



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Lai Yoong Ching and Swee Cheng Khong trading as Team Search Harvesting

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by Lai Yoong Ching and Swee Cheng Khong trading as Team Search Harvesting (**TSH**) for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

Background

2. TSH is in the business of supplying horticultural labourers, primarily to pick, plant and perform weeding on lettuce farms in the Darling Downs and Lockyer Valley in Queensland.
3. Between 1 January 2014 and 30 July 2015 (**Employment Period**), TSH employed 255 employees (**Employees**) on a casual basis to perform work at the Story Fresh farms.
4. The terms and conditions of the Employees' employment with TSH were governed by the *Horticulture Award 2010* (MA000028) (**Award**).
5. On or around 16 January 2015, the FWO commenced an investigation of TSH following a request for assistance (**RFA**) received from a former employee of TSH, in relation to the alleged underpayment of wages.
6. The preliminary investigation identified that the employee who lodged the RFA with the FWO was not the only employee potentially affected by the alleged contraventions and an audit into remaining employees' entitlements was commenced on 5 November 2015.
7. As a result of the investigations, the FWO determined that:

- (a) the Employees' classification under the Award was Level 1;
- (b) the Employees were entitled to be paid the following minimum rates of pay during their employment;

Period Commencing	Minimum Hourly Wage	Casual Hourly Rate
01/07/2013	\$16.37	\$20.40
01/07/2014	\$16.87	\$21.09
01/07/2015	\$17.29	\$21.61

- (c) the Employees were paid a flat rate of \$15 per hour for all hours worked when not paid a piece rate;
 - (d) TSH had contravened provisions of the Award with respect to piecework agreements, minimum wages and unpaid casual loading; and
 - (e) TSH had also contravened provisions of the FW Act with respect to issuing Fair Work Information Statements, paying amounts in full to employees (making unauthorised deductions) and failing to make and keep employee records.
8. As a result of the contraventions, the FWO assessed the total wage underpayments owed to all Employees during the Employment Period to be **\$15,892.33** gross.
 9. TSH subsequently acknowledged that it had underpaid the employee who lodged the RFA **\$3224.81** gross during 1 July 2014 to 31 December 2014 and have commenced repaying this amount as per the payment schedule contained in Attachment A.1.

10. TSH also acknowledge that it had underpaid the audited Employees a total of **\$12,667.52** gross during the Employment Period as set out in the summary table contained within Attachment A and has agreed to rectify the underpayments on or before the corresponding due dates for each listed employee.
11. TSH has at all times co-operated with the FWO and participated fully with the FWO's investigation.

Contraventions

12. The FWO has determined, and TSH admits, that TSH contravened section 44 of the FW Act by failing to issue Fair Work Information Statements to employees as required under the National Employment Standards (**NES**).
13. The FWO has determined, and TSH admits, that TSH contravened section 45 of the FW Act by failing to comply with the following provisions of the Award:
 - (a) Clause 10.4(b) of the Award, by failing to pay the Employees a casual loading; and
 - (b) Clause 14.1 of the Award, by failing to pay the Employees the applicable minimum hourly rate for all time worked.
14. The FWO has determined, and TSH admits, that TSH contravened section 323 of the FW Act which requires an employer to pay an employee, amounts payable in full, without deduction, unless permitted by section 324. Section 324 explains deductions which are permitted under the FW Act. The investigation and the audit found that TSH made deductions from employees' wages for the purposes of providing transport to and from the workplace. While these deductions could be viewed as being principally for the benefit of the employees concerned, they had not been authorised in writing in accordance with the FW Act.
15. The FWO has determined, and TSH admits, that TSH contravened sub-section 535(1) of the FW Act which provides that an employer must make, and keep for seven (7) years, employee records of the kind prescribed by the *Fair Work Regulations 2009* (**the Regulations**) in relation to each of its employees. As the employees of TSH were irregular hourly rate employees, TSH was required to make and keep records of each casual employee's days and hours of work.

(collectively, the **Contraventions**).

