

Red Rooster's Proactive Compliance Deed

Final Report on the Proactive Compliance Deed between Red Rooster Foods Pty Ltd and the Fair Work Ombudsman

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

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1: Summary and key results

Key results

- The wages of 3140 employees were audited in 83 franchise outlets, with \$645 253 in underpayments identified
- Four employee pay queries were actioned
- 1206 employees and former employees have already been back paid in full, receiving \$346 285 in total
- Processes have been implemented to improve compliance with Commonwealth workplace laws.

In February 2012, Red Rooster Foods Pty Ltd (**Red Rooster**) entered into a Proactive Compliance Deed (**the Deed**) with the Fair Work Ombudsman with a view to improving the compliance of its franchisees with Commonwealth workplace laws, in particular the *Fair Work Act 2009* (**the Act**), and the *Red Rooster Agreement 2009* (**2009 Agreement**).

The Deed contained a number of proactive compliance activities to be undertaken by Red Rooster, including:

- conducting a self-audit of the employees of franchisees covered by the 2009 Agreement
- inviting employees to make enquiries about concerns regarding any wage or entitlement issues
- providing Red Rooster the opportunity to resolve complaints against Red Rooster and its franchisees within 28 days of receipt of the complaint from the FWO, and
- identifying improvements to systems and processes.

The key results of the various compliance activities required by the Deed have been independently verified by a Certified Practising Accountant and include:

- 3140 employees had their wages audited (83 Red Rooster franchise outlets)
- 1206 current and former employees have been back paid in full, receiving a total of \$346 285 as at 19 June 2014
- 23 Red Rooster outlets have gone into liquidation and therefore no back payments can be recovered in relation to these outlets
- processes have been implemented to improve workplace relations compliance.

Following the completion of these activities, Red Rooster and the Fair Work Ombudsman have continued to work together to resolve issues raised by employees.

2: Background

2.1: Red Rooster Pty Ltd

Red Rooster is an Australian restaurant business, with outlets in every Australian state and territory, except Tasmania. The company is Australian owned by Quick Service Restaurant Holdings Pty Ltd.

There are currently over 360 Red Rooster outlets, employing over 7000 employees. Some of these outlets are operated by Red Rooster, but the majority of Red Rooster stores are operated by franchisees that are granted the right to operate subject to a standard franchise agreement.

2.2: Background to the Proactive Compliance Deed

By agreeing to enter into the Deed, the Fair Work Ombudsman recognises the commitment by Red Rooster and its franchisees to ensuring fair Australian workplaces. The Deed established a framework within which Red Rooster and the Fair Work Ombudsman could work together to rectify underpayments and ensure ongoing compliance among franchisees. It is recognised that many of the employees of these franchisees are young workers with little or no previous work experience and limited knowledge of their entitlements.

The Deed was proposed by the Fair Work Ombudsman to Red Rooster after it was identified that there was a problem with the interpretation of the 2009 Agreement. As outlined below, this resulted in some employees being underpaid.

As a result of complaints lodged by employees with the Fair Work Ombudsman during 2011, it became evident that some of the base rates of pay under the 2009 Agreement were less than the base rates contained in the *Fast Food Industry Award 2010*, particularly for employees who had been employed for less than six months.¹

Under the Act, enterprise agreements generally apply to the exclusion of award conditions, however employees must be paid a base rate of pay not less than the rate from the modern award that would otherwise apply to them, regardless of the rate in the enterprise agreement.

Potential underpayments were originally identified by Red Rooster at 106 outlets, including 23 owned by companies that have since gone into liquidation. These do not include outlets owned by Red Rooster Foods Pty Ltd and those franchisees who are respondent to the *Shop Distributive and Allied Employees' Association – Red Rooster Award 2002 (Red Rooster Award)*. The reason for this is that due to the operation of the Red Rooster Award, these businesses were not required to pay modern award rates until after 31 December 2013.²

¹ As with most modern awards, the *Fast Food Industry Award 2010* contains transitional arrangements that give employers and employees time to adjust to changes to pay rates. These transitional arrangements provide for the gradual implementation of changes to pay rates over a four year period, to July 2014. As the transition is from different state-based instruments, rates vary between states until the transition period is over. (See section 206 of the *Fair Work Act 2009*, Item 3, Schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the Fair Work Ombudsman's Guidance Note 7, 'Transitional arrangements in modern awards'.)

