



Australian Government

Fair Work
OMBUDSMAN

ENFORCEABLE UNDERTAKING

This undertaking is **given** by the Lutheran Church of Australia Queensland District and **accepted** by the Fair Work Ombudsman pursuant to s 715(2) of the *Fair Work Act 2009* in relation to the contraventions described in clause 11 of this undertaking.

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) the Lutheran Church of Australia Queensland District trading as St Peter's Lutheran College (ABN 64 176 884 840), 66 Harts Road, Indooroopilly QLD 4068; and
 - (b) the Lutheran Church of Australia Queensland District trading as St Peter's Lutheran College Springfield (ABN 16 378 409 881), 42 Wellness Way, Springfield Central QLD 4300(together, the **College**).

COMMENCEMENT

2. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by the College; and
 - (b) the FWO accepts the Undertaking so executed (**Commencement Date**).

BACKGROUND

3. The Lutheran Church of Australia Queensland District is a not-for-profit religious organisation, incorporated under Queensland law, which provides various services, including education. The College is a non-government school which operates two educational campuses located in Indooroopilly and Springfield in the State of Queensland. Each campus is a registered charity with the Australian Charities and Not-for-profits Commission. The College employs approximately 431 employees at the Indooroopilly campus and 77 employees at its Springfield campus.
4. In an initial disclosure on 11 November 2020, and through the provision of subsequent further information, the College notified the FWO that:
 - (a) in June 2020, the College had identified there were potential issues in the way the College was engaging and paying employees engaged as sports coaches and

coordinators, leading to potential underpayments of wages and other non-compliance with the FW Act;

- (b) in July 2020, Mills Oakley was engaged by the College to conduct an audit of a sample of 100 employees (**Sample Employees**), out of the approximately 900 employees engaged as sports coaches and coordinators by the College between 1 July 2012 and 18 May 2020 (**Initial MO Audit**);
- (c) Mills Oakley completed the Initial MO Audit in October 2020. The Initial MO Audit identified a total of \$183,003.92 in underpayments to the Sample Employees, with an average underpayment of \$709.32 per employee;
- (d) in November 2020, the College had notified current and former employees engaged as sports coaches, other staff involved in the College's sporting programs and the Independent Education Union of the issue;
- (e) the College instructed Mills Oakley to engage KPMG to conduct a peer review of the Initial MO Audit. On 12 February 2021, KPMG provided its final report (with addendums) regarding its review of the audit methodologies (**KPMG Report**);
- (f) in March 2021, the College instructed Mills Oakley to engage Vincents Accountants to calculate superannuation guarantee contributions and interest on the underpayments to the Affected Employees. Vincents Accountants provided these calculations on 23 March 2021 (**VA Calculations**);
- (g) on 7 May 2021, Mills Oakley provided its final report into the underpayments (**Final MO Report**). Mills Oakley identified a total of 749 employees who had been underpaid a total of \$2,006,385.23 during the period 1 July 2012 to 31 December 2020 (**Relevant Period**); and
- (h) the College does not intend to seek any repayment of overpayments or apply any unlawful set offs to the underpayments.

5. Prior to entering into this Undertaking, the College provided to the FWO:

- (a) the Initial MO Audit;
- (b) the KPMG Report;
- (c) the Final MO Report; and

- (d) the VA Calculations
(collectively, the **Existing Reports**).
6. The following industrial instruments applied to the College's employees during the Relevant Period:
- (a) for Assistant Coaches and Coaches prior to 21 December 2015 the National Minimum Wage Order (**NMWO**) as in force from time to time applied;
 - (b) for Assistant Coaches and Coaches (after 21 December 2015), First Coaches, Open Coaches, Mentor Coaches and Head Coaches (**Coaches**):
 - (i) the *Educational Services (Schools) General Staff Award 2010 (2010 Award)*, from 1 July 2012 to 28 May 2020;
 - (ii) the *Educational Services (Schools) General Staff Award 2020 (2020 Award)*, from 29 May 2020 to 31 December 2020;
(collectively, the **Awards**);
 - (c) for Managers, Game-Day Managers and Sports Coordinators (**Coordinators**):
 - (i) the *Queensland Lutheran Schools Single Enterprise Agreement 2009 (2009 EA)*, from 1 July 2012 to 12 September 2013;
 - (ii) the *Queensland Lutheran Schools Single Enterprise Agreement 2013 (2013 EA)*, from 13 September 2013 to 17 January 2017;
 - (iii) the *Queensland Lutheran Schools Single Enterprise Agreement 2016 (2016 EA)* from 18 January 2017 to 31 December 2020
(collectively, the **EAs**).
7. The Initial MO Audit was conducted on the basis that casual employees under the Awards were not entitled to pay point progression under clause 15.2 of the 2010 Award or clause 17.2 of the 2020 Award. The KPMG Report and the FWO disagreed with this conclusion and considered that casual employees under the Awards were entitled to pay point progression under these clauses of the Awards. The Final MO Report was conducted on the basis that casual employees under the Awards were entitled to pay point progression under these clauses of the Awards.

