



Australian Government

Fair Work
OMBUDSMAN

ENFORCEABLE UNDERTAKING

This undertaking is **given** by Open Minds Australia Limited (ABN 19009687030) and **accepted** by the Fair Work Ombudsman pursuant to s715(2) of the *Fair Work Act 2009* in relation to the contraventions described in clauses 12 and 13 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 Open Minds Australia Limited (**Open Minds**).

COMMENCEMENT

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

BACKGROUND

3. Open Minds is an Australian not-for-profit charity registered with the Australian Charities and Not-for-profits Commission (**ACNC**). Open Minds provides in-home care and support services to vulnerable clients, including those with mental and physical disabilities across Queensland and Northern New South Wales.
4. Open Minds operates in 35 locations in Queensland and Northern New South Wales and in 2021 engaged approximately 560 full time, part time and casual employees.
5. On 7 October 2021, Multicap Limited (**Multicap**) acquired Open Minds, which became a wholly owned subsidiary of Multicap.
6. In the period relevant to this Undertaking, the terms and conditions of Open Minds' employees were set out in the *Open Minds Collective Agreement 2015 – 2017* (**Open Minds CA**), which commenced on 1 June 2015.
7. On 23 June 2021, Open Minds notified the FWO that it had failed to comply with its obligations under the Open Minds CA in the period 1 July 2015 to 27 June 2021 (the **Relevant Period**). Open Minds also notified the ACNC and the Australian Taxation Office.
8. On 23 June 2021 and 5 November 2021 and through subsequent updates, Open Minds notified the FWO that:

- (a) in February/March 2020, Open Minds engaged external advisors to conduct a sample payroll review of 74 employees (full-time, part-time and casual) across 6 pay periods which identified some underpayments and overpayments concerning specific rates and allowances paid (**First Payroll Review**).
 - (b) a further payroll review was conducted for all former and current employees for a 6-year period. This review was conducted by Open Minds payroll review team (**Second Payroll Review**).
 - (c) KPMG were subsequently engaged to perform independent sample testing of the Second Payroll Review and produce a Sample Wage Calculation Report.
 - (d) the Second Payroll Review identified issues in relation to sleepovers, overtime, weekend and public holiday work, recall, annual leave loading, allowances and pay point increments.
 - (e) the non-compliance was caused by historical misinterpretation of the correct legal interpretation of the Open Minds CA, in addition to staff turnover and errors in payroll and rostering systems and processes over the Relevant Period.
9. Prior to the execution of this Undertaking, Open Minds notified the FWO that:
- (a) it had rectified underpayments of \$3,511,580.36 (inclusive of superannuation and interest) in back payments for 1,507 current and former employees referred to in Column A of Schedule A (**Schedule A Employees**) and Column A of Schedule B (**Schedule B Employees**) to this Undertaking.
 - (b) it had rectified \$695,902 (inclusive of superannuation) in back payments for common law contract remediation to 166 current and former employees referred to in Column A of Schedule C to this Undertaking (**Schedule C Employees**).
 - (c) there are 31 former Schedule A Employees who are owed \$4,075.86 that it was unable to locate. This amount referred to in Column B of Schedule A has been paid to the Commonwealth of Australia in accordance with section 559 of the FW Act; and
 - (d) where appropriate, Open Minds had offset overpayments in the Relevant Period against underpayments within each pay period on a like-for-like basis.

10. As a part of its internal review, Open Minds has identified a further period of four weeks post 27 June 2021 (28 June 2021 to 25 July 2021) where Open Minds continued to underpay Schedule B Employees who were employed in this period. Open Minds has rectified and paid total underpayments of \$61,612.11 (inclusive of superannuation and interest) to these employees listed in Schedule B (**Schedule B Employees**).
11. Prior to execution of this Undertaking, Open Minds also notified the FWO that it had taken or was taking the following measures:
 - (a) implemented, as of July 2023, system changes to transition from a separate rostering and payroll system to an integrated system;
 - (b) engaged KPMG to conduct pre-testing of the integrated payroll system with post implementation testing commenced in January 2024;
 - (c) retained KPMG to undertake an independent review of wage compliance with the Open Minds CA;
 - (d) purchased people experience services and support from Multicap; and
 - (e) reviewed the common law contracts and classifications for all current employees to ensure they are accurate for the 2023 financial year.