Commencement of Undertaking

16. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by TSH; and
 - (b) the FWO accepts the Undertaking so executed.
17. Upon the commencement of this Undertaking, TSH undertakes to assume the obligations set out below in paragraph 18.

Undertakings

18. For the purposes of section 715 of the FW Act, TSH undertakes to:

Rectify underpayments

- (a) within 21 days of the execution of this Undertaking, use reasonable efforts to locate each employee listed in Attachment A for the purpose of complying with the undertaking in subparagraph 18(b), including but not limited to:
 - (i) taking steps to ascertain the current residential address, email address, mobile telephone number and/or social media profiles of each employee; and
 - (ii) contacting each employee, using any current or last-known contact details, to advise them they are owed money and explain the process for payment of the money owed to them.
- (b) pay the amounts owed to each employee on or before the due date as set out in the payment schedule in Attachment A (less all appropriate taxation which is to be remitted to the Australian Taxation Office) and also make appropriate superannuation contributions for the benefit of each eligible employee in accordance with sub-clause 21.2 of the Award;
- (c) within one (1) day of making a payment in compliance with subparagraph 18(b), issue a FW Act compliant payslip to the employee to whom the payment was made;
- (d) within seven (7) days of making a payment in compliance with subparagraph 18(b), provide evidence to the FWO that the payment has been made;
- (e) if an employee listed in Attachment A cannot be located:
 - (i) provide a report to the FWO on the attempts that were taken to locate the employee together with details of the amount owed to them and their last known contact details;
 - (ii) set aside the equivalent amount of the identified underpayment outlined in Attachment A and in the event that the employee makes contact, pay them within seven (7) days as per Undertakings 18(b), 18(c) and 18(d) above.

FWO MyAccount Registration

- (f) within 7 days of the execution of this Undertaking:
 - i. register with the FWO 'MyAccount' portal at 'www.fairwork.gov.au' and complete the profile, minimum pay rates and Award options through this portal;
 - ii. provide to the FWO the business' 'My Account' registration number;
 - iii. within 28 days of the execution of the Undertaking, at a mutually agreed time and location, demonstrate to an officer of the Fair Work Ombudsman knowledge of the use of MyAccount including in relation to accessing the current Award minimum pay rates and Public Holiday penalty rates.

Future workplace relations compliance

- (g) ensure compliance at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the Horticulture Award and the FW Act, by developing systems and processes to ensure ongoing compliance with those requirements;
- (h) provide to the FWO, within 60 days of the execution of this Undertaking, written

details of the systems and processes implemented in satisfaction of the undertakings in paragraph 18(g) above designed to ensure such ongoing compliance. Without limitation, such systems and processes relating to:

- i. Ensuring employees receive the correct minimum rates of pay and entitlements, such as penalty rates and overtime rates;
- ii. Issuing payslips to employees within 1 working day of payment;
- iii. Keeping accurate and complete records to ensure employees receive their correct wages and entitlements.

Apology

- (i) within 14 days of the execution of this Undertaking send to the former Employee who lodged the RFA, a letter apologising for the Contraventions (**Apology Letter**) in the form of Attachment C to this Undertaking and provide the FWO a copy of the Apology Letter to be forwarded to the employee by the FWO on your behalf;

Public notice

- (j) place a public notice in the Saturday edition of the Toowoomba Chronicle (**Public Notice**) within 28 days of the FWO publishing a Media Release on its website in respect of this Undertaking in the terms set out in Attachment B;
- (k) provide a copy of the Public Notice to the FWO within 7 days of publication of the notice;

Workplace notices

- (l) within 28 days of the execution of this Undertaking display a notice in the form of Attachment D to this Undertaking (**Workplace Notice**):
 - i. for a period of at least 28 days in all locations where employees engaged by TSH are performing work; and
 - ii. in a manner which is reasonably capable of drawing the notice to the general attention of all persons engaged by TSH (for example, by placement on a staff noticeboard at each workplace in at least A3 size);
- (m) provide written details of the method/s of displaying or providing the Workplace Notice and photographic proof of its display to the FWO within seven (7) days of it first being displayed;

