

### Section 715 Enforceable Undertaking

#### PARTIES

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:
  - (a) Aged Care Services Australia Group Pty Ltd (ACN 110 281 760) (**ACSAG**); and
  - (b) Japara Healthcare Limited (ACN 168 631 052) (**Japara**),for the purposes of section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**).

#### BACKGROUND

2. ACSAG is a wholly-owned subsidiary of Japara and currently operates 39 residential aged care facilities at various locations throughout Victoria, New South Wales, South Australia and Tasmania. ACSAG employs more than approximately 4,500 employees including registered nurses, allied health workers and support staff to work at its facilities. Employees are employed in a mix of full time, part time and casual or temporary roles.
3. In late November 2014, ACSAG undertook a review of its processes for the payment of overtime rates of pay. This review identified significant deficiencies in the processes associated with payment of overtime entitlements, which included a manual approval process for payment of overtime requiring two levels of management to approve payment in writing before overtime rates were paid by the payroll department.
4. An initial audit undertaken by Japara identified that between 1 November 2008 and 30 November 2014 (**Relevant Period**), 4,850 current and former employees were underpaid approximately \$4,782,785 in overtime entitlements where they worked more than 8 hours on a day shift, 10 hours on a night shift or more than 76 hours in a fortnight (**the Overtime Underpayments**). The Overtime Underpayments range from \$100 or less (1,730 employees) to up to more than \$5,000 per employee (212 employees).
5. In early December 2014, Japara, via its solicitors, contacted the FWO and reported the Overtime Underpayments by ACSAG.

6. Japara and ACSAG acknowledge that the Overtime Underpayments occurred due to a failure to implement adequate systems and processes, commensurate with the size of its workforce and the number of industrial instruments applying at ACSAG facilities, to ensure correct payment of all wage-related entitlements to its employees.
7. Japara and ACSAG have worked with the FWO to address the Overtime Underpayments and at all times have indicated their willingness to:
  - (a) rectify the Overtime Underpayments to employees;
  - (b) identify further instances of underpayments of overtime entitlements in the Relevant Period not identified in the first audit; and
  - (c) implement business changes to prevent future contraventions and to ensure future compliance with Industrial Instruments and workplace laws.
8. The FWO recognises that between December 2014 and the execution of this Undertaking, Japara and ACSAG took a number of positive steps to implement corrective actions, notify current and former employees about the Overtime Underpayments and to rectify identified underpayments, including:
  - (a) implementing processes and procedures to prevent further contraventions, and conducting training of managers responsible for overtime payment approvals;
  - (b) writing to all current and former employees regarding the Overtime Underpayments, advising whether the employee is affected, the process being undertaken to address the Overtime Underpayments and apologising for the underpayments;
  - (c) writing to all former employees identified as being underpaid in the Relevant Period at their last known address, and asking current employees to encourage any known former employees who may have new contact details to approach ACSAG with their updated contact details;
  - (d) notifying and meeting with unions who represent workers employed by ACSAG;
  - (e) providing additional resources to handle employee or former employee telephone queries and claims; and
  - (f) rectifying underpayments to affected employees whose underpayments total \$5,000 or less, including the payment of 2,112 employees amounts totalling \$1,412,863 prior to the end of 2014.



## COMMENCEMENT

9. This Undertaking comes into effect when:
- (a) the Undertaking is executed by Japara and ACSAG; and
  - (b) the FWO accepts the Undertaking so executed.

## CONTRAVENTIONS

10. The FWO has formed the belief, and ACSAG and Japara admit, that by failing to pay overtime rates of pay for all periods of overtime worked by employees pursuant to the instruments listed in Schedule A applying at 41 sites in the Relevant Period, ACSAG contravened:
- (a) Item (2)(1) of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (TPC Act), by contravening a term of an award-based transitional instrument;
  - (b) Item (2)(2) of Schedule 16 of the TPC Act, by contravening a term of an agreement-based transitional instrument;
  - (c) Section 45 of the FW Act, by contravening a term of a modern award; and
  - (d) Section 50 of the FW Act, by contravening a term of an enterprise agreement.

