

enforceable-undertaking-walter-and-eliza-hall

ENFORCEABLE UNDERTAKING

This undertaking is **given** by the Walter and Eliza Hall Institute of Medical Research (ABN: 12 004 251 423) (hereafter **the Institute**) and **accepted** by the Fair Work Ombudsman pursuant to s 715(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) in relation to the contraventions described in clause 6 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 FW Act by the Institute, 1G Royal Parade, Parkville VIC 3052.

COMMENCEMENT

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

BACKGROUND

3. The Institute is an unlisted Australian public company that was founded in 1915. The Institute conducts medical research in areas such as coeliac disease, malaria and various cancers. The Institute has approximately 1,100 staff and students consisting largely of academic research staff, laboratory technicians, postgraduate students and professional services staff. Prior to 1 January 2014, during the transitional period after the commencement of the *Fair Work Act 2009 (FW Act)*, employees of the Institute were covered by two pre-modern awards (the *Walter and Eliza Hall Institute of Medical Research General Staff Conditions Employment Award 1999 (WEHI award)* and the *Universities and Affiliated Institutions Academic Research Salaries (Victoria and Western Australia) Award 1989*).
4. Between October 2019 and February 2020, the Institute, at its own instigation, notified the FWO that:
 - (a) in or around June/July 2018, the Institute identified that six modern awards, being the *Professional Employees Award 2010*, *Miscellaneous Award 2010*, *Manufacturing and Associated Industries Award 2010*, *Clerks Award 2010*, *Nurses Award 2010* and the *Graphic Arts, Printing and Publishing Award 2010 (the modern awards)* may apply to some of its current employees that it had not been applying those modern awards to;
 - (b) in February 2020, the Institute identified that, in respect of the modern awards that may apply to its employees, certain positions were either no longer covered by the *Nurses Award 2010* or that the *Nurses Award 2010* had changed in respect of particular categories of employees;

- (c) in April 2019, the Institute engaged Deloitte to undertake remediation calculations for all affected former and current, casual, part-time and full-time employees during the period from 1 January 2014 to 13 October 2019; and
 - (d) the terms and conditions on which the Institute employed some employees, that it had not been applying the modern awards to, did not satisfy the minimum terms and conditions in the *Professional Employees Award 2010*, *Miscellaneous Award 2010*, *Manufacturing and Associated Industries Award 2010*, *Clerks Award 2010* and the *Graphic Arts, Printing and Publishing Award 2010* (hereafter **the relevant modern awards**) in relation to overtime penalty rates, minimum shift engagements, weekend and public holidays rates, meal allowance and first aid allowance, resulting in underpayments to 343 current and former casual employees from 1 January 2014 to 13 October 2019 totalling \$306,962 and underpayments to 80 current and former full-time and part-time staff totalling \$43,360 and these underpayments had arisen as a result of the Institute continuing to apply the WEHI award instead of the relevant modern awards on the misunderstanding that the WEHI award was more generous.
5. Prior to the execution of this Undertaking, the Institute notified the FWO that the Institute had:
- (a) with the assistance of Deloitte, calculated and identified the underpayments referred to in clause 4(d) above, including payments for superannuation and interest;
 - (b) rectified the underpayments referred to in clause 4(d) above by adopting a more 'favourable' position in relation to back payments (by using over-award ordinary time hourly rates (where applicable) as the basis for calculating any overtime penalty rates, minimum shift engagements, weekend and public holidays rates, and not offsetting any payments). Details of the payments and other relevant information in relation to the employees impacted by the underpayments referred to in clause 4(d) above (**Impacted Employees**) have been provided to the FWO on a confidential basis and are set out in Schedule A to this Undertaking;
 - (c) rectified any associated superannuation underpayments as required by law to each of the Impacted Employees, by paying any such required superannuation contributions to the chosen superannuation fund of the employee;
 - (d) paid interest to each of the Impacted Employees calculated at a rate of 5.5% of the total assessed amount;

- (e) engaged the Australian Industry Group to provide advice on the application of the relevant modern awards to former and current employees;
- (f) conducted several group forums and emailed communications to all Impacted Employees; and
- (g) apologised for the underpayment and commenced back payments with an offer of reimbursement of \$299 for financial planning advice.

