

McDonald's Pro-active Compliance Deed

Final Report on the Pro-active Compliance Deed between
McDonald's Australia Limited and the Fair Work Ombudsman

December 2012

A report by the Fair Work Ombudsman under the *Fair Work Act 2009*
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Australian Government

Fair Work
OMBUDSMAN

1. About the Fair Work Ombudsman

The Fair Work Ombudsman is an independent statutory agency, created by the *Fair Work Act 2009* (Cth) on 1 July 2009.

Our vision is fair Australian workplaces, and our mission is to work with Australians to educate, promote fairness and ensure justice in the workplace. We promote harmonious, productive and cooperative workplace relations and ensure compliance with Australia's workplace laws, by:

- offering people a single point of contact for them to receive accurate and timely advice and information about Australia's workplace relations system;
- educating people working in Australia about their workplace rights and obligations;
- investigating complaints or suspected contraventions of workplace laws, awards and agreements; and
- litigating to enforce workplace laws and to deter people from not complying with their workplace responsibilities.

The Fair Work Ombudsman may engage with employers in an agreement, also known as a 'Pro-active Compliance Deed', which aims to help the employer make sure that their employees are receiving their minimum entitlements. These agreements emphasise employers taking responsibility through a series of pro-active steps so as to ensure effective compliance with workplace law.

This report details the background, methodology and results of the Pro-active Compliance Deed between McDonald's Australia Limited Pty Ltd and the Fair Work Ombudsman.

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2. Summary and Key Findings

Key Findings

- Overall high levels of compliance with wages across the 2009 and 2010 audit periods.
- Generally strong levels of compliance with record keeping obligations.
- The number of contacts made to McDonald's from employees as a result of the Deed increased by approximately 17%.
- Areas of improvement identified in authorised deductions of wages and compliance with payment of casual loading for casual employees participating in workplace meetings.
- Commitment to ongoing future compliance with respect to new employee complaints.

The Fair Work Ombudsman entered into a Pro-active Compliance Deed (the Deed) with McDonald's Australia Ltd [McDonald's] in March 2011. From 1 April 2011 to 30 June 2011, McDonald's and its franchise employers undertook a self-audit to test compliance across two audit periods.

McDonald's presented their findings from the self-audit, along with copies of the relevant employment documents, to the Fair Work Ombudsman in August 2011 for review. Between December 2011 and March 2012, McDonald's and the Fair Work Ombudsman worked collaboratively to clarify any outstanding issues. During the course of 2012, McDonald's has gone beyond the terms of the Deed and committed itself to assessing and rectifying (if required) any new employee complaints received by the Fair Work Ombudsman.

The findings of the Pro-active Compliance Deed found that there was 100% compliance in wages across the 2009 audit period and 97% compliance with wages across the 2010 audit period. There was one instance of non-compliance with authorised deductions relating to deductions for uniform deposits and two instances where it was identified that the casual loading had not been paid for casual employees attending workplace meetings.

The Deed between the Fair Work Ombudsman and McDonald's was the first of its kind for the Fair Work Ombudsman. Throughout the period of this Deed the Fair Work Ombudsman has observed McDonald's undertake responsive, self-regulated compliance activities which have undoubtedly improved the way in which McDonald's manages workplace relations both internally and externally.

3. Background

3.1 McDonald's Australia Limited - Company profile

McDonald's has been operating in Australia since 1971. McDonald's has a total of 888 restaurants in Australia with approximately 75% of the restaurants operated by franchisees whilst the remaining restaurants are owned and operated by McDonald's. McDonald's employees over 90,000 individuals, spends over \$1 billion annually on employee wages, salaries and bonuses and invests more than \$40 million every year in training crew, restaurant managers and corporate staff. Its economic contribution in Australia is equivalent to 0.2% of Gross domestic Product (GDP).

McDonald's has been a nationally registered training organisation since 1997. As a nationally recognised training organisation spread across Australia, for some communities they are the only training provider.

McDonald's provides an opportunity for young people to learn skills that they can apply throughout their working lives. The majority of its employees are engaged in a casual capacity and are between 15 and 21 years of age.