8. Prior to the execution of this Undertaking, the College provided the following updated total figures of the total underpayments, interest and associated superannuation guarantee contributions:
 - (a) \$2,092,051.14 in total underpayments;
 - (b) \$84,749.69 in interest; and
 - (c) \$327,938.67 in superannuation, including interest and administration fees.
9. Prior to the execution of this Undertaking, the College had:
 - (a) calculated the value of the underpayments to each employee listed in Column A of Schedule A to this Undertaking (**Affected Employees**) to be the amount listed in Column B of Schedule A to this Undertaking (the **Underpayments**), subject to the further calculation of vehicle allowance underpayments (see clause 10);
 - (b) issued a written apology to all Affected Employees acknowledging the Underpayments;
 - (c) calculated the value of the interest on the Underpayments to each Affected Employee to be the amount listed in Column C of Schedule A to this Undertaking (**Interest Amounts**);
 - (d) calculated the value of the superannuation contribution required in respect of the Underpayment to each Affected Employee, including interest, to be the amount listed in Column D of Schedule A to this Undertaking (**Superannuation Underpayments**);
 - (e) for each Affected Employee, the College has paid:
 - (i) to that employee the amount in Column E of Schedule A to this Undertaking (except where no payment had been made, in which case the amount of \$0 is listed);
 - (ii) to that employee's nominated superannuation fund the amount listed in Column F of Schedule A to this Undertaking (except where no payment had been made, in which case the amount of \$0 is listed);
10. The College notified the FWO that it was in some cases unable to calculate the amount

of any vehicle allowance owing to the Affected Employees, due to lack of records. The College wrote to Affected Employees in May 2021, inviting the Affected Employees to provide information to enable the College to calculate the amount of vehicle allowance owing to them.

ADMISSIONS

11. The FWO has a reasonable belief, and the College admits, that the College contravened:

- (a) section 293 of the FW Act between 1 July 2012 and 21 December 2015 in relation to the Affected Employees with the words “Minimum Wage” in Column G of Schedule A to this Undertaking, by failing to pay those Affected Employees the amount or amounts to which those Affected Employee were entitled under the applicable NMWO in force during that period; and
- (b) section 45 of the FW Act during the Relevant Period in relation to the Affected Employees who were Coaches by failing to pay those Affected Employees the amount or amounts to which those Affected Employees were entitled under the following clauses of the Awards:
 - (i) 2010 Award (1 July 2012 to 28 May 2020):
 - (A) clause 10.5(b) (casual loading);
 - (B) clause 15.1 (minimum wages);
 - (C) clause 15.2 (commencement and level progression);
 - (D) clause 16.8 (vehicle allowance);
 - (E) clause 19.1 (payment of wages);
 - (F) clause 26.2 (penalty rates — Saturday and Sunday work); and
 - (G) clause 27.1 (overtime rates);
 - (ii) 2020 Award (29 May 2020 to 31 December 2020):
 - (A) clause 11.2 (casual loading);
 - (B) clause 17.1 (minimum rates);
 - (C) clause 17.2 (commencement and level progression);

- (D) clause 18.1 (payment of wages);
 - (E) clause 19.3 (vehicle allowance);
 - (F) clause 21.2 (overtime rates); and
 - (G) clause 22.3 (penalty rates — Saturday and Sunday work);
- (c) section 50 of the FW Act during the Relevant Period in relation to the Affected Employees who were Coordinators by failing to pay those Affected Employees the amount or amounts to which those Affected Employees were entitled in relation to the applicable minimum rates of pay under clause 4.2 the EAs and the following entitlements, as set out in the following clauses of the *School Officers' Award – Non-Government Schools 2003*, incorporated into the EAs and applying as a term of the EAs:
- (i) clause 4.3.2 (casual loading); and
 - (ii) clause 6.2 (overtime);
- (d) section 323 of the FW Act (to the extent applicable) by failing to pay the Affected Employees in full at least monthly; and
- (e) section 535 of the FW Act by failing to make and keep employee records as required by regulation 3.34 of the *Fair Work Regulations 2009 (FW Regulations)* in respect of each of the Affected Employees who performed overtime during the Relevant Period.