ADMISSIONS

12. The FWO has a reasonable belief, and Open Minds admits, that Open Minds contravened:
 - (a) section 50 of the FW Act during the Relevant Period by failing to pay each of the Schedule A Employees the amount or amounts to which that employee was entitled under the Open Minds CA in respect of each provision of any of those instruments which is identified in Schedule A to this undertaking in relation to that employee:
 - (a) Clause 18 – Minimum weekly wages
 - (b) Clause 23 – Ordinary hours of work and rostering
 - (c) Clause 23.6 – Sleepovers
 - (d) Clause 26 – Overtime and penalty rates

- (e) Clause 26.3 – Rest period after overtime
 - (f) Clause 24 – Saturday and Sunday work (weekends)
 - (g) Clause 35 – Public Holiday
 - (h) Clause 26.4 – Recall to work overtime
 - (i) Clause 29.6 – Annual Leave Loading
 - (j) Clause 20.5 – Travel Allowance
 - (k) Clause 20.3 – Meal Allowance
 - (l) Clause 20.8 – On-call allowance
 - (m) Clause 27.2(b) – Night Shift
 - (n) Clause 16.3 – Pay Point increments
 - (o) Clause 13.4(b) – Casual loading
- (b) 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 Schedule A Employees for the Relevant Period.

13. The FWO also has a reasonable belief, and Open Minds also admits, that Open Minds contravened:

- (a) section 50 of the FW Act by failing to pay the Schedule B Employees the amount or amounts to which that employee was entitled under the Open Minds CA during the period from 28 June 2021 to 25 July 2021; and
- (b) section 535 of the FW Act by failing to make and keep employee records as required by regulation 3.34 of the FW Regulations in respect of each of the Schedule B Employees during the period 28 June 2021 to 25 July 2021.

14. For the avoidance of doubt, this Undertaking is not given in relation to:

- (a) any contraventions affecting any employee not listed in Schedule A or Schedule B to this Undertaking (**Non-schedule Employees**); or
- (b) any contraventions which relate to or arise as a consequence of Open Minds as failing to correctly apply any of the Agreements to any of the Schedule A or B

- Employees other than as identified in clause 12 or 13 to this Undertaking; or
- (c) any contraventions which have not yet occurred at the end of the Relevant Period and the period between 28 June 2021 to 25 July 2021 (whether or not those contraventions are identified in the Independent Audit described in clauses 22 to 35 below).

UNDERTAKINGS

15. Open Minds will take the actions set out at clauses 16 to 42 below.

Evidence of Payment Rectification

16. By 30 June 2024, Open Minds will provide the FWO evidence of all payments made to current and former employees to rectify the Underpayments.
17. For any former Employees where underpayments were made to the Commonwealth of Australia in accordance with section 559 of the FW Act, in the event that the FWO is able to locate and contact any former Open Minds employees to whom Underpayments are owed, the FWO will (in addition to its obligations under s559 of the FW Act) notify Open Minds in writing of the name and contact details of the current or former employee. Within 14 days of receiving any such notice Open Minds will:
- (a) pay to the former employee interest on the amount already paid by Open Minds to the Commonwealth of Australia in respect of that employee, calculated up until the date on which Open Minds paid the underpayment amount to the Commonwealth of Australia pursuant to clause 9(c), using an interest rate that is calculated using an interest rate that is 4% above the last cash rate published by the RBA for each relevant financial year; and
 - (b) pay to the former employee's nominated superannuation fund an amount equal to the amount that would have been required by law, had Open Minds paid the amount directly to the former employee.

Implementation of integrated payroll and rostering system

18. Within 90 days of the Commencement Date, Open Minds will provide to the FWO a report to outline the implementation of the integrated payroll system that it has put in place to ensure compliance with its obligations under the FW Act and the Open Minds

CA.

19. The report will include the following details in relation to the implementation of its new integrated rostering and payroll system:
 - (a) date of implementation,
 - (b) internal validation steps completed,
 - (c) external validation steps completed,
 - (d) the findings of the internal and external validation steps,
 - (e) further work required to be undertaken as a result of internal and external validation, and
 - (f) details of any ongoing validation program.
20. If the report provided to the FWO under clause 18 above does not include the information required by the FWO in clause 19 above, Open Minds will, upon written request by the FWO, provide any specific additional information set out at clause 19 as requested. Open Minds will use their best endeavours to provide this information to the FWO within a period of 14 days from the written request.

No limitation on use of information

21. When providing the report under clause 18, Open Minds will state in writing that it does so without qualification and without seeking to place any limitation on how the FWO may use the information in the lawful performance of its statutory functions and powers. Open Minds will not assert, or seek to assert, any limitation on how the FWO may use or rely on the information in the lawful performance of its statutory functions and powers.