## UNDERTAKINGS

11. Upon the commencement of this Undertaking and for the purposes of section 715 of the FW Act:
- (a) the FWO accepts the Undertaking as being given by Japara and ACSAG in relation to the contraventions referred to in paragraph 10 above; and
  - (b) Japara and ACSAG undertake to do the things set out in paragraphs 12 to 32 below.

### **Governance structures to ensure workplace relations compliance**

12. By no later than 31 December 2015, Japara will fully implement the new workplace management system announced to its shareholders in November 2014, which will include a fully electronic time recording system that will better ensure accurate payroll calculation of any overtime loadings or penalties that apply under each fair work instrument that applies to ACSAG.
13. Within 60 days of the commencement of this Undertaking, Japara will, or will ensure that ACSAG:
- (a) develop and implement systems and processes to ensure:

- (i) that any monetary entitlements not automatically calculated and paid in the current payroll system in accordance with the terms of an applicable award, enterprise agreement or transitional instrument, are paid by ACSAG for all occasions where they arise in respect of any of its employees;
  - (ii) future compliance with any transferring instruments applicable to transferring employees at any site that ACSAG acquires or purchases;
  - (iii) that current and future employees are aware of the award, enterprise agreement or transitional instrument that applies to their employment at a particular ACSAG facility and when they have an entitlement to payment of overtime rates of pay; and
  - (iv) internal reporting and investigation of employee complaints, dispute notifications or inquiries or investigations by the FWO that allege non-payment or incorrect payment of monetary entitlements by ACSAG, to ensure that there are no underlying payroll or process issues responsible for the alleged non-compliance;
- (b) register for an online My Account at [www.fairwork.gov.au](http://www.fairwork.gov.au); and
  - (c) provide to the FWO evidence of compliance with the undertakings above, including written details of the implementation of systems and processes implemented in satisfaction of the undertaking in paragraph (a) above.

#### **Audit and rectify remaining overtime underpayments**

14. Japara will, at its own expense, engage a third party auditor to undertake a further audit of all overtime entitlements in the Relevant Period (**Full Audit**). The Full Audit will be conducted in three phases as follows:
  - (a) Phase 1 will undertake a further assessment of the Overtime Underpayments of ACSAG employees in the Relevant Period identified in the initial audit, including those employees for whom no Overtime Underpayment was identified, to ensure that the underpayments were correctly identified and calculated.
  - (b) Phase 2 will audit any further instances of time worked by employees in the Relevant Period that would constitute overtime and attract loadings or penalties (however described) under the instruments in Schedule A that were not paid and were not otherwise identified in Phase 1.
  - (c) Phase 3 will audit whether any other entitlements were incorrectly calculated or not paid as a consequence of an underpayment of overtime identified in Phase 1



and Phase 2 (such as superannuation, leave loading or allowances), to determine any further underpayment of entitlements in the Relevant Period.

15. By no later than the completion of Phase 1, Japara will provide to the FWO, for approval, a list of the overtime provisions in each of the Schedule A instruments to be audited in Phase 2 and the methodology to be applied.
16. The Full Audit will be completed by no later than 30 November 2015.
17. By no later than 14 days after the completion of the Full Audit, Japara will pay, or will ensure that ACSAG pays, all amounts owed to any employee of ACSAG identified in the Full Audit who remains employed by ACSAG at that time.
18. Japara and ACSAG agree that no retrospective adjustments will be made to employee leave accruals because of any overtime hours having been paid and counted as ordinary hours for leave accrual purposes.
19. Proof of payment of any amounts paid in accordance with paragraph 17 will be provided to the FWO within 14 days of the payment(s) being made by Japara or ACSAG.
20. For the period of 12 months after completing the Full Audit, ACSAG, or Japara on behalf of ACSAG, will:
  - (a) take all reasonable steps to locate any employees who are no longer employed by ACSAG and who are identified in the Full Audit as being owed an amount of money for underpaid overtime entitlements, including but not limited to, taking steps to ascertain their current residential address and contacting them by telephone, post or email to:
    - (i) advise them that they are owed money;
    - (ii) explain the process for claiming the money owed to them; and
  - (b) report to the FWO after every four months on the attempts to locate former employees, and the payments made to any former employees located and paid in the preceding four month period.
21. Within 7 days of the end of the period specified in paragraph 20, ACSAG, or Japara on behalf of ACSAG, will:
  - (a) pay any amounts owed to former employees who could not be located within the period specified in paragraph 20, to the Commonwealth (through the Office of the Fair Work Ombudsman), pursuant to section 559(1) of the FW Act and in

discharge of the liability of ACSAG to make further payments to those persons for the owed amounts; and