² These businesses are covered by an enterprise award, not a modern award, therefore modern award rates did not apply. Note: enterprise awards ceased to operate from 1 January 2014, unless the Fair Work Commission made a modern enterprise award to replace the existing award.

The 2009 Agreement was negotiated by Red Rooster with the Shop, Distributive and Allied Employees' Association on behalf of the majority of franchisees. Not all franchisees are covered by this agreement, which took effect on 16 March 2010. Prior to this date the applicable agreement for many franchisees was the *Red Rooster Agreement 2003*.³

The Fair Work Ombudsman acknowledges that where underpayments have occurred due to modern award rates not being met, these appear to be inadvertent contraventions of Red Rooster franchisees' obligations under the Act.

3: Proactive Compliance Deed objectives and scope

A central objective of the Deed was to provide an opportunity for Red Rooster to work closely with the Fair Work Ombudsman and demonstrate its commitment to achieving fair Australian workplaces by ensuring ongoing compliance with relevant Commonwealth workplace laws.

This objective has been achieved through Red Rooster conducting a range of activities, involving franchisees, as detailed in the Deed. This included:

- Franchisee Employee Pay Audit
- Franchisee Employee Wage Queries
- Self-Resolution of future complaints
- Systems and Procedures Review

The methodology of the audit was agreed between Red Rooster and the Fair Work Ombudsman, ensuring that a comprehensive audit could be undertaken, whilst limiting the workload of franchisees in compiling and providing records.

3.1: Franchisee employee pay audit

In accordance with the Deed, Red Rooster completed an audit of time and wages records relating to 3140 current and former employees.

The audit covered the period 1 January 2010 to 31 December 2011, and included current and former employees at grades one, two and three under the 2009 Agreement. Grade four employees were not audited, as these rates under the agreement were above the corresponding modern award rates.

The audit was undertaken by Certified Practising Accountants engaged by Red Rooster at their expense.

Before commencing the audit Red Rooster and the Fair Work Ombudsman undertook extensive research to ensure that pay rates were assessed against the correct relevant phased modern award rates, the applicable modern award being the *Fast Food Industry Award 2010*.

The audit identified underpayments totalling \$645,253. The underpayments are being repaid over an extended period, due to the financial circumstances of some franchisees. The Fair Work Ombudsman will continue to work with Red Rooster to ensure the remaining underpayments are rectified. A significant proportion of the outstanding underpayments are owed by two multi-site franchisees, which are responsible for 16 outlets collectively.

³ The requirement for agreement-covered employees to be paid at least award-equivalent rates was first introduced in March 2006, however this requirement only applied to agreements made from that time onwards, so did not impact on the *Red Rooster Agreement 2003*.

3.2: Franchisee employee wage queries

In February 2012, employees of all franchisees taking part in the audit, were invited by Red Rooster to report any issues or concerns with their pay, or to report if they believed that they had been underpaid wages or entitlements.

There were only four employees who submitted queries to Red Rooster: Three employees asked about whether they were entitled to back pay, and the other query was from an employee expressing concern about rostered shift patterns.

3.3: Self-resolution of future complaints

Under the Deed, Red Rooster was given the opportunity to resolve complaints lodged with the Fair Work Ombudsman by employees and former employees of Red Rooster and its franchisees.

During the period of the Deed, there were six complaints lodged against Red Rooster and its franchisees. The main issues related to the underpayment of wages and access to meal breaks. These complaints were all resolved voluntarily, with the exception of one complaint that was not pursued because the employing entity went into liquidation.

3.4: Systems and procedures review

Red Rooster is continuing to work on improving the compliance of its franchisees. One of the undertakings made by Red Rooster as part of the Deed was that it would ensure that it complies at all times and in all respects with relevant Commonwealth workplace laws by developing systems and processes to ensure ongoing compliance.

This included a commitment to provide the Fair Work Ombudsman with details of the implementation of systems and processes designed to ensure ongoing compliance with relevant Commonwealth Workplace Laws.

Since entering into the Deed, Red Rooster has:

- posted all relevant policies and procedures on their on-line communications platform for the franchisee network
- conducted franchisee webinars to explain obligations under the 2009 Agreement and the *Fast Food Industry Award 2010*
- attended franchisee meetings to present changes in legislation and updates on significant changes including minimum wage increases
- provided all franchisees with the correct transitional rates as supplied by Red Rooster's legal advisors and checked with the Fair Work Ombudsman
- Introduced additional auditing processes of rate changes in the payroll system.