ADMISSIONS

6. The FWO has a reasonable belief, and the Institute admits, that the Institute contravened section 45 of the FW Act between 1 January 2014 and 13 October 2019 (**Relevant Period**) by failing to pay each of the Impacted Employees the amount or amounts to which that employee was entitled under the relevant modern awards in respect of each provision of any of those instruments which is identified in Schedule A (the **Underpayments**).
7. The contraventions identified in clause 6 and Schedule A of this Undertaking do not include:
 - (a) any contraventions which relate to or arise as a consequence of the Institute failing to correctly apply the relevant modern awards to any employee not listed in the Schedule as an Impacted Employee (**Non-impacted Employees**). For the avoidance of doubt this Undertaking is not given in respect of any Non-impacted Employees who were underpaid as a result of the Institute failing to correctly apply the relevant modern awards 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 Institute (whether or not those contraventions are identified in the Independent Audits described at clause 17 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 Institute and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any such contravention.

UNDERTAKINGS

8. The Institute will take the actions set out at clauses 9 to 46 below.

Rectification of underpayments to employees that cannot be located

9. If any of the current or former employees to whom Underpayments are owed cannot be located by 15 August 2020, the Institute will pay the underpayment amounts owing to those employees to the Commonwealth of Australia in accordance with section 559 of the FW Act. The Institute will complete the required documents supplied by the FWO for this purpose.
10. In the event that the FWO is able to locate and contact any current or former the Institute employees to whom Underpayments are owed, the FWO will (in addition to its obligations under s 559 of the FW Act) notify the Institute in writing of the name and contact details of the current or former employee. Within 14 days of receiving any such notice, the Institute will pay the current or former employee interest on the amount already paid by the Institute to the Commonwealth of Australia in respect of that employee, calculated for each financial year from the date that the employee first became entitled to that amount until 10 April 2020, using an interest rate of 5.5%.

Provision of Deloitte report(s)

11. By 1 September 2020, the Institute will provide the FWO with any full and non-redacted reports it has received from Deloitte in relation to the underpayments identified at clause 4(d).
12. The FWO requires the following information about the report(s):
 - (a) methodology adopted by Deloitte;
 - (b) actions taken by Deloitte;
 - (c) findings made by Deloitte; and
 - (d) recommendations made by Deloitte.
13. If the report(s) provided to the FWO do not already include the information required by the FWO, the Institute agrees that upon a written request by the FWO it will provide any specific additional information set out at clauses 12(a) to (d) requested.
14. If the Institute does not have the information set out at clauses 12(a) to (d), the Institute must, in response to a request by the FWO, obtain such information as necessary from Deloitte to provide to the FWO, within any reasonable timeframes specified by the FWO.

Letter of Assurance

15. By 1 September 2020, the Institute will provide the FWO a Letter of Assurance signed by the Director of the Institute in the terms as set out at Attachment A.

16. The FWO will accept the Letter of Assurance and the Deloitte report(s) in lieu of requiring the Institute to be subject to an Independent Assessment of the Institute's quantification, and rectification of underpayments to the Impacted Employees.

Independent Audits

17. The Institute must, at its cost, engage an appropriately qualified, experienced, external and independent accounting professional, employment law specialist or industry group (**Independent Auditor**) to conduct two audits of the Institute's compliance with the FW Act and FW Regulations, in relation to the relevant modern awards, and any future instruments that replace the relevant modern awards (**Audits**).
18. The Institute will notify the FWO of its proposed Independent Auditor by no later than 24 August 2020. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require the Institute 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 Institute.
19. The Institute must ensure that each of the Audits conducted by the Independent Auditor includes:
 - (a) an assessment of whether the relevant modern awards (or replacement instruments) applies to a minimum sample of 20 or 15% (whichever is greater) of employees (excluding those that have had their fixed term contracts renewed or extended without a break in service) who either commenced employment, or whose role and function changed, during the relevant pre-audit period (**Sampled Employees**) in respect of their employment by the Institute;
 - (b) an assessment of whether the Sampled Employees to whom the relevant modern awards (or replacement instruments) apply have been correctly classified by the Institute;
 - (c) an assessment of whether the pay and conditions of the Sampled Employees to whom the relevant modern awards (or replacement instruments) applies during the relevant audit period is in compliance with the FW Act and relevant modern awards (or replacement instruments);
 - (d) direct contact, including contact via telephone or video, with Sampled Employees to whom the relevant modern awards (or replacement instruments) applies by way of site visits to at least two different sites, to ensure accuracy of hours worked;
 - (e) 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

- (f) that each of the written reports referred to in (e) 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 Institute, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from the Institute 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

- 20. The Institute must ensure the Independent Auditor commences the first of the Audits by no later than 30 September 2020 (**First Audit**).
- 21. For the First Audit, the relevant pre-audit period to assess Sampled Employees is twelve months preceding 30 September 2020.
- 22. The relevant audit period for the First Audit must be at least two full pay periods falling within the period 15 July 2020 to 15 September 2020.
- 23. By 14 September 2020, the Institute will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the First Audit.
- 24. The Institute will use its best endeavours to ensure the Independent Auditor provides a draft written report of the First Audit directly to the FWO by 30 November 2020, setting out the draft First Audit findings, and the facts and circumstances supporting the First Audit findings. The Institute will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to the Institute without the FWO's prior written approval.
- 25. The Institute 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 Institute will ensure the Independent Auditor does not provide the First Audit Report, or a copy of the same, to the Institute without the FWO's prior written approval.