- (b) provide the FWO with a report on the former employees who could not be located containing details of the amount owed to them, their last known contact details, date of birth, details of the bank account into which they usually received their wages, visa details (if any), and professional registration number (if any) for nurses or other registered practitioners.

#### **Employee assistance**

- 22. For current ACSAG employees whose underpayment exceeds \$10,000, Japara agrees to offer the employee the opportunity to access independent financial advice up to the value of \$500 regarding the method and timing of payment of the underpayments to them.
- 23. For a period of 12 months after the commencement of this Undertaking, ACSAG will maintain adequate resources to receive telephone enquiries and monitor a designated email address for all persons engaged by ACSAG in the Relevant Period to make enquiries about any underpayment amount owing to them.

#### **Donation to medical research**

- 24. Japara will donate \$20,000 to Alzheimer's Australia Dementia Research Foundation Ltd (ABN 79 081 407 534) by 31 July 2015 for the purposes of medical research into dementia.
- 25. Japara will provide proof of the donation to the FWO within 7 days of payment.

#### **Public notice**

- 26. ACSAG, or Japara on behalf of ACSAG, will cause to be placed, within 28 days of the execution of this Undertaking, a notice in The Australian newspaper that:
  - (a) is in the form of Schedule B;
  - (b) bears the company name and logo of ACSAG;
  - (c) appears on either of page 3 or page 5 of the relevant edition; and
  - (d) measures at least 15 cm x 7.4 cm in size.
- 27. ACSAG, or Japara on behalf of ACSAG, will provide to the FWO evidence of the public notice referred to above within 7 days of publication.

### **Workplace relations training**

28. Within 120 days of the commencement of this Undertaking, ACSAG, or Japara on behalf of ACSAG, will design and implement at its own cost, a training program for all roles with managerial responsibility for human resources, employee entitlements or payroll functions on behalf of ACSAG (Training) that relates to:
- (a) compliance with workplace instruments that currently apply to ACSAG employees (and in particular the circumstances in which overtime rates may apply);
  - (b) the provisions of the FW Act relating to transfer of business and compliance with transferring instruments; and
  - (c) the systems and processes developed and implemented in accordance with paragraph 13(a) above.
29. Japara, or ACSAG if it develops the Training, will provide to the FWO a copy of the training materials to be used in the Training and a list of the specific job titles (including the entity that employs the person in that role, if applicable) the Training will be delivered to.
30. For a period of 3 years from the commencement of the Undertaking, Japara and/or ACSAG will ensure that the Training is provided to any new employees or contractors who acquire managerial responsibilities for human resources, employee entitlements or payroll functions for ACSAG.

### **Future audits**

31. Japara or ACSAG will cause to have performed by an accounting or audit professional, and at their own expense, an audit of compliance by ACSAG with the FW Act and *Fair Work Regulations 2009* (Cth) relating to the pay and conditions of employees of ACSAG (Future Audits) as follows:
- (a) the Future Audits will be conducted for a period of 3 years, commencing with the financial year ending 30 June 2016;
  - (b) the Future Audits will assess a sample of at least 5% of the total workforce of ACSAG, with the sample to be representative of the different work locations, industrial instruments, wage classifications and type or category of work that apply across ACSAG's business; and
  - (c) a copy of the methodology to be applied in the Future Audits will be provided to the FWO by no later than 31 May in each year of the Future Audits.



32. A copy of the outcomes of the Future Audits will be provided to the FWO within 7 days of being provided to Japara and/or ACSAG, and Japara and/or ACSAG agree to provide the FWO with a copy of documents used or relied upon in the Future Audit upon request by the FWO.