4: Audit outcomes and rectification

Red Rooster reported the following audit outcomes:

	Total employees	Total underpayments
Audits completed	3 140	\$645 253
Back payments completed	1206	\$346 285
Backpayments in progress	1934	\$298 698

In total, 106 franchisee-operated outlets were identified as requiring an audit. Audits of 23 outlets were not completed due to the employing entities being placed into liquidation.

In accordance with the Deed, all back payments were due to be made by 30 September 2012. While some back payments were made before this date, there have been significant delays with some franchisees making back payments. In many instances the timeframes set out in the Deed were extended in order to provide particular franchisees with adequate capacity.

The Fair Work Ombudsman acknowledges that the trading conditions for some outlets have been tough due to a number of regional and economic influences. In agreeing to extended timeframes for wages to be audited and rectified the impact of these influences are recognised, particularly because many of the franchisees can be considered 'small business',

In at least one instance, a franchisee took out a bank loan in order to be able to back pay employees.

Where former employees who were owed back pay could not be located, payment was made to the Commonwealth's Receiver of Public Monies, with the wages held in trust for the workers in accordance with section 559 of the Act.⁴

5: Conclusions

The Proactive Compliance Deed has been successful in meeting its key objectives.

The Fair Work Ombudsman commends Red Rooster and its franchisees for working with the Fair Work Ombudsman to ensure that employees have received the correct minimum entitlements. The commitment by Red Rooster has been a great example of corporate leadership.

⁴ Where wages are made to the Commonwealth, employees' details are added to the "Search for Unpaid Wages" facility at www.fairwork.gov.au/resources.

The circumstances that led to the employees being underpaid highlight the importance of employers with agreements being aware that employees' base rates of pay need to be at least equivalent to the modern award base rates that would otherwise apply.

The audit activity undertaken and the Fair Work Ombudsman's dealings with Red Rooster through complaint resolution processes have failed to identify any other significant compliance issues, other than the underpayments that led to the Deed being entered into.

The Fair Work Ombudsman will continue to work with Red Rooster and its franchisees to ensure that remaining back payments are rectified and to identify opportunities to improve compliance.

6: About the Fair Work Ombudsman

The Fair Work Ombudsman is an independent statutory agency, created by the FW Act on 1 July 2009.

Our vision is fair Australian workplaces. 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
- monitoring compliance with, inquiring into and, investigating any act or practice that may be contrary to workplace laws, awards and agreements
- enforcing workplace laws to deter people from not complying with their workplace responsibilities.

The Fair Work Ombudsman employs a number of strategies to achieve compliance with national workplace laws. This includes entering into Proactive Compliance Deeds with employers. A Proactive Compliance Deed (Deed) is an opportunity for businesses to work with the Fair Work Ombudsman in a positive and constructive manner and achieve sustainable monitoring arrangements so as to demonstrate commitment to 'fair Australian workplaces'.

Employers may seek to enter into a Deed with the Fair Work Ombudsman for a variety of reasons. Some of these reasons include:

- ensuring its obligations under the Act are being met
- a method of identifying and minimising business risks with respect to its employees
- to demonstrate that it is a **fair Australian workplace** and potentially an employer of choice
- to address potential areas of non-compliance with the Act.

A range of activities can be utilised to assist the business meet the intended outcomes of the Deed, for example, self-auditing of wages and record keeping, initiatives to engage with employees to improve compliance, and mutually beneficial improvements to employment and business outcomes by focussing on supply chain, brand and franchise relationships.

A business that enters into a Deed with the Fair Work Ombudsman is assigned a dedicated Fair Work Officer who provides support and assistance to the business to ensure they are able to meet the outcomes of the Deed.

A publicly available report is published at the conclusion of each Deed.

For further information and media enquiries please contact FWO media (media@fwo.gov.au).

If you would like further information about the Fair Work Ombudsman's Proactive Compliance Deeds please contact Steven Ronson, Executive Director – Dispute Resolution and Compliance (steven.ronson@fwo.gov.au).

7: Appendix A

Quick Service Restaurants Holdings Pty Ltd's "Report on Proactive Compliance Deed between Red Rooster Foods Pty Ltd and the Commonwealth of Australia", 19 June 2014