Employee education

- (n) issue information packs containing current versions of the FWO fact sheets listed below and a Fair Work Information Statement to all new employees on commencement with TSH;
 1. Fact sheet "About the Fair Work Ombudsman"
 2. Fact sheet "Employer obligations in relation to employee records and pay slips"
 3. Fact sheet "Fair Work Information Statement"

Workplace relations training

- (o) within three (3) months of the execution of this Undertaking, organise and ensure training of all persons engaged by TSH who have managerial responsibility for human resources, recruitment or payroll functions (**Training**);
- (p) ensure the Training relates to compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the rights and responsibilities of employers under the FW Act and the Award;
- (q) ensure the Training is conducted by an accredited workplace trainer; such person or organisation to be approved by the FWO and paid for by the Company;
- (r) provide the training materials to be used in the Training to the FWO no later than 14 days before the Training is to be conducted;
- (s) provide evidence of attendance at the Training to the FWO within seven (7) days of the Training being provided (including the name and position of all attendees and the date on which the Training was attended);
- (t) for a period of two (2) years from the execution of this Undertaking, ensure that training is conducted in the manner prescribed in paragraphs 18(o) to 18(s) above in relation to any new or existing employees who, after the commencement of this Undertaking, acquire managerial responsibilities that include human resources, recruitment or payroll functions on behalf of the Company;

Audit Activity

- (u) perform, or cause to have performed by a Certified Practising Accountant or employment law specialist, audits of TSH's compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the Award and the FW Act, in respect of the pay and conditions of at least 50% of all employees of TSH (Audit), for the following periods as follows:
 - i. the Audit for the first two full pay periods following 1 July 2016 is to be finalised by 30 September 2016
 - ii. the Audit for the first two full pay periods following 1 July 2017 is to be finalised by 30 September 2017;
- (v) provide to the FWO, within 14 days of the completion of each Audit, details of the methodology used to conduct the Audit and the outcomes of the Audit certified as correct by a Certified Practising Accountant or employment law specialist;
- (w) on request, provide to the FWO all employment records relied upon to undertake the audit within 14 days of such request being made;
- (x) in the event an Audit discloses contraventions of any applicable Commonwealth workplace laws and/or instruments, rectify all such contraventions within 14 days of the Audit being provided to the Company, including any and all underpayments to employees;
- (y) provide evidence of rectification of any contraventions disclosed by an Audit to the FWO within 14 days of rectification;

No Inconsistent Statements

19. TSH, Lai Yoong Ching and Swee Cheng Khong:

- (a) must not; and
 - (b) must ensure that each of its officers, employees or agents, do not, make any statement, orally or in writing or otherwise imply anything that is inconsistent with admission or acknowledgements contained in this agreement.
-

Acknowledgements

20. TSH acknowledges that:

- (a) the FWO may make this Undertaking (including any attachments) available for public inspection, including by posting it to its website at www.fairwork.gov.au (subject to the FWO taking any necessary steps to redact the names of individuals not party to the Undertaking);
- (b) the FWO may release a copy of this Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
- (c) the FWO may issue a media release in relation to this Undertaking and from time to time, publicly refer to the Undertaking and its terms;
- (d) the admissions made in the Undertaking may be relied upon by the FWO in respect of any future decision about enforcement action to be taken in relation to any future non-compliance with Commonwealth workplace relations obligations by TSH;
- (e) consistent with the Note to section 715(4) of the FW Act, this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this Undertaking;
- (f) if the FWO considers that TSH has contravened any of the terms of this Undertaking the FWO may apply to any of the Courts set out in section 715(6) of the FW Act for orders under section 715(7) of the FW Act;
- (g) consistent with section 715(3) of the FW Act, TSH may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO;

Executed as an undertaking

EXECUTED by Lai Yoong Ching and Swee Cheng Khong trading Team Search Harvesting, as Partners