#### ACKNOWLEDGEMENTS

33. Japara and ACSAG acknowledge that:
- (a) the FWO may:
    - (i) 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](http://www.fairwork.gov.au);
    - (ii) issue a media release in relation to this Undertaking or from time to time publicly refer to the Undertaking and its terms;
    - (iii) release a copy of this Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
  - (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 in this Undertaking;
  - (c) if the FWO forms the belief that Japara and/or ACSAG 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;
  - (d) consistent with section 715(3) of the FW Act, Japara and/or ACSAG may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.
34. The FWO reserves the right to rely on the terms of this Undertaking and the admissions made herein in respect of any future proceedings brought by the FWO against Japara or ACSAG in relation to any future contraventions of Commonwealth workplace laws.
35. Japara and ACSAG agree that they will not, and will take reasonable steps to ensure that their respective officers, employees or agents do not, make any statement, orally, in writing or otherwise, which conveys or implies or reasonably conveys, or implies anything inconsistent with the terms of this Undertaking.



Executed as an undertaking

EXECUTED by Japara Healthcare Limited (ACN 168 631 052) in accordance with section 127(1) of the Corporations Act 2001 (Cth):

  
\_\_\_\_\_  
(Signature of director)

MARK ANDREW SUDHOLZ  
\_\_\_\_\_  
(Name of director)

4 May 2015  
\_\_\_\_\_  
(Date)

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

Kathryn Davies  
\_\_\_\_\_  
(Name of witness)

  
\_\_\_\_\_  
(Signature of director/company secretary)

JOHN MCKENNA  
\_\_\_\_\_  
(Name of director/company secretary)


4 May 2015  
\_\_\_\_\_  
(Date)

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

Kathryn Davies  
\_\_\_\_\_  
(Name of witness)

EXECUTED by Aged Care Services Australia Group Pty Ltd (ACN 110 281 760) in accordance with section 127(1) of the Corporations Act 2001 (Cth):

  
\_\_\_\_\_  
(Signature of director)

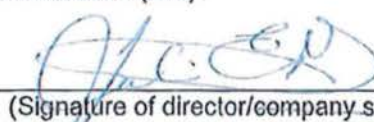
MARK ANDREW SUDHOLZ  
\_\_\_\_\_  
(Name of director)

4 May 2015  
\_\_\_\_\_  
(Date)

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

Kathryn Davies  
\_\_\_\_\_  
(Name of witness)

  
\_\_\_\_\_  
(Signature of director/company secretary)

JULIE ELIZABETH REED  
\_\_\_\_\_  
(Name of director/company secretary)

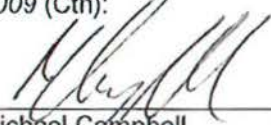
4 May 2015  
\_\_\_\_\_  
(Date)

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

Kathryn Davies  
\_\_\_\_\_  
(Name of witness)

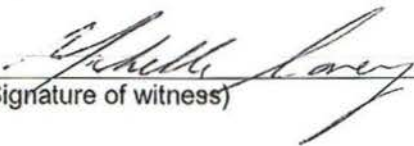
ACCEPTED by the Fair Work Ombudsman pursuant to section 715(2) of the *Fair Work Act 2009* (Cth):

  
\_\_\_\_\_  
Michael Campbell  
Deputy Fair Work Ombudsman – Operations

5 MAY 2015  
\_\_\_\_\_  
(Date)

Authorised delegate pursuant to an instrument of delegation made pursuant to section 683 of the FW Act

in the presence of:

  
\_\_\_\_\_  
(Signature of witness)

MICHAEL CAREY  
\_\_\_\_\_  
(Name of Witness)

