



Australian Government

Fair Work OMBUDSMAN

ENFORCEABLE UNDERTAKING

dated 5th Dec. 2012

Given by

McDonald Real Estate Dandenong Pty Ltd (ACN 108 178 230)

&

John Wysham

&

Le Hoa Wysham

to

The Commonwealth of Australia

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

concerning contraventions of Commonwealth workplace laws

Details

Parties	FWO and McDonald Real Estate Dandenong Pty Ltd, John Wysham and Le Hoa Wysham	
FWO	Name	Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman)
	ABN	43 884 188 232
	Address	The Fair Work Ombudsman GPO Box 9887 Adelaide SA 5001
	Telephone	(08) 8225 8265
	Fax	(02) 6204 2824
	Attention	Steven Ronson Executive Director, Dispute Resolution and Compliance
McDonald Real Estate Dandenong Pty Ltd	Name	McDonald Real Estate Dandenong Pty Ltd (ACN 108 178 230)
	ABN	36 108 178 230
	Incorporated in	Victoria
	Address	13 Ozone Avenue Aspendale VIC 3195
	Telephone	03 9707 8800 0418 322 618
	Fax	03 9707 8899
	Attention	John Wysham and Le Hoa Wysham
John Wysham	Name	John Wysham
	Address	13 Ozone Avenue Aspendale VIC 3195
	Telephone	03 9707 8800 0418 322 618
	Fax	03 9707 8899
Le Hoa Wysham	Name	Le Hoa Wysham
	Address	13 Ozone Avenue Aspendale VIC 3195
	Telephone	03 9701 8611 0418 566 133
	Fax	03 9701 8644

Recitals	A	The Fair Work Ombudsman (FWO) commenced an investigation into allegations that McDonald Real Estate Dandenong Pty Ltd (the Company) had breached Commonwealth workplace laws.
	B	By reason of the matters set out in Attachment "A" (the Background), the FWO has determined, and the Company and John Wysham and Le Hoa Wysham (collectively, the Directors) acknowledge, that the Company and the Directors contravened Commonwealth workplace laws.
	C	The parties have agreed to resolve the contraventions without the need to resort to civil penalty litigation by way of this Enforceable Undertaking (the EU) made pursuant to section 715 of the <i>Fair Work Act 2009</i> (the FW Act).

Governing law	Commonwealth
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Date of agreement	See Signing page
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General terms

1 Admission of contravention

By reason of the matters described in the Background, which are admitted without demur by the Company and the Directors, the Company and the Directors admit that they contravened Commonwealth workplace laws in the respects set out in Attachment "B" (collectively, the Contraventions).

2 Limit of admission

2.1 The FWO acknowledges that the terms of this EU:

- (a) are solely for the purposes of resolving the FWO investigation into the Contraventions; and
- (b) must not be interpreted as an admission by the Company and the Directors of liability for any matter, other than as expressly provided in this EU.

2.2 No assertion or matter in this EU may be relied upon as an admission by any person to support a cause of action in any other civil penalty proceeding.

2.3 However, this term does not prevent any matter in this EU being relied upon in future proceedings in order to inform a relevant Court or tribunal of the details of the conduct that was the evidentiary foundation for the Company and the Directors entering into this EU.

2.4 This means that the FWO reserves the right to rely on the terms of this EU and the admissions in respect of any future proceedings brought by the FWO against the Company and the Directors in relation to any future contraventions of Commonwealth workplace laws.

3 Enforceable undertakings

The Company and the Directors **NOW UNDERTAKE** that, in consideration of the FWO agreeing not to apply for any orders under Part 4-1 of the FW Act in relation to the Contraventions (as evidenced by the FWO's acceptance of this EU endorsed below), The Company and the Directors must do all those activities and things set out in Attachment "C" (the Undertakings).

4 Commencement of enforceable undertaking

This EU comes into effect when:

- (a) the EU is executed by the Company and the Directors; and
- (b) the FWO accepts the EU executed by the Company and the Directors (as evidenced by the FWO's acceptance of this EU endorsed below).