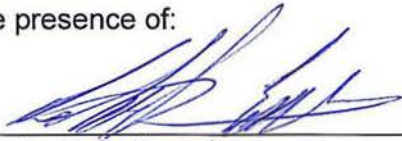
(Signature of Partner)

Lai Yoong Ching

17/5/2016

(Date)

in the presence of:



(Signature of witness)

Robert Evans

(Name of witness)




(Signature of Partner)

Swee Cheng Khong

17/5/2016

(Date)

in the presence of:



(Signature of witness)

Robert Evans

(Name of witness)

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



Steve Ronson

Executive Director Dispute Resolution and Compliance

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:



(Signature of witness)

19 May 2016

(Date)

PIA MORGAN

(Name of Witness)

ATTACHMENT A – WAGE UNDERPAYMENTS

Name as recorded on pay slips	01/01/2014 - 30/06/14	01/07/2014 - 30/06/2015	Total Underpayment	Payment due on or before
		\$62.43	\$62.43	29/04/2016
		\$45.68	\$45.68	29/04/2016
	\$29.71		\$29.71	29/04/2016
	\$28.36		\$28.36	29/04/2016
		\$38.07	\$38.07	29/04/2016
		\$18.27	\$18.27	29/04/2016
		\$25.89	\$25.89	29/04/2016
	\$21.60		\$21.60	29/04/2016
		\$70.05	\$70.05	6/05/2016
	\$10.80		\$10.80	6/05/2016
		\$79.18	\$79.18	6/05/2016
	\$6.75		\$6.75	6/05/2016
	\$194.41		\$194.41	6/05/2016
	\$75.60		\$75.60	13/05/2016
	\$5.40		\$5.40	13/05/2016
		\$290.82	\$290.82	20/05/2016
		\$109.64	\$109.64	27/05/2016
	\$55.36		\$55.36	27/05/2016
	\$24.31		\$24.31	27/05/2016
		\$53.30	\$53.30	27/05/2016
	\$8.11		\$8.11	27/05/2016
		\$7.62	\$7.62	27/05/2016
	\$6.75		\$6.75	27/05/2016
	\$31.05		\$31.05	27/05/2016
	\$515.76	\$461.36	\$977.12	24/06/2016
		\$7.62	\$7.62	1/07/2016
	\$74.27		\$74.27	1/07/2016
	\$24.31		\$24.31	1/07/2016
	\$124.22		\$124.22	1/07/2016
		\$100.50	\$100.50	1/07/2016
	\$1,062.01		\$1,062.01	29/07/2016
		\$118.76	\$118.76	5/08/2016
		\$207.08	\$207.08	5/08/2016
	\$74.26		\$74.26	12/08/2016
		\$200.99	\$200.99	12/08/2016
		\$86.79	\$86.79	19/08/2016
		\$103.54	\$103.54	19/08/2016
		\$118.76	\$118.76	26/08/2016
		\$7.62	\$7.62	26/08/2016
		\$38.07	\$38.07	26/08/2016
		\$44.16	\$44.16	26/08/2016
		\$25.89	\$25.89	26/08/2016
	\$122.87		\$122.87	2/09/2016
	\$18.91		\$18.91	2/09/2016
	\$18.91		\$18.91	2/09/2016
		\$79.18	\$79.18	2/09/2016
		\$15.23	\$15.23	2/09/2016
	\$318.62		\$318.62	9/09/2016