#### SCHEDULE A - LIST OF INSTRUMENTS CONTRAVENED

1. *Aged Care General Services (State) Award 2006* [AN120011]
2. *Nursing Homes, etc, Nurses (State) Award* [AN120387]
3. *Nursing Homes Award* [AN170121]
4. *Health Services Employees Award* [AN150064]
5. *Health and Allied Services - Private Sector - Victoria Consolidated Award 1998* [AP783872]
6. *Nurses (Victorian Health Services) Award 2000* [AP790805]
7. *Aged Care Award 2010* [MA000018]
8. *Nurses Award 2010* [MA000034]
9. *The Park Group Nursing Enterprise Agreement 2004* [AG836076]
10. *ANF and Brighton Aged Care Nursing Employee Workplace Agreement 2006* [AC306553]
11. *ACSAG (Central Park & Ors) ANF & HSU Collective Agreement 2006 – 2008* [CAUN061382537]
12. *ACSAG (Narracan & Ors) ANF & HSU Collective Agreement 2006 – 2008* [CAUN061381393]
13. *Aged Care Services Australia Group Pty Ltd, ANF & HSU Enterprise Agreement 2009* [AE873924] (including incorporated terms of the Awards referred to in item 3 and 4 above)
14. *Blue Cross Community and Residential Care Services Group, ANF and HSU Enterprise Agreement 2009* [AE873916]
15. *Aged Care Services Australia Group Pty Ltd (Sandhill and Tamar Park) Nursing Agreement 2009-2013* [AE887886]
16. *Aged Care Services Australia Group Pty Ltd Sandhill & Tamar Park General Staff Agreement 2010-2013* [AE889754]
17. *Aged Care Services Australia Group Pty Ltd, NSWNMA & HSU Enterprise Agreement 2010* [AE401025]
18. *Mitcham & Oaklands Residential Care Facilities and ANF Nursing Employees Enterprise Agreement 2013* [AE402013]
19. *The Homestead at Walkley Heights Residential Care Facility and ANF Nursing Employees Enterprise Agreement 2013* [AE402014]
20. *Trevu House Residential Care Facility and ANF Nursing Employees Enterprise Agreement 2013* [AE402015]
21. *Aged Care Services Australia Group & ANF South Australian Branch, Nursing Employees Enterprise Agreement 2011* [AE402218]
22. *Aged Care Services Australia Group Pty Ltd, ANF & HSU Enterprise Agreement 2014* [AE408278]
23. *Aged Care Services Australia Group Pty Ltd - Nurses and Aged Care Employees Enterprise Agreement 2014* [AE410864]
24. *Aged Care Services Australia Group Pty Ltd, NSWNMA & HSU NSW Branch Enterprise Agreement 2014* [AE411607]



## SCHEDULE B - FORM OF PUBLIC NOTICE

### Contravention of the Fair Work Act by Aged Care Services Australia Pty Ltd

Aged Care Services Australia Group Pty Ltd (ACSAG) employs approximately 4,500 employees including registered nurses, allied health workers and support staff across 39 residential aged care facilities throughout Australia.

As a result of a review of ACSAG's payroll systems, it has been identified that ACSAG has inadvertently underpaid employees' overtime entitlements under various enterprise agreements and awards during the period from 1 November 2008 to 30 November 2014.

When the underpayments were discovered, ACSAG considered that this amounted to a contravention of the various enterprise agreements and awards that applied to ACSAG's employees, which in turn amounted to a contravention of the *Fair Work Act 2009 (Cth)* (FW Act). Following the discovery, ACSAG's representatives acted as soon as possible to notify the Fair Work Ombudsman (FWO) of the nature of the contravention, and, since December 2014, ACSAG and its parent company, Japara Healthcare Limited, have been working together with the FWO in an open and cooperative manner to rectify the underpayments.

ACSAG also undertook the following remedial actions:

- engaging external consultants to design and implement a computational tool to calculate the estimated underpayments due to current and former employees, and engaging a forensic accountant to review and verify that calculation;
- taking steps to pay the amount of underpayment to affected employees, including seeking to inform former employees of the prospect they may be affected by the underpayment, and the way in which they can have any claim investigated;
- notifying and meeting with the various trade unions which represent workers employed by ACSAG to ensure they were briefed and well placed to advise members who may be affected by the issue;
- providing additional internal resources to handle employee or former employee telephone queries and claims to support the efficient resolution of any potential underpayments;
- conducting training of managers responsible for overtime payment approvals to ensure the process failures that led to the underpayments did not continue; and
- issuing an apology to employees and former employees who were affected by the underpayments.

ACSAG and its parent company have concluded the terms of an enforceable undertaking with the FWO setting out agreement regarding these and further remedial actions (available at [www.fairwork.gov.au](http://www.fairwork.gov.au)). As part of this undertaking, ACSAG has formally admitted to the FWO that it contravened the FW Act in the manner described above.

