

Enforceable undertaking given by:

John Holland Rail Pty Ltd (ACN 009 252 653)

And

John Holland Pty Ltd (ACN 004 282 268)

**to Comcare for the purpose of clause 2 of Schedule 2 of the
*Occupational Health and Safety Act 1991***

Purpose

- 1.1. The commitments articulated in this Undertaking are enforceable undertakings given in accordance with clause 16 of schedule 2 of the Act, to Comcare in fulfilment of obligations under the Act.
- 1.2. This Undertaking is given by the Employers as a consequence of of the Incident, and as evidence of the remedial action and future safety commitments that they propose and outline in this Undertaking.

Definitions

- 2.1. In this Undertaking:

"**the Act**" means *the Occupational Health And Safety Act 1991* (Cth). "**the Employers**" means John Holland Rail Pty Ltd (ACN 009 252 653) and John Holland Pty Ltd (ACN 004 282 268) jointly.

"**the Incident**" means the incident summarised at paragraph 4.4 of this Undertaking and includes (but is not limited to) the matters causing or contributing to that incident.

"**Comcare**" means the body corporate established by section 68 of the *Safety, Rehabilitation and Compensation Act 1988*.

"**the Commitments**" means all acts, programs, measures, and things the Employers undertakes to do in accordance with this Undertaking including but not limited to those described at paragraph 8.

"**this Undertaking**" means this document and the undertakings expressed herein.

"the Proceedings" and "the Related Proceedings" have the meaning ascribed to it in paragraph 5.

"the Reporting Dates" are the dates listed in paragraph 9 being the dates on which the Employers will report to Comcare on the implementation of this Undertaking.

"the Report of Investigation" has the meaning ascribed to it in paragraph 5.

"the Undertaking Date" means the date the Undertaking is to have effect from, being the date on which it is executed by Comcare.

Background

- 3.1. The Employers are wholly owned subsidiaries of John Holland Group Pty Ltd (ACN 37 050 242 147) and operate nationally in all states of Australia.
- 3.2. Key operations of the Employers include railway design, construction, refurbishment, and maintenance. They have a workforce of approximately 8,000, including full time and part-time employees (as defined by the Act).
- 3.3. The Employers were granted a licence under Part VIII of the *Safety, Rehabilitation And Compensation Act 1988* (Cth) on 1 January 2007 which was in effect at the Undertaking Date and, as a consequence, for all relevant purpose the Employers are employers for the purposes of the Act.

Incident

- 4.1. On 27 April 2007, Yarra Trams awarded a contract to John Holland Pty Ltd ("JH") to upgrade the section of the St Kilda Light Rail in Melbourne which runs between Fitzroy Street, St Kilda and Fraser Street, Middle Park ("the Project").
- 4.2. JH subcontracted work on the Project to the John Holland Rail Pty Ltd ("JHR").
- 4.3. On about 30 May 2007, the JHR contracted Skilled Group Limited ("Skilled") to provide it with labour and personnel to conduct the Project's works. Pursuant to that contract, Skilled proposed and the JHR accepted 'M' to be one of those contract workers.
- 4.4. At approximately 4 am on 17 June 2007, in the course of his duties, 'M' used a Pandrol Clipper machine ("the Clipper") to fasten new rail track to concrete sleepers. In accordance with its function, 'M' commenced to run the Clipper along lengths of new track while engaging its hydraulic pads to "punch" metal clips (which were already positioned) into the new concrete sleeper's anchor point. Shortly after an incident occurred in which 'M's' right index finger was crushed and his right middle finger was lacerated. 'M' was hospitalized for approximately 36 hours and his right index finger was subsequently amputated approximately one centimetre above the knuckle.
- 4.5. Following the Incident, the Employers risk assessed the use of the Clipper, applied guarding to the Clipper to restrict access to the pads of the Clipper while it is in operation, and installed a "dead man" switch to the Clipper.

Investigation

- 5.1. On or about 25 July 2008, a Comcare Investigator completed a report of his investigation ("**the Report**") into the Incident. The findings of the Report identified opportunities for improvement.
- 5.2. On 22 August 2008, Comcare commenced proceedings [VID660/2008] in the Federal Court of Australia (Victorian Registry) claiming that, in view of the findings in the Report, the court should make a declaration that the JHR had contravened clause 2 of Part 1 of Schedule 2 to the Act and, consequently, impose a pecuniary penalty ("**the Proceedings**").
- 5.3. By Notice of Motion dated 25 March 2009, Comcare sought to join JH as a second respondent to the Proceedings. On 19 June 2009, the Federal Court of Australia ordered that JH be joined as a second respondent to the Proceedings.
- 5.4. By Notices of Motion dated 26 June 2009 and 2 March 2011, the Employers sought leave to appeal against interlocutory judgments in the Proceedings. The applications for leave to appeal were heard by the Full Court of the Federal Court of Australia in proceeding VID480/2009 and proceeding VID168/2011. The Proceedings, proceeding VID480/2009 and proceeding VID168/2011 are collectively referred to hereinafter as the "**the Related Proceedings**".