3.2 McDonald's Australia Enterprise Agreement 2009

On 23 April 2010 Fair Work Australia Commissioner McKenna declined to approve of the *McDonald's Australia Enterprise Agreement 2009* (the Agreement).¹ Commissioner McKenna was of the view that the Agreement failed to meet the pre-approval requirements and the statutory no disadvantage test.² Further to this, Commissioner McKenna indicated that she intended to refer her decision to the FWO as there was evidence that McDonald's or its licensees, or both, 'may have been underpaying some employees'.³

McDonald's denied, and continues to deny the purported contraventions identified by Commissioner McKenna and objected to the decision. On 11 May 2010, McDonald's Australia Pty Ltd (McDonald's) lodged an appeal with Fair Work Australia against Commissioner McKenna's decision. The appeal was heard and determined by the Full Bench of Fair Work Australia. The Full Bench overturned the decision of Commissioner McKenna and approved the Agreement.

¹ [2010] FWA 1347.

² Ibid 379.

³ Ibid 382.

3.3 Background to the Pro-active Compliance Deed

Following the Full Bench Decision of Fair Work Australia, McDonald's entered into a 'Pro-active Compliance Deed' (the Deed) with the Fair Work Ombudsman (FWO) in March 2011.⁴

The Deed provided that McDonald's were to undertake two key compliance activities:

- 1- Facilitate an 'Employee Reporting Process' in which employees of McDonald's and its franchisee can query their workplace entitlements; and
- 2- Undertake a 'Self Audit' of 10% of the employees of a selected 27 McDonald's employing entities. Two periods were selected to be audited: 1 October 2009 to 14 October 2009 (2009 audit period) and 1 October 2010 to 14 October 2010 (2010 audit period).

The entities that were chosen to participate in the self-audit were selected by the FWO. McDonald's provided the Fair Work Ombudsman with information and employment records relating to the entities that they had undertaken the self-audit in August 2011. This information was provided to the FWO for review and assessment.

The Fair Work Ombudsman undertook an analysis of the employment records and the information provided by McDonald's. In December 2011, the Fair Work Ombudsman provided McDonald's with a preliminary report on the initial findings. The preliminary report contained areas in which the Fair Work Ombudsman required further clarification and requested a response from McDonald's which was received in March 2012. Between April and June 2012, the Fair Work Ombudsman conducted a thorough review and analysis of the McDonald's findings. The Fair Work Ombudsman formed the view in July 2012 that McDonald's workplace relations policies and processes were compliant with the *Fair Work Act 2009*.

Between August and November 2012, the Fair Work Ombudsman reviewed the interpretation of certain provisions of the *McDonald's Australia Enterprise Agreement 2009* to ensure the Shop, Distributive & Allied Employees' Association and McDonald's held a common view. Again, the Fair Work Ombudsman was pleased to find there was a shared understanding of the intent and meaning of several key pay rate provisions.

4. Pro-active Compliance Deed

As noted above, the Deed provided that McDonald's were required to undertake two key compliance activities: the Employee Reporting Process and a Self-Audit. The methodology and implementation of these activities is detailed below.

⁴ See <http://www.fairwork.gov.au/Documents/Proactive-Compliance-Deed-McDonalds-Aust-and-FWO.PDF>.

4.1 Employee Reporting

4.1.1 Implementation and Methodology

Under the Deed, McDonald's were to undertake an employee reporting process in which employees of McDonald's and its franchisees could enquire at a central contact about their employment entitlements.

The following actions were undertaken by McDonald's in this regard:

On 30 March 2011, a notice was placed on 'metime' (a website accessible to all employees of McDonald's and its franchisee's) explaining the self-audit process and inviting employees to contact McDonald's Workplace Relations team if they had concerns relating to alleged underpayments of wages and/ or entitlements. The 'metime' notice remained in place until 1 May 2011; and

On 4 April 2011, another notice was placed on McDonald's intranet ('McSource') for McDonald's corporate employees and franchisees. This notification was intended to further advise McDonald's franchisees of the notice placed on 'metime'.

4.2 Self-Audit

4.2.1 Implementation and Methodology

The Deed provided that McDonald's must undertake a self-audit of 10% of employees of 27 McDonald's employing entities which included both McDonald's and its franchises.

