuant to the Award;
- (d) in accordance with the Award, the Company will inform each employee of the terms of their engagement in writing including their status as full-time, part-time or casual and the employee's classification;
- (e) provide to the FWO written confirmation that the changes in paragraph 12(c) and 12(d) have been completed within 7 days after the completion of the changes occurring;

Future workplace relations compliance

- (f) take all reasonable steps to ensure compliance at all times and in all respects with applicable Commonwealth workplace laws and instruments, including;
 - (i) within 7 days of the execution of this Undertaking, register with the FWO 'My Account' portal at www.fairwork.gov.au and complete the profile, minimum pay rates and award options;
 - (ii) within 14 days of the execution of the Undertaking provide to the FWO the 'My Account' registration number;
 - (iii) within 90 days of the execution of this Undertaking ensure the Company completes the educational activities as set out in **Attachment B** from the FWO website, record the dates of when these activities are completed in **Attachment B** and provide the completed document to the FWO;

Future reporting to the FWO

- (g) Cause to have performed by an accounting professional (eg. Certified Practicing Accountant) at the Company's expense, audits of the Company's compliance with all applicable Commonwealth workplace relations laws including but not limited to the Award and the FW Act, relating to pay and conditions of employees of the Company, for the following periods (**Audit**):
 - (i) the Audit will be required to cover the period 11 January 2016 to 30 June 2016;
 - (ii) the Audit of 1 complete pay period in September 2016;
 - (iii) the two Audits must be completed within 45 days of the execution of the Undertaking;
- (h) provide to the FWO, at least 14 days of each of the finalisation dates specified in subclauses (g) (i) and (g) (ii) above, details of the methodology used to conduct the Audit;
- (i) provide to the FWO, details of the outcomes of the Audit within 14 days of Audit completion;
- (j) in the event an Audit discloses contraventions of any applicable Commonwealth workplace relations laws, rectify all such contraventions and provide evidence of the rectification within 30 days of the finalised Audit including rectification of any and all underpayments to employees;
- (k) If an employee referred to in subclause (g) (i) and (g) (ii) above cannot be located, within 1 month of the payment falling due, pay any amounts owed to the Commonwealth (as presented by the FWO), pursuant to section 559 of the FW Act and in discharge of the Company's liability to make further payments to those employees.

Apology

- (l) within 28 days of the execution of this Undertaking, send an apology to the Affected Persons Apology Letters (**Apology Letters**), in Cantonese, in the terms set out in **Attachment C**;
- (m) within 7 days of the distribution of the Apology Letters to the Affected Persons provide copies of the Apology Letters to the FWO;

Public Notice

- (n) place a public notice (**Public Notice**) in the Saturday edition of Chinese Melbourne, in Cantonese, within 28 days of the FWO publishing a Media Release on its website in respect of this Undertaking in the terms set out in **Attachment D**;
- (o) place a notice within the workplace, in Cantonese, which is accessible to all employees (**Workplace Notice**) within 28 days of the execution of this Undertaking in the terms set out in **Attachment D**;
- (p) provide a copy of the **Public Notice** and **Workplace Notice** and written details of how the **Workplace Notice** has been displayed within 7 days of publication/display of the notices;

Workplace relations training

- (q) within 90 days of the executing of the Undertaking, organise and ensure that the Directors of the Company attend a training course which deals with the rights and responsibilities of an employer under the FW Act (**Training Course**);
- (r) ensure the Training Course is conducted by an accredited workplace trainer who is approved by the FWO and paid for by the Company;
- (s) provide the training materials used in the training course to the FWO no later than 14 days before the training is to be conducted and the training materials must be approved by the FWO;
- (t) provide evidence of attendance and payment for the Training Course to the FWO within 7 days of the training being provided;

Recordkeeping – Requirements and Fair Work Information Statement

- (u) ensure that all employee records are in a legible form and in the English language.
- (v) provide to all current employees a copy of the Fair Work Information Statement where they have yet to receive a copy. Copies of the Fair Work Information Statement in English and other languages are available on the FWO website at www.fairwork.gov.au;
- (w) ensure that all future employees are provided with a copy of the Fair Work Information Statement and that the Company maintains records of this activity;
- (x) within 14 days of the execution of this Undertaking provide the FWO with a document evidencing the actioning of paragraphs 12(u) – (v) above.