The Second Audit

26. The Institute must ensure the Independent Auditor commences the second of the Audits by no later than 30 September 2021 (**Second Audit**).
27. For the Second Audit, the relevant pre-audit period to assess Sampled Employees is 12 months preceding 30 September 2021.
28. The relevant audit period for the Second Audit must be at least two full pay periods falling within the period 15 July 2021 to 15 September 2021.
29. By 14 September 2021, the Institute will provide for the FWO's approval, details of the methodology to be used by the Independent Auditor to conduct the Second Audit.
30. The Institute will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Second Audit directly to the FWO by 30 November 2021, setting out the draft Second Audit findings, and the facts and circumstances supporting the Second Audit findings. The Institute will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to the Institute without the FWO's approval.
31. The Institute 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 Institute will ensure the Independent Auditor does not provide the written report, or a copy of the same, to the Institute without the FWO's prior written approval.

Outcome of Audits

32. If any of the Audits identify underpayments to any current or former employees, the Institute will conduct a reconciliation of the amounts paid to those employees during the relevant pre-audit period and rectify any underpayments that are identified. The reconciliation period for each identified employee will be from the start of the relevant pre-audit period to the end of the relevant audit period.
33. The Institute 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.
34. If any employees identified in the Audits as having underpayments owing to them cannot be located within 60 days of the conclusion of each Audit, the Institute will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with

section 559 of the FW Act. The Institute will complete the required documents supplied by the FWO for this purpose.

35. 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 Institute 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 relevant modern awards (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 Institute and completed within any reasonable timeframe specified by the FWO.
36. If requested by the FWO, the Institute 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.

Employee Helpline

37. For a period of 6 months after the commencement of this Undertaking, the Institute will:
 - (a) maintain adequate resources to receive and address telephone and email enquiries from current or former employees to whom the relevant modern awards apply, regarding their entitlements, underpayments or related employment concerns (Employee Helpline);
 - (b) nominate a telephone number and create a designated email address for enquiries to be directed;
 - (c) include details of the telephone number and email address referred to above in the communications contained in Attachments B and C;
 - (d) take steps to respond to each telephone and 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; and
 - (e) provide a de-identified list of enquiries received by the Employee Hotline to the FWO every two months from the establishment of the Employee Hotline.

Notices – Internal and External

Media Release

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

Public Notice

39. Within 40 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, the Institute will place a notice in *The Weekend Australian* (**Public Notice**).
40. The Public Notice must:
 - (a) bear the name and logo of the Institute;
 - (b) appear within the first 10 pages of *The Weekend Australian*;
 - (c) be at least 10 cm x 8 cm; and
 - (d) contain wording in the form of Attachment C.
41. The Institute will inform the FWO when the Public Notice will be published and provide a copy to the FWO within seven days of its publication.

Website Notice

42. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, the Institute will place a notice on its website, accessible through a hyperlink on the front page of www.wehi.edu.au (**Website Notice**).
43. The Website Notice must:
 - (a) contain wording in the form of Attachment C;
 - (b) be displayed in at least size 10 font; and
 - (c) remain on the website for a period of one month.

Within 7 days of placing the Website Notice on its website, the Institute will provide to the FWO evidence of its placement.

Social Media Notice

44. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, the Institute will place a post on its Facebook page (**Social Media Notice**).
45. The Social Media Notice must:
 - (a) be posted to the Institute timeline, pinned to the top of the Facebook page in public view;
 - (b) remain on the Facebook page for a continuous period of at least one month; and
 - (c) contain wording in the form of Attachment C.

Within 7 days of posting the Social Media Notice to its Facebook page, the Institute will provide to the FWO evidence of the post.

No Inconsistent Statements

46. The Institute 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

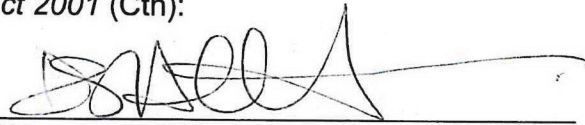
47. The Institute acknowledges that:

- (a) the FWO may;
 - (i) make this Undertaking (including any of the Attachments) 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 (including any of the Attachments) 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 Institute set out in clause 6 above, in respect of decisions taken regarding enforcement action in the event that the Institute is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by the Institute 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 Institute may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if the Institute 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 Institute in clause 6 above, and also in respect of the question of costs.