ACSAG expresses its sincere regret and apologises unreservedly to its employees for the contraventions of the FW Act. The company commits to current and prospective employees that it will comply in future with all requirements of the various enterprise agreements and modern awards applicable to its employees, the FW Act and other applicable laws regulating the relationship between it and its employees.

If you worked for ACSAG between 1 November 2008 and 30 November 2014 and have queries or questions relating to your employment, or if you are unsure if you were paid correctly, please contact the Back Pay Helpdesk on (03) 9649 2100. Alternatively, please contact the FWO via its website at [www.fairwork.gov.au](http://www.fairwork.gov.au) or the Infoline on 13 13 94.

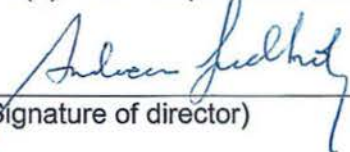


*Fair Work Act 2009*

**Section 715 Enforceable Undertaking - Variation**

1. This variation to an enforceable undertaking is made pursuant to section 715(3) of the *Fair Work Act 2009* (Cth).
2. On 5 May 2015, the Fair Work Ombudsman (**FWO**) accepted an enforceable undertaking from Aged Care Services Australia Group Pty Ltd (ACN 110 281 760) (**ACSAG**) and Japara Healthcare Limited (ACN 168 631 052) (**Japara**).
3. Japara and ACSAG have requested the FWO's consent to vary clause 12 of the enforceable undertaking by extending the date by which Japara will implement its workplace management system, including full electronic time recording systems.
4. The FWO consents to vary the date in clause 12 of the enforceable undertaking by deleting "31 December 2015" and replacing it with "31 March 2017".
5. The variation in paragraph 4 above is taken to be a term of the enforceable undertaking given by ACSAG and Japara from the date of the consent by the Fair Work Ombudsman, or her authorised delegate, to the variation.
6. All other terms of the enforceable undertaking remain unchanged.
7. ACSAG and Japara agree and acknowledge that a copy of this variation may be made available for public inspection by the FWO, including by posting a copy to the FWO's [website](http://www.fairwork.gov.au) at [www.fairwork.gov.au](http://www.fairwork.gov.au).

SIGNED by **Japara Healthcare Limited (ACN 168 631 052)** in accordance with section 127(1) of the *Corporations Act 2001* (Cth):

  
 \_\_\_\_\_  
 (Signature of director)

MARK ANDREW SUDHOLZ  
 \_\_\_\_\_  
 (Name of director)

29/6/16  
 \_\_\_\_\_  
 (Date)

  
 \_\_\_\_\_  
 (Signature of director/company secretary)

Bruce Craig Paterson  
 \_\_\_\_\_  
 (Name of director/company secretary)

29/6/16  
 \_\_\_\_\_  
 (Date)



in the presence of:

Gina Melis  
(Signature of witness)

GINA MELIS  
(Name of witness)

in the presence of:

Gina Melis  
(Signature of witness)

GINA MELIS  
(Name of witness)

EXECUTED by **Aged Care Services Australia Group Pty Ltd (ACN 110 281 760)** in accordance with section 127(1) of the *Corporations Act 2001* (Cth):

Mark Andrew Sudholz  
(Signature of director)

Mark Andrew Sudholz  
(Name of director)

29/6/16  
(Date)

Chris Price  
(Signature of director/company secretary)

Christopher Murray Price  
(Name of director/company secretary)

29/6/16  
(Date)

in the presence of:

Gina Melis  
(Signature of witness)

GINA MELIS  
(Name of witness)

in the presence of:

Gina Melis  
(Signature of witness)

GINA MELIS  
(Name of witness)

CONSENTED TO by the **Fair Work Ombudsman** pursuant to section 715(3) of the *Fair Work Act 2009* (Cth):

Michael Campbell  
Michael Campbell  
Deputy Fair Work Ombudsman – Operations  
Authorised delegate pursuant to an  
instrument of delegation made pursuant to  
section 683 of the FW Act

in the presence of:

Louise Catu  
(Signature of witness)

29 AUGUST 2016  
(Date)

LOUISE CATU  
(Name of Witness)