	\$179.67	\$179.67	16/09/2016
	\$263.41	\$263.41	23/09/2016
	\$7.62	\$7.62	23/09/2016
	\$71.56	\$71.56	23/09/2016
	\$18.27	\$18.27	23/09/2016
\$553.52	\$281.28	\$834.80	21/10/2016
	\$7.62	\$7.62	21/10/2016
\$217.35		\$217.35	21/10/2016
\$538.71		\$538.71	4/11/2016
	\$18.27	\$18.27	11/11/2016
	\$38.07	\$38.07	11/11/2016
	\$94.41	\$94.41	11/11/2016
\$133.67		\$133.67	11/11/2016
	\$200.99	\$200.99	18/11/2016
\$24.31		\$24.31	18/11/2016
\$187.69		\$187.69	25/11/2016
\$55.36		\$55.36	25/11/2016
\$228.19		\$228.19	2/12/2016
\$44.55		\$44.55	2/12/2016
\$135.03		\$135.03	9/12/2016
\$6.75		\$6.75	9/12/2016
	\$28.93	\$28.93	9/12/2016
\$692.61		\$692.61	30/12/2016
\$39.16		\$39.16	30/12/2016
\$29.71		\$29.71	30/12/2016
\$89.11		\$89.11	30/12/2016
	\$48.72	\$48.72	6/01/2016
\$6.75		\$6.75	6/01/2016
\$22.95		\$22.95	6/01/2016
\$126.91		\$126.91	6/01/2016
\$9.45		\$9.45	6/01/2016
\$14.85		\$14.85	6/01/2016
\$31.05		\$31.05	6/01/2016
	\$27.41	\$27.41	13/01/2017
	\$85.82	\$85.82	13/01/2017
\$86.41		\$86.41	13/01/2017
\$55.36		\$55.36	13/01/2017
	\$28.93	\$28.93	13/01/2017
\$47.25	\$126.38	\$173.63	20/01/2017
\$6.75		\$6.75	20/01/2017
	\$118.32	\$118.32	20/01/2017
\$604.86	\$179.67	\$784.53	10/02/2017
	\$15.23	\$15.23	17/02/2017
	\$12.18	\$12.18	17/02/2017
\$6.75		\$6.75	17/02/2017
\$28.35		\$28.35	17/02/2017
\$22.95		\$22.95	17/02/2017
\$16.20	\$22.84	\$39.04	17/02/2017
\$36.46		\$36.46	17/02/2017
\$409.05	\$290.82	\$699.87	10/03/2017
\$86.41	\$13.71	\$100.12	10/03/2017
	\$28.93	\$28.93	17/03/2017

		\$63.96	\$63.96	17/03/2017
	\$24.31		\$24.31	17/03/2017
	\$340.22		\$340.22	24/03/2017
		\$35.03	\$35.03	31/03/2017
		\$124.86	\$124.86	31/03/2017
	\$6.75		\$6.75	31/03/2017
TOTAL FOR ALL EMPLOYEES			\$12,667.52	

ATTACHMENT A.1 – SCHEDULE OF AGREED UNDERPAYMENTS

Schedule of agreed payments for [REDACTED]

The underpayment of \$3224.81 relates to the period 1 July 2014 – 31 December 2014.

The FWO entered into an agreed payment schedule with TSH as outlined in the table below.

As at the date of execution of the Undertaking, all payments have been made according to the schedule contained within this Attachment.

Instalment number	Due Date	Instalment Amount	Total Paid	Amount Outstanding
1	15/01/16	\$250.00	\$250.00	\$2974.81
2	22/01/16	\$250.00	\$500.00	\$2724.81
3	29/01/16	\$250.00	\$750.00	\$2474.81
4	05/02/16	\$250.00	\$1000.00	\$2224.81
5	12/02/16	\$250.00	\$1250.00	\$1974.81
6	19/02/16	\$250.00	\$1500.00	\$1724.81
7	26/02/16	\$250.00	\$1750.00	\$1474.81
8	04/03/16	\$250.00	\$2000.00	\$1224.81
9	11/03/16	\$250.00	\$2250.00	\$974.81
10	18/03/16	\$250.00	\$2500.00	\$724.81
11	25/03/16	\$250.00	\$2750.00	\$474.81
12	01/04/16	\$250.00	\$3000.00	\$224.81
13	08/04/16	\$224.81	\$3224.81	\$0

ATTACHMENT B – FORM OF PUBLIC NOTICE

Contraventions of the *Fair Work Act 2009 (FW Act)* and the *Horticulture Award 2010 (Award)* by Lai Yoong Ching and Swee Cheng Khong trading as Team Search Harvesting (TSH).