12. The contraventions identified in clause 11 of this Undertaking do not include:

- (a) any contraventions which relate to or arise as a consequence of the College failing to correctly apply the Awards or EAs to any employee not listed in Schedule A or to this Undertaking (**Non-schedule Employees**). For the avoidance of doubt this Undertaking is not given in respect of any Non-schedule Employees who were underpaid as a result of the College failing to correctly apply the Awards or EAs and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any contravention because of any such underpayment; or
- (b) any contraventions which have not yet occurred at the date that this Undertaking

is offered by the College (whether or not those contraventions are identified in the Independent Audits described at clause 26 below). For the avoidance of doubt this Undertaking is not given in respect of any contravention which has not occurred on the date which it is offered by the College and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

UNDERTAKINGS

13. The College will take the actions set out at clauses 14 to 51 below.

Review and rectification of underpayments

14. Within 30 days of the Commencement Date, the College will:

(a) pay to each Affected Employee any outstanding Underpayment and Interest Amount owing to that Affected Employee; and

(b) pay to each Affected Employee's nominated superannuation fund any outstanding Superannuation Underpayments.

15. The College will provide the FWO evidence of all payments made to current and former employees to rectify the Underpayments, whether made prior to the Commencement Date or as required by clause 14 — within 40 days of the Commencement Date.

16. If any of the Affected Employees to whom Underpayments are owed cannot be located within 30 days of the Commencement Date, the College will pay the Underpayments owing to those Affected Employees to the Commonwealth of Australia in accordance with section 559 of the FW Act. The College will complete the required documents supplied by the FWO for this purpose.

17. In the event that the FWO is able to locate and contact any Affected Employees to whom Underpayments are owed, the FWO will (in addition to its obligations under section 559 of the FW Act) notify the College in writing of the name and contact details of the Affected Employee. Within 14 days of receiving any such notice the College will:

(a) pay the Affected Employee the Interest Amount for that Affected Employee; and

(b) pay to the Affected Employee's nominated superannuation fund the Superannuation Underpayment for that Affected Employee.

Calculation and rectification of vehicle allowance underpayment claims

18. Within 20 days of the Commencement Date, the College will provide confirmation and evidence to the FWO that it has written to each of the Affected Employees (or to their last known address) providing details of how the Affected Employee can make a claim for vehicle allowance under either the EAs or the Awards (as applicable).
19. For a period of twelve months after the Commencement Date, where the College receives a claim for vehicle allowance from an Affected Employee, it will, within 60 days of receipt of the claim:
 - (a) assess claim and calculate the vehicle allowance owing to the Affected Employee so far as reasonably possible based on all information available, including through making reasonable further inquiries with the Affected Employee;
 - (b) pay any vehicle allowance owing to the Affected Employee, plus interest for each relevant financial year; and
 - (c) provide the FWO with a copy of the claim, and evidence of compliance with clauses 19 (a) and (b).

No recovery of overpayments

20. The College will not:
 - (a) recover, or seek to recover, any overpayments of wages identified in the Existing Reports; or
 - (b) apply, or seek to apply, any overpayments of wages identified in the Existing Reports as an off-set against any other entitlement owing to the Affected Employees.

Provision of information

21. Within 10 days of the Commencement Date, the College will provide to the FWO a written confirmation that the Existing Reports have been provided without qualification and without seeking to place any limitation on how the FWO may use the Existing Reports in the lawful performance of its statutory functions and powers. The College will not assert, or seek to assert, any limitation on how the FWO may use or rely on these documents in the lawful performance of its statutory functions and powers

22. Within 120 days of the Commencement Date, the College will provide to the FWO a written report detailing the improvements the College has made to its record keeping systems and processes to avoid future non-compliance with section 535 of the FW Act.
23. When providing the report required by clause 22, the College will state in writing that it is provided without qualification and without seeking to place any limitation on how the FWO may use the report in the lawful performance of its statutory functions and powers. The College will not assert, or seek to assert, any limitation on how the FWO may use or rely on the report in the lawful performance of its statutory functions and powers.