Executed as an undertaking

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



(Signature of director)

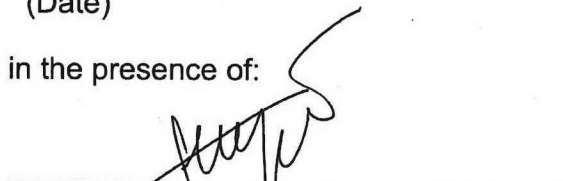
Douglas Hilton

(Name of director)

24 July 2020

(Date)

in the presence of:



(Signature of witness)

FENNY WIRADJAJA

(Name of witness)

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



[Insert name and role of Delegate]

29 July 2020

(Date)

Delegate for the FAIR WORK

OMBUDSMAN - MARK SCULLY, DEPUTY FAIR WORK OMBUDSMAN - COMPLIANCE & ENFORCEMENT

in the presence of:



(Signature of witness)

Cheryl Tam

(Name of Witness)

Schedule A

No	Employee	[Name of instrument and clause contravened]	Period	Award underpayment	Total payment made by WEHI	Interest	Total payment (excl super)
1.	Example Jo Blogs	Clerks Private Sector Award 2010: Clause x – overtime Clause y - min engagement period	01.01.2014 – 30.10.16				

Attachment A – Letter of Assurance

Mark Scully
Deputy Fair Work Ombudsman - Operations
GPO Box 9887
MELBOURNE VIC 3001

Dear Mr Scully

I am writing on behalf of the Walter and Eliza Hall Institute of Medical Research (the Institute) in my capacity as the Director of the Institute.

This letter follows a process where the Institute self-reported that a number of underpayments had occurred between 1 January 2014 and 13 October 2019.

The Institute agreed to enter into an Enforceable Undertaking with the Fair Work Ombudsman (FWO).

I write to provide the FWO with my assurance that I am satisfied:

- the process by which the Institute, as assisted by Deloitte, calculated the underpayments to its current and former employees in the correct manner; and
- as of [date] all former and current employees impacted by the underpayments, apart from those who have not been able to be located by the Institute, have been paid rectification payments by the Institute, which in most situations are in excess to, and above, the employees' entitlements under the relevant awards.

The Institute has remediated all issues as a matter of priority and is committed to minimising the risk of future non-compliance.

Sincerely



Douglas Hilton AO FAA FTSE FAHMS

Director, Walter and Eliza Hall Institute of Medical Research
The Lorenzo and Pamela Galli Chair in Medical Biology
Professor of Medical Biology and Head of Department of Medical Biology Honorary
Principal Fellow, School of BioSciences
The University of Melbourne

Attachment B – Apology to employees

Dear <insert name>

As you may be aware, the Walter and Eliza Hall Institute (**the Institute**) has admitted to the Fair Work Ombudsman (**FWO**) that it contravened the *Fair Work Act 2009* (Cth) (**FW Act**) by failing to pay some employees in accordance with the relevant provisions of the following applicable modern awards: the *Professional Employees Award 2010*, *Miscellaneous Award 2010*, *Manufacturing and Associated Industries Award 2010*, *Clerks Award 2010* and the *Graphic Arts, Printing and Publishing Award 2010*.

By [date] the Institute rectified all underpayments to current and former employees, provided further details of the underpayments to those persons and sincerely apologised.

The Institute has recently entered into an enforceable undertaking with the FWO in relation to the contraventions of the FW Act. As part of the enforceable undertaking entered into with the FWO, the Institute has committed to ensure ongoing compliance with Commonwealth legislation.

If you have questions that you wish to discuss directly discuss with the Institute you can contact our enquiry line on <insert telephone number/ email address>. 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. You can contact the Institute's enquiry line via <insert email address or telephone number>.

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

Please accept my sincere apologies and thank you for your understanding as we resolve this important matter

Yours sincerely

Attachment C – Form of Public, Website, Social Media and Workplace Notice

The Institute recently undertook a review of its payroll systems and determined that some employees had been underpaid in accordance with applicable modern awards.

On [date], the Institute informed the Fair Work Ombudsman (**FWO**) that a number of employees had been underpaid and that, by [date], these underpayments had been fully repaid and the situation rectified. The Institute has entered into an enforceable undertaking with the FWO and has committed to ensure ongoing compliance with Commonwealth legislation.

The Institute expresses its sincerest regrets and apologises for these underpayments, and has contacted affected employees.

If you worked for the Institute during the period 1 January 2014 to 13 October 2019 and have further queries or questions relating to your employment, please contact the Institute directly through a non-confidential enquiry line on <insert contact number or at <email address>.

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