Acknowledgements

13. The Company acknowledges that:

- (a) the FWO may make this Undertaking (including any attachments) available for public inspection, including by posting it to its [website](http://www.fairwork.gov.au) 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 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 the Company;
- (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 the Company 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, the Company may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

Executed as an undertaking


EXECUTED by Yuns Healing Spirit Pty Ltd (ABN 47 601 067 761) trading as Sen's Body & Mind in accordance with section 127(1) of the *Corporations Act 2001*:


(Signature of director)

XIAO XIAO GANG
(Name of director)

22/08/2016
(Date)

in the presence of:


(Signature of witness)


Yu Huang
(Name of witness)


(Signature of director/company secretary)

YUAN BO QU
(Name of director/company secretary)


22/08/2016
(Date)

in the presence of:


(Signature of witness)


Yu Huang
(Name of witness)

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


Steven Rohson
Executive Director
Dispute Resolution & Compliance
Operations Group
Delegate for the FAIR WORK OMBUDSMAN

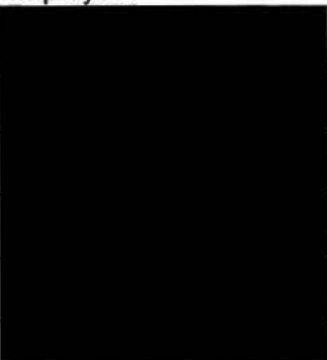
2 SEPTEMBER 2016
(Date)

in the presence of:


(Signature of witness)

LISA-MARIE OLIVER
(Name of Witness)

Attachment A – Schedule of underpayment to Affected Persons

Employees	Amount Owed	Assessment Period
	\$1,003.18	21 December 2015 to 10 January 2016
	\$ 659.40	21 December 2015 to 10 January 2016
	\$ 991.39	21 December 2015 to 10 January 2016
	\$1,036.68	21 December 2015 to 10 January 2016
	\$ 672.69	21 December 2015 to 10 January 2016
	\$ 789.54	21 December 2015 to 10 January 2016
Total	\$5,152.88 gross	

Attachment B

TRAINING RESOURCES UTILISED FROM THE FAIR WORK OMBUDSMAN WEBSITE

I, _____ have undertaken the following tools:

Completed online courses* including:

- Difficult conversations in the workplace – manager course date completed: _____
- _____ Hiring employees date completed: _____
- _____ Managing performance date completed: _____

** Please provide printout of the Statement/Certificate of Attainment for each course completed*

Viewed Videos including:

- _____ Welcome to fairwork.gov.au date completed: _____
- _____ Finding information for your industry date completed: _____
- _____ My account date completed: _____
- _____ Tool Introduction to the Pay and Conditions date completed: _____
- _____ completed: _____ PACT – Award classifications date _____
- _____ PACT – Pay summary date completed: _____
- _____ PACT – Penalty rates date completed: _____
- _____ PACT – Shift calculator date completed: _____
- _____ PACT – Allowances date completed: _____

Read Factsheets including:

- _____ Role of the Fair Work Ombudsman

date completed: _____

- _____ Contractors and employees – what's the difference? date completed:

Read information on the following:

- ***Pay Overview***

- Minimum wages Page Ref No. _____ date completed: _____
- Penalty rates & allowances Page Ref No. _____ date completed: _____

- ***Leave Overview***

- Annual leave Page Ref No. _____ date completed: _____
- Sick & carer's leave Page Ref No. _____ date completed: _____