The Self Audit process was undertaken as follows:

Notification to franchisees – McDonald's provided each franchisee a letter outlining that they had been selected to participate in the Self Audit process. The letter also provided direction as to what was required and contact information for McDonald's Workplace Relations team. Included with the notification letter was a template document in which the franchisees could record any identified contraventions.

Undertaking the Self Audit – Franchise employers then undertook an audit of their employee's records for the two audit periods noted in the Deed. These audits would often be conducted in consultation with their administration staff and/or payroll providers. Finally, these audits were verified by the franchisee's accountants and/or book keepers. During the Self Audit period, McDonald's carried out a similar process with the McDonald's Payroll and Benefits Manager performed the self-audit. The verification of the findings for McDonald's was undertaken by the McDonald's Group Taxation Manager.

Rectification of contraventions – If rectifications were identified, McDonald’s and its franchisees were required to self-remedy and complete the aforementioned template to be provided to McDonald’s Workplace Relations Team.

Provision of initial findings and employment records – Following these compliance activities, McDonald’s provided the Fair Work Ombudsman with copies of the initial findings and the employment records to which the audit related for review.

5. Findings

5.1 Employee Reporting

Key Findings

- The number of contacts made to McDonald’s Workplace Relations Team was approximately 17% above the monthly average during the Employee Reporting Process.
- Nine workplace complaints were received by Fair Work Ombudsman relating to McDonald’s franchisee employers with the Fair Work Ombudsman during this time. All matters were resolved voluntarily with the assistance of McDonald’s.

Prior to the implementation of the Pro-active Compliance Deed, McDonald’s had in place a process in which employees of McDonald’s or its franchisees could contact the McDonald’s Workplace Relations Team to escalate their workplace relations enquiries. McDonald’s advised that they receive approximately 500 calls per month via this process.

During the Employee Reporting Process, employees were advised, via the ‘metime’ article, to contact the McDonald’s Workplace Relations Team if they had a query regarding their entitlements. During the month of April 2011, 585 calls were received which represented an average increase of 17% when compared to the average calls received for the same period.

Across the self-audit period, the FWO received nine workplace complaints against McDonald’s franchisee employees. These complaints related to the following allegations:

- Underpayment of wages;
- Not paid for time worked;
- Meal Breaks;
- Overtime; and
- Non-payment of long service leave.

McDonald’s provided assistance to the FWO in the resolution of these complaints in a timely manner.

5.2 Self Audit

Key Findings

- Minor issues were identified in relation to the 'rounding' of hourly rates of pay.
- No underpayments were identified during the 2009 audit period.
- One McDonald's franchise employer was found to be applying the incorrect casual loadings during the 2010 audit period.
- Uniform Deductions was identified as being an area in which clarification was required.
- Two instances of franchise employers not providing casual loading to employees undertaking training.
- The standard of record keeping practices was generally very high.

Rounding of hourly rate

Through the Self Audit process, McDonald's had identified that there were a very small number of issues with the rounding of hourly rates of pay for McDonald's and some of the franchisees. The underpayments associated with this issue were minor and rectified during the rectification period. It is noted that McDonald's have processes in place to facilitate ongoing auditing at a restaurant level.

2009 audit period

There were no underpayments identified during the 2009 audit period in both the Self Audit process conducted by McDonald's and its franchisees and the review conducted by the Fair Work Ombudsman.

2010 audit period

After the review conducted by the Fair Work Ombudsman, it was identified that one franchise employer had been applying the incorrect casual loading (19.43% instead of 21%). McDonald's advised that this issue was the result of a program error with the payroll provider used by the franchise employer. In total 66 employees were affected with the underpayment totalling \$3142.61. The individual payments to employees ranged from \$5.00 to \$169.00.

Uniform deposits

The deduction for uniform deposits was an area that was identified through the review conducted by the Fair Work Ombudsman. It was found that eight McDonald's franchisees had been deducting uniform deposits from their employees. The *Fair Work Act 2009*⁵ provides that an employer may deduct an amount from the amount payable to an employee if, *inter alia*, it is in writing and to the employees benefit.