5 Acknowledgements

The Company and the Directors acknowledge that:

- (a) the undertakings they have given in this EU are reasonable in the circumstances;
- (b) this EU is given to and accepted by the FWO pursuant to section 715 of the FW Act;
- (c) the FWO may:
 - (i) make this EU (and any of the Attachments) available for public inspection, including by posting it on the FWO internet site at www.fwo.gov.au (subject to the FWO taking any necessary steps to the redaction of the names of any person affected by the Contraventions);
 - (ii) release a copy of this EU (and any of the Attachments to it) pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
 - (iii) issue a media release in relation to this EU;
 - (iv) from time to time, publicly refer to the EU (and any of the Attachments to it) and its terms;
 - (v) rely upon the admissions made by the Company and the Directors in paragraph 1 above in respect of any future decision about enforcement action to be taken in respect of any future non-compliance by the Company and the

Directors with Commonwealth workplace relations obligations.

- (d) consistent with the Note to section 715(4) of the FW Act, this EU in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this EU; and
- (e) If the Company and the Directors contravene any of the terms of this EU:
 - (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 EU may be provided to the Court as evidence of the admissions made by the Company and the Directors in paragraph 1, and also in respect of the question of costs; and
 - (iii) this EU is to be taken as having been withdrawn from by the Company and the Directors for the purposes of section 715(3) of the FW Act if the FWO gives its written consent (in which case the FWO may apply for orders against Company and the Directors under Part 4-1 of the FW Act).

6 No inconsistent statements

The Company and the Directors:

- (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 which conveys or implies or reasonably conveys or implies anything inconsistent with admission or acknowledgements contained in this EU.

7 Termination by the FWO

At any time, the FWO may, by notice in writing, terminate this EU (that is, immediately and without notice) if the Company and/or the Directors commit, in the opinion of the FWO, a serious or persistent breach or non-observance of a term or terms of this EU.

8 Withdrawal from or variation to this EU

Consistent with section 715(3) of the FW Act, the Company and the Directors may withdraw from or vary this EU at any time, but only with the consent of the FWO.

9 Continuing obligations

9.1 General survival

Any provision of this EU remaining to be performed or observed by the Company and the Directors or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal from by the Company and/or the Directors) remains in full force and effect and is binding on the Company and/or the Directors after this EU ends.

9.2 Survival

Without limiting the generality of clause 9.1 ("General survival"), the following clauses survive termination of this EU for whatever reason (including termination by the FWO or withdrawal from by the Company and/or the Directors):

- (a) Clause 1 (Admissions and contraventions); and
- (b) Clause 6 (No inconsistent statements).

10 Legally binding agreement

These terms are intended to have immediate effect on all parties upon acceptance by the FWO of this EU (as evidenced by the FWO's acceptance of this EU endorsed below).

11 Entire agreement

This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter. No oral explanation or information provided by either party to the other:

- (a) affects the meaning or interpretation of this EU; or
- (b) constitutes any collateral agreement, warranty or understanding between the FWO and the Company and the Directors.

12 No representations or warranties

The Company and the Directors acknowledge that in entering into this EU they have not relied on any representations or warranties about the subject matter of this EU except as provided in this EU.

13 Construction

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of, or seeks to rely on, this EU or any part of it.

14 Costs

The parties must pay their own legal and other costs and expenses in connection with the preparation, execution and completion of this EU and other related documentation.

15 Severance

If the whole or any part of a provision of this EU is void, unenforceable or illegal in a jurisdiction it is severed for that jurisdiction. The remainder of the agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This clause has no effect if the severance alters the basic nature of this EU or is contrary to public policy.

16 Competency

The Company and the Directors acknowledges that:

- (a) before executing this EU, the Company and the Directors were given the opportunity to seek independent legal and other advice of their choice;
- (b) in the light of any advice provided to the Company and the Directors, they considered their position;
- (c) if the Company and the Directors have been advised by their solicitors, they have been advised by them as to the terms of this EU; and
- (d) the Company and the Directors fully understand the effect of this EU.

17 Governing law

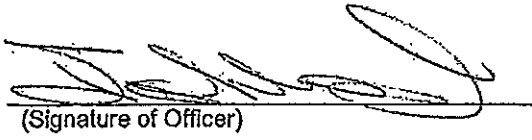
This EU is governed by the law in force in the place specified in the Details. Each party submits to the non-exclusive jurisdiction of the courts of that place.