- ***Ending Employment Overview***

- Notice & final pay Page Ref No. _____ date completed: _____
- Unfair dismissal Page Ref No. _____ date completed: _____

- ***Employee Entitlements Overview***

- Types of employees Page Ref No. _____ date completed: _____
- National Employment Standards Page Ref No. _____ date completed: _____

- ***Awards & Agreements Overview***

- _____ Awards Page Ref No. _____ date completed:

- Date and signature: _____

Attachment C – Apology to Affected Persons

(Cantonese speaking Affected Persons to receive this letter written in Cantonese)

<Date>

<Name>

<Employee Address>

Dear <Name>

I am writing to apologise on behalf of Yuns Healing Spirit Pty Ltd (**the Company**) trading as Sen's Body & Mind 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 should have employed you as a casual employee with entitlements under the *Hair & Beauty Award Pty Ltd* [**the Award**], instead of an independent contractor. The Company has contravened the Award and *Fair Work Act 2009* by:

1. failing to pay the correct minimum base hourly rate of pay for time work Monday to Sunday;
2. failing to pay casual loading Monday to Friday 7:00 am to 9:00 pm;
3. failing to pay casual loading Monday to Friday 9:00 pm to 7:00 am and Saturday between 6:00 pm to 7:00 am;
4. failing to pay casual employees the minimum engagement of 3 hours;
5. failing to pay penalty rates for time worked on Saturdays between 7:00 am to 6:00 pm;
6. failing to pay penalty rates for time worked on Sundays; and
7. failing to pay penalty rates for time worked on a public holiday.

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

The Company is taking steps to remedy the contraventions and will repay you any amounts identified as owing. You will be provided with a payslip regarding any payments.

The Company has formally admitted to the FWO that the Company did not comply with its obligations under Commonwealth workplace relations laws and 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, the Company have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

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

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

Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.

Yours sincerely

<signature>

Xiao Gang
Director

Attachment D –

Form of Public and Workplace Notice

(to be written in Cantonese)

Contravention of Fair Work Act 2009 by Yuns Healing Spirit Pty Ltd

The Office of the Fair Work Ombudsman (FWO) has completed an investigation into compliance of Yuns Healing Spirit Pty Ltd (**the Company**) trading as Sen's Body & Mind, located at Melbourne Central Shopping Centre in the Melbourne CBD, with the *Fair Work Act 2009* (**FW Act**). As a result of that investigation the FWO has determined that with respect to six Affected Persons the Company should have employed them as casual employees instead of misclassifying them as independent contractors. During the period from 21 December 2015 to 10 January 2016 the Company contravened:

- (a) Section 45 of the FW Act by failing to comply with the following provisions of the *Hair & Beauty Award 2016* [MA000005]:
 - (i) clause 17 by failing to pay the correct minimum base hourly rate of pay for time work Monday to Sunday;
 - (ii) clause 13.2 by failing to pay casual loading Monday to Friday 7:00 am to 9:00 pm;
 - (iii) clause 13.3 by failing to pay casual loading Monday to Friday 9:00 pm to 7:00 am and Saturdays between 6:00 pm to 7:00 am;
 - (iv) clause 13.6 failing to pay casual employees the minimum engagement of 3 hours;
 - (v) clause 31.2 (b) by failing to pay penalty rates for time worked on Saturdays between 7:00 am to 6:00 pm;
 - (vi) clause 31.2 (c) by failing to pay penalty rates for time worked on Sundays; and
 - (vii) clause 35.3 by failing to pay penalty rates for time worked on a public holiday
- (b) Section 535(2) of the FW Act by failing to keep employee records of a kind prescribed by the *Fair Work Regulations 2009*;
- (c) Section 536(1) of the FW Act by not giving pay slips to employees;

The Company has formally admitted to 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.

The Company expresses its sincere regret and apologises for the conduct which resulted in the Contraventions. Furthermore, the Company 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 the Company and have queries or questions relating to your employment, please contact Xiao Gang. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.