Acknowledgement

- 6.1. The Employers acknowledges:
 - (A) That they have obligations under section 16 of the Act to take all reasonably practicable steps to protect the health and safety of their employees at work, and that those obligations extend to contractors (as defined in section 5 of the Act) in respect of matters over which they have control.
 - (B) The findings and conclusion expressed in the Report and in particular that 'M' was exposed to a risk as a result of the work he was undertaking with the Clipper and that the Employers subsequently took steps to minimise that risk.
 - (C) That the Comcare Investigator reached conclusions in respect of the Incident.

Assurance about future behaviour

- 7.1. The Employers will:
 - (A) Do and ensure that their employees, agents, and contractors do all things reasonably necessary to prevent a reoccurrence of the Incident or the occurrence of any event similar to the Incident;
 - (B) Abstain, and ensure that their employees, agents, and contractors abstain, from doing any act, matter or thing which gave rise to, or allegedly gave rise to the Incident or could give rise to the occurrence of any event similar to the Incident; and

- (C) Ensure that they use their best endeavours to observe and implement industry best practice in respect of occupational health and safety and in compliance with the Act.

Occupational health and safety commitments

8.1. In particular, and without limitation to the generality of any of the undertakings given in this Undertaking, the Employers shall perform the following Commitments by the relevantly specified date:

- (A) A formal guarding review of Pandrol/E Clipper machines will be undertaken across the rail business, with recommendations provided as to the nature of guarding of the clip compression device on the machines and internal procedures for ensuring all new clipping machines are guarded where appropriate;
- (B) Submit to Pandrol/E Clipper manufacturers the outcome of its review and recommended areas for improvement in operational safety design of these machines;
- (C) Provide the findings of the review to the Australasian Rail Association;

Within a period of six months from the Undertaking Date.

Reporting

9.1. The Employers must:

- (A) Provide all documents and information requested by Comcare from time to time for the purpose of enabling Comcare to assess their performance of the Commitments and their compliance with this Undertaking;
- (B) Develop procedures which will ensure that their boards and senior management, and any employees, contractors or agents, and all other relevant persons are regularly informed on their performance of the Commitments in accordance with this Undertaking;
- (C) Within 7 months of the Undertaking Date, at their own cost, engage an auditor, who must be approved by Comcare in writing, (the Auditor) to conduct an independent audit of:
 - (i) the Employers' compliance with this Undertaking;
 - (ii) the Employers' development, performance, and/or implementation Commitments; and
 - (iii) the Employers' development, performance or implementation of any other measures the Employers have undertaken to develop, perform, implement and/or give effect to in accordance with this Undertaking ("**the Audit Report**").
- (D) Ensure that:
 - (i) Comcare is advised of the Auditor's engagement; and
 - (ii) The Auditor conducts and concludes the audit.

- (E) Within one month of receipt of the Audit Report, report to Comcare on the performance of the Commitments in accordance with this Undertaking.

Publicity

- 10.1. The Employers acknowledges that this Undertaking constitutes a public declaration of the Employers' commitment to occupational health and safety and response to the Report of Investigation
- (A) The Employers acknowledge that, following the adjournment of the Proceedings, Comcare will:
- (i) From time to time publicly refer to this Undertaking; and
 - (ii) Make this Undertaking available for public inspection, including by publishing it on Comcare's website.

Costs

- 11.1. Subject to the Federal Court of Australia agreeing to adjourn the Proceedings in accordance with paragraph 12.1, the Employers agree to pay Comcare's agreed costs of the Proceedings and Related Proceedings within 30 days of Undertaking Date ("**the Agreed Costs**").
- 11.2. The Employers agree and undertake to pay, bear, reimburse, and/or indemnify Comcare for:
- (A) The reasonable costs associated with implementing, monitoring, and facilitating compliance with this Undertaking, which costs may be payable on a periodic basis and shall be paid by the Employers within 30 days of receiving notice from Comcare specifying the relevant cost;
 - (B) The reasonable costs associated with investigating any breach (or anticipated breach) of or non-compliance with this Undertaking, including the cost of any expert or technical advice or attendance in relation to the measures which are to be implemented by the Employers, which costs may be payable on a periodic basis and shall be paid by the Employers within 30 days of receiving notice from Comcare specifying the relevant cost; and
 - (C) Unless otherwise ordered by the Court, the reasonable costs associated with any proceedings initiated by Comcare against the Employers concerning compliance with this Undertaking, which costs shall be paid by the Employers within 30 days of receiving notice from Comcare specifying the relevant cost.
- 11.3. The Employers acknowledges that they will bear their own costs of the Proceedings and any other action taken by Comcare in accordance with or pursuant to this Undertaking.
- 11.4. If the parties are unable to agree on costs payable by the Employers in accordance with this paragraph 11 within 30 days of the due date for payment, then any party may seek a determination of the amount of such costs in accordance with, and subject to, the Institute of Arbitrators & Mediators Australia Fast Track Arbitration Rules ("**the Rules**"), and:

- (A) For disputes in which the quantum is less than \$50,000.00, arbitration shall take place with the submission of documents alone unless both parties agree otherwise;
- (B) The parties agree that they may, at their discretion, be represented in the arbitration by legal practitioners;
- (C) For the avoidance of doubt and Rule 13 of the Rules notwithstanding:
 - (i) The arbitration and the arbitrator's sole function shall be determining the costs which the Employers must pay in accordance with paragraph 11;
 - (ii) Except to the extent necessary to arbitrate the disputes (limited in the manner contemplated by paragraph 11.3(c)(i)), the Arbitrator must not make findings, awards, orders, directions or comments on any other matter, including but not limited to any aspect of the Investigation, the Proceedings, this Undertaking or the Employers' compliance with its terms; and
 - (iii) Nothing in this paragraph 11 means that the parties submit to arbitration in respect of any other dispute, whether arising out of or in connection with this Undertaking or otherwise.

Proceedings While Undertaking Being Satisfied And Enforcement

- 12.1. Comcare has agreed to seek an adjournment of the Proceedings on the basis that the Employers:
 - (A) Grant, keep and not breach, withdraw or vary, or propose to breach, withdraw or vary this Undertaking, and the assurance and promises expressed herein; and
 - (B) Without limiting the generality of the proceeding paragraph 12.1(A), have promised to perform the Commitments by the relevantly specified date.
- 12.2. The parties agree that if for whatever reason the Federal Court does not agree to adjourn the Proceedings after reasonable endeavours by the parties to obtain the agreement of the Federal Court, then this agreement will cease to have effect. The Employers acknowledge that this Undertaking is enforceable at law and that the Employers may be subject to penalties if they do not comply with this Undertaking.
- 12.3. If the Employers:
 - (A) Fail to keep, breaches and/or withdraws, or varies — or proposes to breach withdraw or vary — this Undertaking and the assurance and promises expressed herein; and/or
 - (B) Without limiting the generality of the proceeding paragraph 12.1(A), fail to perform the Commitments by the relevantly specified date,

Then Comcare may pursue or recommence the Proceedings and in any such proceedings the Employers may not object to Comcare tendering this Undertaking for any purposes.
- 12.4. Any act or omission by the Employers which is inconsistent with or in contravention of this Undertaking or the Commitments may be deemed by Comcare to be a

breach of this Undertaking and, without limiting the generality of this paragraph 12.3, Comcare may, in its absolute discretion, deem any finding by the Auditor that the Employers have failed to give full effect to any provisions of this Undertaking to be a breach of this Undertaking.


- 12.5. At such time as the Employers have discharged to Comcare's satisfaction all of the Commitments and or other measures they have undertaken to develop, give effect to, perform, and/or implement in accordance with this Undertaking, Comcare and the Employers shall enter into and file with the Federal Court consent orders that the Proceedings be dismissed with no order as to costs being made against the Employers in respect of the Proceedings and the Related Proceedings.

Acknowledgements

- 13.1. The Employers acknowledges that
- (A) Comcare's acceptance of this Undertaking does not affect Comcare's:
 - (i) Power to investigate or pursue civil or criminal proceedings in respect of similar or related incidents or injuries which occur after the Undertaking Date; or
 - (ii) Authorities, powers, and obligations in respect of any conduct of the Employers which is not the conduct which gave rise to the Incident;
 - (B) This Undertaking in no way derogates from the rights and remedies available to any other person or entity other than the Employers and Comcare arising from any conduct described in this Undertaking or arising from future conduct;
 - (C) This Undertaking has no operative force until accepted by Comcare; and
 - (D) This Undertaking will be deemed to be formally concluded when Comcare confirms in writing that the Undertaking has been fully discharged.

This Undertaking is given on behalf of the Employers, by Karl Mociak who is Executive General Manager, Transport Services, and has the authority of the Employers to grant this Undertaking on behalf of the Employers.

I certify that the persons(s) signing opposite, with whom I am personally acquainted or as to whose identity I am otherwise satisfied, signed this document in my presence.




Signature of Witness

19 Ford Street, Newport, Vic 3015
Address of witness



Signed for by Authorised Officer



Signing on behalf of Employers

Accepted by Comcare pursuant to clause 16 of Schedule 2 of the *Occupational Health And Safety Act 1991* by its duly authorised delegate:



Signature of Deputy Chief Executive Officer

Steve Kibble
Name of Deputy Chief Executive Officer

Gaby Medley - Brown
Name of witness



Signature of witness