18 Signing page

SIGNED on 19th Nov 2012 by
McDonald Real Estate Dandenong Pty Ltd
ACN 108178230 in accordance with section
127(1) of the Corporations Act 2001, in the
presence of:



(Signature of Witness)



(Signature of Officer)

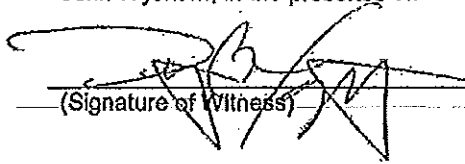
DUYEN CAO NGUYEN

(Name of Witness in Full)

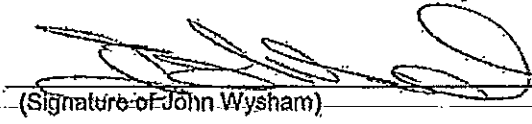
JOHN WYSHAM

(Name of Officer in Full)

SIGNED on _____ by
John Wysham, in the presence of:



(Signature of Witness)



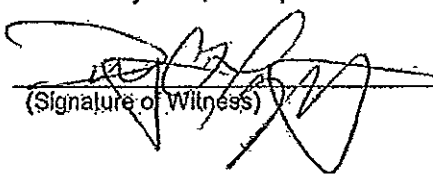
(Signature of John Wysham)

DUYEN CAO NGUYEN

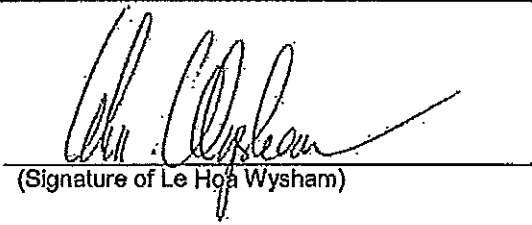
(Name of Witness in Full)

John Wysham

SIGNED on _____ by
Le Hoa Wysham, in the presence of:



(Signature of Witness)



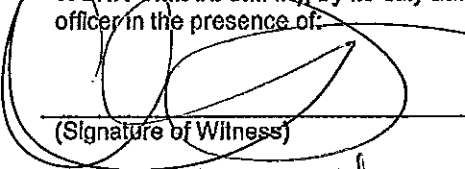
(Signature of Le Hoa Wysham)

DUYEN CAO NGUYEN

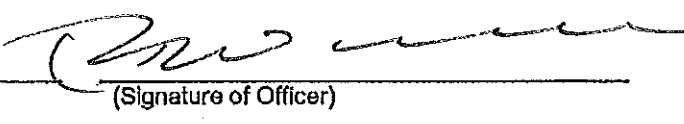
(Name of Witness in Full)

Le Hoa Wysham

SIGNED on 5th December 2012
COMMONWEALTH OF AUSTRALIA (FAIR
WORK OMBUDSMAN), by its duly authorised
officer in the presence of:



(Signature of Witness)



(Signature of Officer)

Marnie Sandliffe

(Name of Witness in Full)

**NICHOLAS PAUL WILSON
FAIR WORK OMBUDSMAN**

or by his Delegate subject to the instrument of
delegation made pursuant to section 683 of the
FW Act and executed by Nicholas Paul Wilson
on 25 October 2012.

ATTACHMENT "A" (BACKGROUND)