Letter of Assurance

24. Within 70 days of the Commencement Date, the College will provide to the FWO a Letter of Assurance signed by the Head of School or Chief Operating Officer in the terms set out at Attachment A.
25. The FWO will accept the Letter of Assurance, the provision of the Existing Reports and the report required by clause 22, in lieu of requiring the College to be subject to an Independent Assessment of the College's quantification and rectification of the Underpayments and Superannuation Underpayments to the Affected Employees and the College's new systems and processes.

Independent Audits

26. The College must, at its cost, engage an appropriately qualified, experienced, external and independent accounting professional or an employment law specialist (**Independent Auditor**) to conduct two audits of the College's compliance with the FW Act and FW Regulations, in relation to the 2020 Award, the *Queensland Lutheran Schools Single Enterprise Agreement 2020 (2020 EA)*, any future agreements that replace the 2020 EA, and the record keeping obligations in section 535 of the FW Act (**Audits**).
27. The College will notify the FWO of its proposed Independent Auditor by no later than 11 January 2022. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require the College to propose other Independent Auditors until

the FWO has approved in writing an Independent Auditor. The Independent Auditor must be approved by the FWO in writing prior to being engaged by the College.

28. The College must ensure that each of the Audits conducted by the Independent Auditor includes:

- (a) an assessment of a minimum of 20% of all employees engaged in roles equivalent to the Coaches or Coordinators, across a range of classifications and sporting activities, and proportionately split between the two campuses referred to in clause 3 (the **Campuses**), during the relevant audit period (**Sampled Employees**) in respect of their employment by the College;
- (b) an assessment of whether the Sampled Employees have been correctly classified by the College;
- (c) an assessment of whether the pay and conditions of the Sampled Employees during the relevant audit period is in compliance with the FW Act, the 2020 Award and the 2020 EA (or replacement);
- (d) an assessment of whether the College has created and maintained the records required by s 535 of the FW Act in relation to the Sampled Employees for the relevant audit period;
- (e) direct contact with at least 20% of Sampled Employees for each Campus, across a mix of different sporting activities, to ensure accuracy of hours worked. Direct contact will be face-to-face. Where the Independent Auditor advises that it is not reasonably practicable to meet employees face-to-face, the FWO may authorise alternative forms of direct contact such as telephone or video-conferencing;
- (f) the production of a written report on each of the Audits setting out the Independent Auditor's findings, and the facts and circumstances surrounding them, to the FWO; and
- (g) that each of the written reports referred to in (f) above contains the following declarations from the Independent Auditor:
 - (i) the Independent Auditor has no actual, potential or perceived conflict of interest in providing the report to the FWO;

- (ii) notwithstanding that the Independent Auditor is retained by the College, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from the College in preparing the report;
- (iii) the report is provided in accordance with applicable professional standards (which will be listed in the report); and
- (iv) the report is provided to the FWO for its benefit and the FWO can rely on the report.

The First Audit

- 29. The College must ensure the Independent Auditor commences the first of the Audits by no later than 1 April 2022 (**First Audit**).
- 30. For the First Audit, the relevant audit period to assess Sampled Employees is at least two full pay periods falling in each term during the period 1 January 2021 – 31 December 2021.
- 31. By 28 February 2022, the College will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the First Audit.
- 32. The College will use its best endeavours to ensure the Independent Auditor provides a draft written report of the First Audit directly to the FWO by 15 June 2022, setting out the draft First Audit findings, and the facts and circumstances supporting the First Audit findings. The College will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to the College without the FWO's approval.
- 33. The College will use its best endeavours to ensure the Independent Auditor finalises the First Audit and provides a written report of the First Audit (**First Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. The College will ensure the Independent Auditor does not provide the First Audit Report, or a copy of the same, to the College without the FWO's approval.