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that TSH contravened the FW Act and the Award.

The FWO has found that TSH contravened the FW Act and the Award by failing to pay casual employees (where not covered by a written piecework agreement as per Clause 15 of the Award) engaged in picking, planting and weeding between 1 January 2014 and 30 June 2015 the following:

- The minimum hourly rate of pay;
- a casual loading for all hours worked;

TSH has formally admitted to the FWO that these contraventions occurred and have entered into an Enforceable Undertaking with the FWO (available at www.fwo.gov.au) committing to a number of measures to remedy the contraventions, including by rectifying the underpayments to the employees affected by the contraventions and changing workplace practices.

TSH expresses their sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, TSH gives a commitment that such conduct will not occur again and will comply with all requirements of the Commonwealth workplace relation laws in the future.

If you worked for TSH and have queries or questions relating to your employment, please contact Cheng on [REDACTED]. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the infoline on 13 13 94.

ATTACHMENT C – LETTER OF APOLOGY

<Date>

<Employee Name & Address>

Dear <Employee Name>

We write to apologise on behalf of Lai Yoong Ching and Swee Cheng Khong trading as Team Search Harvesting (TSH) for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (FWO) determined that TSH contravened the *Fair Work Act 2009* by failing to pay you the following entitlements under the Horticulture Award 2010 (MA000028):

- minimum wages
- the casual loading

The investigation determined that you were affected by the above contraventions.

TSH is committed to, and are taking steps to remedy the contraventions, including by:

- Paying you the amount that you have been underpaid (\$3224.81); and
- Committing to future compliance.

TSH have formally admitted to the FWO that they did not comply with their obligations under Commonwealth workplace relations laws and have entered into an Enforceable Undertaking with the FWO, a copy of which is available from the FWO website at www.fairwork.gov.au. As part of the Enforceable Undertaking, TSH has committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

We express sincere regret and apologise to you for failing to comply with our lawful obligations.

Should you have any questions, please contact Cheng on [REDACTED]

Yours sincerely

Lai Yoong Ching (Partner)
Team Search Harvesting

Swee Cheng Khong (Partner)
Team Search Harvesting

Attachment D – Form of Workplace Notice

Contraventions of the Fair Work Act 2009 (**FW Act**) and the Horticulture Award 2010 (**Award**) by Lai Yoong Ching and Swee Cheng Khong trading as Team Search Harvesting (**TSH**).

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) into allegations that TSH contravened the FW Act and the Award.

The FWO has found that TSH contravened the FW Act and the Award by failing to pay casual employees (where not covered by a written piecework agreement as per Clause 15 of the Award) engaged in picking, planting and weeding between 1 January 2014 and 30 June 2015 the following:

- The minimum hourly rate of pay;
- a casual loading for all hours worked;

TSH has formally admitted to the FWO that these contraventions occurred and have entered into an Enforceable Undertaking with the FWO (available at www.fwo.gov.au) committing to a number of measures to remedy the contraventions, including by rectifying the underpayments to the employees affected by the contraventions and changing workplace practices.

TSH expresses their sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, TSH gives a commitment that such conduct will not occur again and will comply with all requirements of the Commonwealth workplace relation laws in the future.

TSH are committed to ensuring that our employees are paid at least the rates of pay as contained in the Modern Award which covers their employment where not covered by a written piecework agreement as per Clause 15 of the Award. From 1 July 2015 employees covered by the *Horticulture Award 2010* are as follows:

Level	Ordinary Rate of Pay Full time and part time employees	Ordinary Rate of Pay for Casual Employees	Public Holiday Rate Casual employee
Level 1	\$17.29	\$21.61	\$38.90
Level 2	\$17.79	\$22.24	\$40.03
Level 3	\$18.30	\$22.88	\$41.18
Level 4	\$18.99	\$23.74	\$42.73

If you worked for TSH and have queries or questions relating to your employment, please contact Cheng on [REDACTED]. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the infoline on 13 13 94.