1. On 7 March 2011 [REDACTED] filed a complaint with the Fair Work Ombudsman (FWO) arising from [REDACTED] employment by McDonald Real Estate Dandenong Pty Ltd (the Company) between October 2010 and February 2011, when [REDACTED] employment was terminated by the Company (the Complaint). The FWO commenced an investigation into the Complaint on 9 March 2011.
2. The Company was at all material times a real estate agency operating in the Dandenong area in Victoria.
3. During the first four weeks of employment [REDACTED] participated in a 'training program' in which [REDACTED] was, purportedly, being trained to be a sales consultant selling real estate (Training Program). Pursuant to a written agreement, he was not entitled to and the Company did not pay remuneration for the work performed during the Training Program. During the Training Program [REDACTED] work consisted of tasks that were substantially the same in nature and volume as the tasks performed by him once he commenced work as a sales consultant in November 2010.
4. Pursuant to the terms of [REDACTED] written contract of employment with the Company executed on 25 November 2010 [REDACTED] remuneration comprised of:
 - a. a car allowance of \$115.00 (the Car Allowance); and
 - b. a weekly payment of \$551.03, which was described as an 'advance against commission...to be deducted from commission when payable' (the Advance on Commission) to Mr Wimal Siri.
5. Pursuant to the terms of the *Real Estate Industry Award 2010* (the Award) the Employee was properly classified as a Sales Representative and entitled to receive \$576.00 per week as wages (the Minimum Wage).
6. Pursuant to the terms of the Award an employer can either engage employees on a minimum weekly wage basis or on a commission-only basis. Employees employed on a weekly wage basis are entitled to be paid the minimum weekly wage prescribed by the Award. In order to engage an employee under a commission only-basis, an employer must ensure that the employee meets the minimum threshold requirements of clause 16 of the Award. Importantly, pursuant to clause 16.3 of the Award this involves obtaining evidence that the employee earned more than the minimum remuneration under the Award selling real estate in any 12-month period in the preceding 5 years (the MIT Test). Employees who do not meet the minimum threshold for engagement on a commission-only basis are entitled to the relevant minimum weekly wage.
7. Between October and November 2010, the Company paid no remuneration to [REDACTED] in relation to work performed during the Training Program. [REDACTED] was entitled to receive the Minimum Wage for such work performed during that period. By failing to pay the Employee the Minimum Wage, the Company contravened *Fair Work Act 2009* (the FW Act) and the Award in relation to [REDACTED] minimum wage entitlements.
8. Between November 2010 and January 2011 the Company paid [REDACTED] the Advance on Commission in relation to work performed during this period. [REDACTED] was entitled to receive the Minimum Wage for such work which is more than the Advance on Commission. By paying [REDACTED] less than the Minimum Wage, the Company contravened the FW Act and the Award in relation to [REDACTED] minimum wage entitlements.
9. Between January and February 2011 the Company paid no remuneration to [REDACTED] in relation to the performance of work. The Company paid [REDACTED] the Car Allowance, however this was not paid in relation to the performance of work. The Company did not determine whether or not the Employee met the minimum requirements to be engaged as a commission-only employee in accordance with clause 16 of the Award, in particular the MIT Test. Therefore the Employee was entitled to be paid the Minimum Wage for work performed during this period. By failing to pay [REDACTED] the Minimum Wage, the Company contravened the FW Act and the Award in relation to [REDACTED] minimum wage entitlements.
10. On about 17 February 2011 the Company terminated [REDACTED] employment.
11. The Company ceased trading in June 2011.
12. The FWO determined on 3 October 2011, by the issuing of a contravention letter, that the Company had contravened the Award and the FW Act. The contraventions resulted in the underpayment of wages to [REDACTED] of a total of \$5,248.53. Specifically, and amongst others contraventions, the FWO found the Company had both failed to pay [REDACTED] the prescribed minimum weekly wage and failed to determine whether [REDACTED] satisfied the requirements of

clause 16 of the Award in relation to being employed on a commission-only basis, including the MIT Test.

13. After further investigation, the underpayment was revised to \$10,346.29 via an amended contravention letter dated 3 May 2012, which sought a response by 18 May 2012 from the Company. On 18 May 2012, the Company offered to repay the \$10,346.29 and sought approval to do so by way of a payment plan, which the FWO approved.
14. The Company rectified all underpayments owing to [REDACTED] by 15 June 2012.
15. The Company, John Wysham and Le Hoa Wysham admit the contraventions set out in Attachment "B" and undertake to commit to future compliance and audit activities in accordance with the terms of Attachment "C".

ATTACHMENT "B" (CONTRAVENTIONS)

McDonald Real Estate Dandenong Pty Ltd

McDonald Real Estate Dandenong Pty Ltd (the Company) contravened:

1. section 44(1) of the FW Act due to contravening the following provisions of the National Employment Standards (the NES), as well as contravening those provisions of the FW Act themselves:
 - 1.1. section 90(2) of the FW Act by failing to pay [REDACTED] an amount he would have received in relation to any accrued annual leave upon termination of his employment by the Company had he taken that annual leave;
 - 1.2. section 116 of the FW Act by failing to pay [REDACTED] the applicable transitional rate of pay for the relevant classifications on public holidays; and
 - 1.3. section 117(2) of the FW Act by failing to pay [REDACTED] the period of notice he was entitled to receive upon termination of his employment by the Company;
2. section 45 of the *Fair Work Act 2009* (FW Act) due to contravening the following provisions of the *Real Estate Industry Award 2010* (the Award):
 - 2.1. clause 18.6(d) by failing to pay [REDACTED] a mobile phone allowance; and
 - 2.2. clause 24.1(a) by failing to pay [REDACTED] the applicable overtime rate for all overtime hours worked by [REDACTED] and
 - 2.3. clause A.2.5 of Schedule A by failing to pay [REDACTED] the applicable transitional rate of pay for ordinary hours for the specified classification; and
3. section 323(1) of the FW Act by failing to pay [REDACTED] the amounts payable in relation to the performance of work in full at least monthly; and
4. section 535(1) of the FW Act by failing to make and keep records in relation to the Company's employment of [REDACTED] that included information prescribed by the *Fair Work Regulations 2009* (Cth).

John Wysham

Pursuant to section 550 of the FW Act, John Wysham was a person involved in the Company's abovementioned contraventions of, and was therefore taken to himself have contravened:

5. section 44(1) of the FW Act due to contravening the following provisions of the NES, as well as contravening those provision of the FW Act themselves:
 - 5.1. section 116 of the FW Act by failing to pay [REDACTED] the applicable transitional rate of pay for the relevant classifications on public holidays; and
 - 5.2. section 117(2) of the FW Act by failing to pay [REDACTED] the period of notice he was entitled to receive upon termination of his employment by the Company; and
6. section 45 of the FW Act due to contravening clause A.2.5 of Schedule A of the Award by failing to pay [REDACTED] the applicable transitional rate of pay for ordinary hours for the specified classification; and

7. section 323(1) of the FW Act by failing to pay [REDACTED] the amounts payable in relation to the performance of work in full at least monthly.

Le Hoa Wysham

Pursuant to section 550 of the FW Act, Le Hoa Wysham was a person involved in the Company's abovementioned contraventions of, and was therefore taken to herself have contravened:

8. section 44(1) of the FW Act due to contravening section 116 of the FW Act, as well as contravening section 116 of the FW Act itself, by failing to pay [REDACTED] the applicable transitional rate of pay for the relevant classifications on public holidays;
 9. section 45 of the FW Act due to contravening clause A.2.5 of Schedule A of the Award by failing to pay [REDACTED] the applicable transitional rate of pay for ordinary hours for the specified classification; and
 10. section 323(1) of the FW Act by failing to pay [REDACTED] the amounts payable in relation to the performance of work in full at least monthly.
 11. The Company and the Directors admit that the above contraventions resulted in [REDACTED] being underpaid \$10,346.29.
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ATTACHMENT "C" (UNDERTAKINGS)

McDonald Real Estate Dandenong Pty Ltd (the Company) and John Wysham and Le Hoa Wysham (collectively, the Directors) undertake to:

Future workplace relations compliance

1. Ensure compliance at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the *Real Estate Industry Award 2010* (the Award) and the *Fair Work Act 2009 (FW Act)* by developing systems and processes to ensure ongoing compliance with those requirements in relation to:
 - (a) the Company; and/or
 - (b) all businesses and/or companies within the real estate industry as defined by the Award:
 - (i) over which any or all of the Directors have or will have control (within the meaning of section 50AA of the *Corporations Act 2001*) either separately or together;
 - (ii) of which any and all of the Directors are or will be officeholders; and/or
 - (iii) in which any or all of the Directors have or will have any managerial, human resource, recruitment or payroll function,(collectively, the Real Estate Agencies).
2. Provide to the FWO within 28 day of the date of this Enforceable Undertaking (the EU) written details of the implementation of systems and processes designed to ensure such ongoing compliance.

Public notices

3. Cause to be placed within 28 days of the execution of the EU (or so soon afterwards as is available), a notice which:
 - (a) bears the name of "McDonald Real Estate";
 - (b) bears the logo of "McDonald Real Estate";
 - (c) is in the form of Attachment D to the EU;
 - (d) if published in a newspaper:
 - (i) measures at least 15cms high x 7.4cms wide; and
 - (ii) appears on either of pages 3, 5 or 7 of the relevant edition;
 - (e) if published on a website:
 - (i) remains on-line for a period of at least 28 days or such similar length of time which can be reasonably negotiated with the person or entity responsible for maintaining the website;
 - (ii) is at least size 14 font; and
 - (iii) contains a html link to:
 - the EU; and
 - a signed copy of the letter of apology at Attachment F,in the following publications:
 - (f) The Melbourne Weekly newspaper;
 - (g) The Dandenong Leader newspaper; and
 - (h) the 'homepage' of the official "McDonald Real Estate" website (the McDonald Website).