The Second Audit

- 34. The College must ensure the Independent Auditor commences the second of the Audits

- by no later than 1 April 2023 (**Second Audit**).
35. For the Second Audit, the relevant audit period to assess Sampled Employees is at least two full pay periods falling in each term during the period 1 January 2022 – 31 December 2022.
 36. By 28 February 2023, the College will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Second Audit.
 37. The College will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Second Audit directly to the FWO by 15 June 2023, setting out the draft Second Audit findings, and the facts and circumstances supporting the Second Audit findings. The College will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to the College without the FWO's approval.
 38. The College will use its best endeavours to ensure the Independent Auditor finalises the Second Audit and provides a written report of the Second Audit (**Second Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. The College will ensure the Independent Auditor does not provide the written report, or a copy of the same, to the College without the FWO's approval.
 39. Notwithstanding anything contained in clauses 6 to 38 (inclusive) above, the College may request, and the FWO may agree to, additional time to comply with the requirements contained in those clauses. The FWO will not unreasonably refuse to agree to such a request. Any such agreement must be in writing.

Outcome of Audits

40. If any of the Audits identify underpayments to any current or former employees, the FWO will provide the College with a copy of the written report and College will conduct a reconciliation of the amounts paid to those employees during the relevant audit period and rectify any underpayments that are identified. The reconciliation period for each identified employee will be from the start of the relevant audit period to the end of the relevant audit period.

41. The College will provide to the FWO evidence of such rectification within 28 days of being informed by the FWO of the requirement to undertake the reconciliation.
42. If any employees identified in the Audits as having underpayments owing to them cannot be located within 60 days of the College receiving the notification referred to at clause 40 above, the College will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. The College will complete the required documents supplied by the FWO for this purpose.
43. If any of the Audits identify an underpayment of minimum entitlements to one or more employees, and the FWO reasonably believes that employees not included in the Audits are also likely to have been underpaid, the College will engage an accounting professional or an employment law specialist approved by the FWO to conduct a further audit of all its employees to whom the 2020 Award and 2020 EA (or replacement instrument) applies (or a particular cohort of employees within this group), as determined by the FWO (**Additional Audit**). Any Additional Audit must be paid for by the College.
44. If requested by the FWO, the College will provide the FWO with all records and documents used to conduct any or all of the Audits (including any Additional Audit), within 14 days of such a request or such longer period as agreed in writing between the College and the FWO.

Notices – Internal and External

Media Release

45. Upon acceptance of the Undertaking, the FWO will publish a media release on its website in respect of this Undertaking.

Website Notice

46. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, the College will place a notice on its website, accessible through a hyperlink on the front page of www.stpeters.qld.edu.au (**Website Notice**).
47. The Website Notice must:
 - (a) be in the form of the Website Notice set out at Attachment B;

- (b) be displayed in at least size 10 font; and
 - (c) remain on the website for a period of 1 month.
48. Within 7 days of placing the Website Notice on its website, the College will provide to the FWO evidence of its placement.

Contribution Payment

49. Within 30 days of the Commencement Date, the College will make a contribution payment of \$20,000 to the Consolidated Revenue Fund for the Underpayments to the Affected Employees.
50. The College will provide evidence to the FWO of any contribution payment within 14 days of making payment to the Consolidated Revenue Fund.

No Inconsistent Statements

51. The College must not, and must use its best endeavours to ensure that its officers, employees or agents do not, make any statement or otherwise imply, either orally or in writing, anything that is inconsistent with admissions or acknowledgements contained in this Undertaking.

ACKNOWLEDGEMENTS

52. The College 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 the College set out in clause 11 above in respect of decisions taken regarding enforcement action in the event that the College is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by the College to comply with its obligations under this Undertaking;
- (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 College may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if the College contravenes any of the terms of this 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 Undertaking may be provided to the Court as evidence of the admissions made by the College in clause 11 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by the College in accordance with

JWH
(Signature of director)

Karen Hill
(Signature of director/company secretary)

TIM KOTZUR
(Name of director)

KAREN HILL
(Name of director/company secretary)

1 December 2021
(Date)

1 December 2021
(Date)

in the presence of:

in the presence of:

L. Delaney
(Signature of witness)

L. Delaney
(Signature of witness)

LISA DELANEY
(Name of witness)

LISA DELANEY
(Name of witness)

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

Mark Scully
Mark Scully, Deputy Fair Work
Ombudsman – Compliance and
Enforcement

3/12/21
(Date)

Delegate for the FAIR WORK
OMBUDSMAN

in the presence of:

Antonia Parkes
(Signature of witness)

Antonia Parkes
(Name of Witness)