Independent Audit

22. Open Minds must, at its cost, engage an appropriately qualified, experienced, external and independent accounting professional or an employment law specialist (**Independent Auditor**) to conduct one audit of Open Minds' compliance with the FW Act and FW Regulations, in relation to the Open Minds CA and any future agreements that have replaced the Open Minds CA (**Audit**).

23. Open Minds will notify the FWO of its proposed Independent Auditor by no later than 24 May 2024. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require Open Minds 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 Open Minds.

The Audit

24. Open Minds must ensure the Independent Auditor commences the Audit by 22 July 2024 (**Audit**).
25. The relevant audit period for the Audit must be at least two full consecutive pay periods falling within the period 12 July 2024 – 30 August 2024.
26. By 28 June 2024, Open Minds will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Audit.
27. Open Minds must ensure that the Audit conducted by the Independent Auditor includes:
 - (a) an assessment of 5% of all employees to whom the Open Minds CA applies, across a range of classifications, locations and employment types (full time, part time and casual employment), during the relevant audit period (**Sampled Employees**) in respect of their employment by Open Minds;
 - (b) an assessment of whether the Sampled Employees have been correctly classified by Open Minds;
 - (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 and the Open Minds CA (or replacement instrument);
 - (d) direct contact with Sample Employees by way of site visits (or video conference if more practical) to at least 5 different sites, to ensure accuracy of hours worked;
 - (e) the production of a written report on the Audit setting out the Independent Auditor's findings, and the facts and circumstances surrounding them, to the FWO; and
 - (f) that the written report referred to in (e) above contains the following declarations

from the Independent Auditor:

- (a) the Independent Auditor has no actual, potential or perceived conflict of interest in providing the report to the FWO;
 - (b) notwithstanding that the Independent Auditor is retained by Open Minds, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from Open Minds in preparing the report;
 - (c) the report is provided in accordance with applicable professional standards (which will be listed in the report); and
 - (d) the report is provided to the FWO for its benefit and the FWO can rely on the report.
28. Open Minds will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Audit directly to the FWO by 11 November 2024, setting out the draft Audit findings, and the facts and circumstances supporting the Audit findings. Open Minds will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Open Minds without the FWO's approval.
29. Open Minds will use its best endeavours to ensure the Independent Auditor finalises the Audit and provides a written report of the Audit (**Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. Open Minds will ensure the Independent Auditor does not provide the Audit Report, or a copy of the same, to Open Minds without the FWO's approval.

Outcome of Audit

30. If the Audit identifies underpayments arising under the FW Act and the Open Minds CA (or replacement instrument) to any current or former employees, Open Minds will:
- (a) rectify any such underpayments identified in the relevant audit period; and
 - (b) conduct a reconciliation of the amounts paid and owed to those employees in the 12-month period immediately prior to the relevant audit period and rectify any underpayments that are identified.

31. Open Minds will provide to the FWO evidence of such rectification within 60 days of being informed by the FWO of the requirement to undertake the reconciliation.
32. If any employees identified in the Audit as having underpayments arising under the FW Act and the Open Minds CA (or replacement instrument) owing to them cannot be located within 60 days of the conclusion of the Audit, Open Minds will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. Open Minds will complete the required documents supplied by the FWO for this purpose.
33. If the Audit identifies an underpayment of entitlements arising under the FW Act and the Open Minds CA (or replacement instrument) to one or more employees, and the FWO reasonably believes that employees not included in the Audit are also likely to have been underpaid, Open Minds 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 Open Minds CA (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 Open Minds.
34. If requested by the FWO, Open Minds will provide the FWO with all records and documents used to conduct any or all of the Audits (including any Additional Audit), within 7 days of such a request.
35. The FWO will notify Open Minds in writing that the independent Audit (and if required the Additional Audit) has concluded upon compliance with clauses 22 to 34.

Employee Hotline

36. Within 7 days of the Commencement Date at its own expense, Open Minds will engage an independent organisation to operate a dedicated email address for all current and former employees to whom the Open Minds CA applies or applied, to make enquiries in relation to their entitlements, underpayments or related employment concerns (**Employee Hotline**). Employees will have the option of making enquiries on a confidential basis.
37. The independent organisation must be approved by the FWO prior to being engaged by Open Minds to operate the Employee Hotline.

38. Open Minds will:

- (a) ensure the Employee Hotline remains operational for a period of at least 3 months;
- (b) take steps to respond to each email enquiry and seek to resolve any issues within 30 days and notify the FWO of any issues that are not resolved within 60 days;
- (c) within 30 days from the Employee Hotline ceasing operation, provide the FWO with a report of any concerns raised by employees and how the matters were resolved; and
- (d) if any enquiries remain unresolved 30 days after the cessation of the Employee Hotline, Open Minds will continue reporting to the FWO until any such enquiries are resolved.