Audits

4. Cause to have performed by an accounting professional (e.g. Certified Practising Accountant) or an audit or employment law specialist (at their own expense) within 56 days (eight weeks) of the execution of the EU an audit of compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the Award and FW Act, relating to the pay and conditions of employees of:

- (a) the Company; and/or
- (b) the Real Estate Agencies,

in relation to the period from 1 July 2011 to the date of the execution of the EU (the Audit).

5. Direct that the Audit specifically consider whether during the period from 1 July 2011 to the date of the execution of the EU (the Audit Period) the employees the subject of the Audit:
 - (a) were correctly classified;
 - (b) were paid the correct wage rates and entitlements;
 - (c) were correctly engaged on a commission-only basis pursuant to the terms of the Award; and
 - (d) ought to have received any further payments for:
 - (i) allowances, overtime, penalty rates and any other entitlements;
 - (ii) work performed during any training for which payment is required by law; and
 - (iii) work performed while they were engaged on a commission-only basis pursuant to the Award.
6. Provide a copy of the Audit to the FWO within 7 days of the Audit being provided to the Company and/or the Directors.
7. In the event that the Audit discloses contraventions of any applicable Commonwealth workplace laws and instruments, rectify all such contraventions within 28 days of the Audit being provided to the relevant business and/or Directors, including rectification of any and all underpayments to employees during the Audit Period.
8. Provide evidence of rectification of any amounts to employees pursuant to the Audit to the FWO within seven days of the rectification occurring.
9. Cause to have performed audits for the 3 year period following the execution of the EU, to be finalised by 31 August 2013, 2014, and 2015, for the preceding 12-month period (collectively, the Future Audits). The Future Audits are to be conducted in accordance with Undertakings 4 to 8 above, that is, in the same manner as the Audit.

Workplace notices

10. Cause to be distributed to each of the businesses within the Real Estate Agencies within 28 days of the execution of the EU, a registered memo which is in the form of Attachment D to the EU (the Memo).
11. Ensure the Memo is printed in at least A3 size and clearly displayed at each business premises of all of the businesses within the Real Estate Agencies for a period of at least 28 days:
 - (a) in a location to which all employees of businesses within the Real Estate Agencies have access; and
 - (b) in a manner which is reasonably capable of drawing the letter to the general attention of all employees of businesses within the Real Estate Agencies (for example, by placement on a staff noticeboard).
12. Provide evidence to the FWO of the distribution of the Memo within seven days of its distribution.

Workplace relations training

13. Within 56 days (eight weeks) of the execution of the EU, organise and ensure training for any and all persons who have any managerial, human resource, recruitment or payroll function and who are engaged either directly or indirectly by or perform work for:
 - (a) the Company; and/or
 - (b) the Real Estate Agencies,(the Training).
14. Ensure the Training relates to compliance with all applicable Commonwealth workplace laws and instruments which apply to any of the entities referred to in Undertaking 13 above, or to any employee of those entities, including but not limited to the rights and responsibilities of employers under the FW Act and the Award, in particular in relation to overtime, penalty

- rates, allowances, commission-only arrangements and lawful and unlawful paid training.
15. Ensure the Training is conducted by an independent workplace trainer; such person or organisation to be approved by the FWO and paid for by the relevant business and/or the Directors.
 16. 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. The FWO must approve such training materials.
 17. Provide evidence of attendance at the Training and payment of the Training to the FWO within seven days of the Training being provided.
 18. For a period of 3 years from the execution of the EU, ensure that training is conducted in the manner prescribed by Undertakings 13 to 17 (the Future Training), but the Future Training will be in relation to:
 - (a) any employees who at the time of the execution of the EU did not have but who subsequently acquire responsibilities that include managerial, human resource, recruitment or payroll functions, for example by promotion or change in duties; and
 - (b) any new employee who has responsibility for the duties referred to in Undertaking 18(a).