⁵ Section 324

The Fair Work Ombudsman requested that McDonald's request their franchisees provided evidence of compliance with this provision. In their response, McDonald's identified that seven of the entities had written authorisation from their employees. McDonald's also responded that their franchise employers submit that these types of deductions are for the employees benefit in that it allows the provision of high quality maintained garments. Moving forward, McDonald's have taken steps to ensure that their franchise employers are aware of this requirement, through means such as internal communications and the issue placed on meeting agendas.

Casual Loading

Through the review of the Fair Work Ombudsman, it was identified that there were two franchise employers who had not been paying casual loading to employees participating in workplace meetings. McDonald's have indicated that these instances were not intentional and were brought about by an error in the manual entry of these hours in the payroll system. Both franchise employers have taken corrective steps in making necessary wage adjustments for effected employees.

Record keeping

The Fair Work Ombudsman found that the standard of record keeping across McDonald's and its franchisees was generally very high.

6. Changes implemented by McDonald's as a result of the self-audit

Following the conclusion of the activities associated with the Deed, McDonald's have indicated that there are several areas in which improvements can be made. Some of these include:

- Continuing to work with franchisee's in relation to providing information when there are increases in the Agreement rates;
- Incorporating an assessment of employment legislation, called 'Legislation Foundation Questions' when undertaking reviews of restaurant operations. These questions relate to a variety of areas including: the National Employment Standard; provisions of the Agreement; meal breaks scheduling; and apprenticeship and trainee legislation; and
- The introduction of an improved roster and shift management system which allows increased control and monitoring of meal and rest breaks for employees.

7. Ongoing compliance

Another positive feature of the Deed has been the facilitation of a collaborative arrangement between the Fair Work Ombudsman and McDonald's relating to future compliance. A key aspect of this arrangement allows for incoming complaints being referred by the Fair Work Ombudsman to McDonald's for a response within 14 days.

The working arrangement between the Fair Work Ombudsman and McDonald's has also seen Fair Work Inspectors attend Young Worker seminars conducted by McDonald's where the Fair Work Inspectors have been able to provide advice and feedback to attendees and presenters. The ongoing relationship also involves information sharing between the Fair Work Ombudsman and McDonald's, particularly in relation to emerging trends and issues in the fast food sector.

From 1 January 2012 to 4 December 2012, the Fair Work Ombudsman has received 29 individual complaints from McDonald's employees. These complaints have been referred to McDonald's for an initial assessment, and self-assessed rectification if appropriate. McDonald's undertakes to liaise directly with the relevant franchisee (if applicable) and provide the responses to the Fair Work Ombudsman concerning compliance and the provision of relevant information/evidence where complaints are disputed. The Fair Work Ombudsman actively reviews and analyses the information and evidence to determine compliance and advises McDonald's on the required actions to be taken for rectification, education and advice to assist in future compliance. Where an issue affects other employees, McDonald's notifies the Fair Work Ombudsman of the rectification and the actions undertaken taken to ensure compliance for those employees.

The majority of the complaints received have concerned unauthorised deductions, non-payment for all hours worked, non-payment of training allowances, and entitlements on termination (such as payment in lieu of notice and annual leave). Specifically:

- 11 of these matters were voluntarily rectified with a quantum of \$6,578.80 paid to employees;
- 4 matters were technical contraventions, all concerning written authorisation for deductions;
- 2 matters concerned long service leave entitlements and were referred to the relevant State Organisation; and
- 6 matters were not sustained and a further 2 had insufficient evidence for the Fair Work Ombudsman to determine.
- 4 matters (at the time of reporting) remained active.

8. Final Comments

The Deed between the Fair Work Ombudsman and McDonald's was the first of its kind for the Fair Work Ombudsman. It is a pioneering arrangement that reinforces the responsibility that large national employers must take to ensure that they are fully compliant with workplace laws. It demonstrates how the Fair Work Ombudsman is able to work collaboratively with employers to not only ensure compliance but enhance their workplace relations reputation.

Throughout the period of this Deed the Fair Work Ombudsman has observed McDonald's undertake responsive, self-regulated compliance activities which have undoubtedly improved the way in which McDonald's manages workplace relations both internally and externally.

The success of this Deed has led to additional collaborative compliance initiatives between other major employers and the Fair Work Ombudsman.