Notices – Internal and External

Letter to Employees

- 39. Within 28 days of the Commencement Date, Open Minds will send a letter (**Employee Letter**) to all current Open Minds employees giving notice of this and relevant contact details of the Employee Hotline. The Employee Letter will be in the form of Attachment A.
- 40. Within 45 days of the Commencement Date, Open Minds will provide evidence to the FWO that the Employee Letter has been sent to all current Open Minds employees.

Monitoring of Progress

- 41. Open Minds will provide the FWO with evidence on a quarterly basis for the life of the EU that:
 - (a) the Payroll Remediation Committee is in place and is facilitating consultation and communication with the staff of Open Minds and monitoring progress made against the obligations to this Undertaking in paragraphs 16 to 40 above. This evidence will include the following:
 - (i) The makeup and composition of the members of the Payroll Remediation Committee.

- (ii) Copies of minutes issued following Payroll Remediation Committee meetings.
 - (iii) Progress against undertakings at paragraphs 16 - 40.
 - (iv) Details on any amendments to organisational policies and or procedures which address continuous improvement in the application of the Open Minds CA.
 - (v) Interactions between any relevant unions and the Payroll Remediation Committee.
 - (vi) Any outstanding issues raised in relation to the self-report and the associated remediation program.
- (b) its Risk and Quality Committee is continually reviewing Open Minds' governance obligations regarding ongoing payroll compliance and that this is being reported to the member of the Board of Directors (**Board**).
- (c) the members of the Board are monitoring progress made against the obligations under the FW Act and the Open Minds CA.

No Inconsistent Statements

42. Open Minds 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


43. Open Minds acknowledges that:
- (a) the FWO may;
 - (a) 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;
 - (b) 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);

- (c) issue a media release in relation to this Undertaking;
 - (d) from time to time, publicly refer to the Undertaking (and any of the Attachments hereto) and its terms; and
 - (e) rely upon the admissions made by Open Minds set out in paragraphs 12 and 13 above in respect of decisions taken regarding enforcement action in the event that Open Minds is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by Open Minds 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, Open Minds may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
 - (d) if Open Minds contravenes any of the terms of this 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 Undertaking may be provided to the Court as evidence of the admissions made by Open Minds in clauses 12 and 13 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by Open Minds in accordance with section 127(1) of the *Corporations Act 2001*:



(Signature of director)

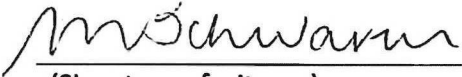
Joanne Jessop Chair

(Name of director)

13 May 2024

(Date)

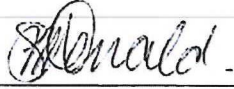
in the presence of:



(Signature of witness)

Marilyn Schwarzer

(Name of witness)



(Signature of director/company secretary)

Sue McDonald

(Name of director/company secretary)

13 MAY 2024

(Date)

in the presence of:




(Signature of witness)

Marilyn Schwarzer

(Name of witness)

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



Mark Scully - Deputy Fair Work
Ombudsman Compliance and
Enforcement

Delegate for the FAIR WORK
OMBUDSMAN

in the presence of:



(Signature of witness)

14 May 2024

(Date)

Cheryl Tam

(Name of Witness)

Attachment A – Letter to employees

Dear <insert name >

As you may be aware, Open Minds Limited (**Open Minds**) has admitted to the Fair Work Ombudsman (**FWO**) that it contravened the *Fair Work Act 2009* (Cth) by incorrectly applying clauses of the *Open Minds Collective Agreement 2015 – 2017* and thereby underpaid those employees by failing to comply with its obligations under this agreement.

Open Minds understands that you may have further questions and concerns relating to this and other employment issues. In addition to the existing internal Open Minds Payroll Helpdesk, and to assist you to easily address your concerns, a separate hotline has been established for all employees to access. The hotline is being operated by <insert entity name>, an independent party that can assist you with your enquiries. <Insert name > can be contacted on <insert contact number> or at <insert email address> and, if required, on a confidential basis.

Should you wish to discuss your concerns directly with Open Minds you can contact our Helpdesk at payroll@openminds.org.au. We will make every attempt to resolve your enquiry within 30 days of receiving it and commit to maintaining open communication with you about the progress of your enquiry.

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

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

Yours sincerely

<Employer name>