Apology

19. Send a letter to [REDACTED] within 28 days of the execution of the EU advising him of the EU in the form of Attachment E to the EU, signed by the Directors (the Apology).
20. Provide proof to the FWO of the Apology within seven days of the Apology being sent.

Charitable donation

21. Make two payments totalling \$1,000.00 (the Donation) within 28 days of the execution of the EU to the Peninsula Community Legal Centre.
22. Provide proof to the FWO of the Donation within seven days of the payment being made.

ATTACHMENT "D" (FORM OF PUBLIC AND WORKPLACE NOTICE)

Underpayments by McDonald Real Estate Dandenong Pty Ltd

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that McDonald Real Estate Dandenong Pty Ltd (the Company) and its directors, Mr John Wysham and Le Hoa Wysham (the Directors) contravened the *Fair Work Act 2009* (the FW Act), in particular by failing to pay the employee for on-the-job training in circumstances where it was required to do so and also by failing to either pay the employee the minimum wage prescribed by the *Real Estate Industry Award 2010* (the Award) or establish that the employee met the minimum requirements for engagement on a commission-only basis as set out at clause 16 of the Award.

We advise that the Company has paid a total of \$10,346.29 to the affected employee to rectify underpayments found to be owing. The underpayments arose in the period October 2010 to February 2011. The contraventions arose in part because the Company failed to ascertain whether or not the employee met the minimum income threshold test set out in the Award (the MITT) which is required before a sales employee can be engaged on a commission-only basis.

The Company and the Directors express their sincere regret and apologise to the employee for failing to comply with their lawful obligations. Furthermore, the Directors give current and prospective employees employed by McDonald Real Estate agencies in which the Directors have been involved a commitment that they will comply with all requirements of the Award, the FW Act and all other applicable Commonwealth workplace relations laws and instruments, including but not limited to commission-only arrangements and providing payment for on-the-job training where required by law to do so.

An Enforceable Undertaking has been given by the Company and the Directors to the FWO reflecting admissions to the contraventions, a copy of which is available at www.fairwork.gov.au.

An employer must be satisfied that a sales employee meets the MITT prior to engaging that employee on a commission-only basis. In regards to unpaid training, an employer cannot avoid paying an employee for the performance of work simply by describing the work as 'training'.

If you worked for the Company, or any of the businesses within the McDonald Real Estate Group, between 1 July 2011 and <insert date of execution of EU> and have queries or questions relating to your employment or are unsure if you are being correctly paid, please speak to <insert details of internal McDonald Real Estate Group contact> Alternatively, anyone can contact the FWO via its website at www.fairwork.gov.au or the Infoline on 13 13 94.

ATTACHMENT "E" (FORM OF APOLOGY)

<McDonald Real Estate Group letterhead>

<[REDACTED] address>

<Date>

Dear [REDACTED]

We are writing to let you know about a recent investigation by the Office of the Fair Work Ombudsman (the FWO). The investigation related to your complaint filed on 7 March 2011 concerning your employment with McDonald Real Estate Dandenong Pty Ltd (the Company) between October 2010 and February 2011.

The FWO determined that the Company had contravened the *Fair Work Act 2009* (the FW Act) and the *Real Estate Industry Award 2010* (the Award) and underpaid you \$10,346.29 (the Underpayment). The FWO also determined that we were involved in some of the Company's contraventions. As you are aware, the Company rectified the Underpayment in full by June 2012.

The Company and we have formally admitted that we contravened the FW Act and the Award and that the Company underpaid you the amount referred to above. The contraventions occurred because the Company failed to comply with the requirements of the Award concerning minimum wages or employment on a commission-only basis and for unlawfully requiring you to work during the training program in October 2010 without pay. The admissions are contained in an enforceable undertaking, a copy of which is available from the FWO website at www.fairwork.gov.au.

The Company and we express our sincere regret and apologise to you for failing to comply with our lawful obligations. Furthermore, we give current and prospective employees engaged in our businesses within the McDonald Real Estate group a commitment that they will not be engaged on a commission-only basis unless we are satisfied that they meet the minimum income threshold test, which is a requirement of the Award and further that people will not be required to perform work without pay when it is not lawful to do so.

Signed,

<John Wysham and Le Hoa Wysham>