

Productivity Commission Review of the Workplace Relations Framework

Submission by M. Corling

Paws a While Boarding Kennels

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OUTLINE

Part One of my submission deals with -

1. Certain administrative processes and practices of the Fair Work Commission with regards to a matter I attended in 2014,
2. Certain shortcomings of the legislative framework in the Fair Work Act (2009) that governs the aforementioned processes and practices,
3. How those factors can (and do) result in the unbalanced and unfair treatment of business owners in ways that favour employee applicants, and ignore the costs and practicalities facing businesses in dealing with matters before the Fair Work Commission,
4. How those factors have a detrimental effect, not only on business productivity, but also on the productivity of the Fair Work Commission itself, and
5. The lack of any impetus on the part of the Fair Work Commission to use measures at its own discretion to negate that imbalance while easily working within its legislative mandates and limitations.

Part Two of my submission deals with –

1. Penalty Rates
2. General Protections

INTRODUCTION - PART ONE

I will list events and subsequent communications which have given rise to issues in the course of my dealings with the Fair Work Commission since September last year. The problems these issues have caused for me as a small business owner are likely to be endemic throughout Australia, because my case is unlikely to be unique.

These matters were of sufficient concern for me to complain to the Fair Work Commission, and also bring my problems to the attention of the Federal Member for Paterson, Mr Bob Baldwin, on 8/12/14. Mr Baldwin in turn forwarded the information to Senator Eric Abetz. Mr Abetz in his reply to Mr Baldwin wrote –

“...I would strongly encourage Mr Corling to raise his concerns with the Productivity Commission and for him to highlight his specific experience as a case study for the Productivity Commission’s consideration. It is very important for the Productivity Commission to have before it practical examples of how the current system works and the impact this has, particularly for small business.”

I have also sought the help of the Office of the Commonwealth Ombudsman, and they would not commence an investigation. I will demonstrate that the reason for that refusal is because the Fair Work Commission is legislatively bound to irrevocably cause businesses (and themselves) inconvenience and expense, and as long as they are complying with legislation there is neither any compulsion nor any willingness on their part, or anyone else’s part, to rectify the problems caused by that compliance.

DETAILS OF EVENTS

On 24/10/14 I received, via email, a 'Service of Application' from the Fair Work Commission, notifying me that a 'General Protections' claim had been filed against me by a former employee. The information attached in that email (on the response form 'F8A') made it apparent I should engage legal representation.

"...If you decide to represent yourself in proceedings you will need to make sure you are well prepared."

I didn't feel I had that capacity, so I lodged a response to the application with the help of my solicitor. Part of that response (item 6 in the 'respondent details' section) was also to notify the Fair Work Commission that I had engaged a legal representative.

Soon after I lodged my response, the Fair Work Commission notified me through my solicitor that a meeting was scheduled for mediation on 21/11/14. On that date, I attended the scheduled hearing at 12:00pm in the Newcastle Fair Work Commission office. My solicitor was also in attendance, as my listed representative. The applicant in the matter did not show up.

The Commission immediately spent at least half an hour unsuccessfully trying to call the applicant on the phone. When they eventually got the applicant on the phone she said she was at her home, and she said she didn't know the hearing was scheduled at all. It was confirmed that the applicant had been notified by email, but she asserted that she hadn't seen the email. The Fair Work Commission accepted her excuse, and re-scheduled the hearing for December 19 as a phone conference.

It was immediately obvious I was substantially out of pocket through no fault of my own, for absolutely no good reason at all. I had attended the hearing as directed, and brought my legal representative as recommended. I had to re-arrange my entire schedule and put extra staff on at my business for that day. I had to pay a substantial legal bill for my solicitor's attendance at the cancelled meeting.

I called the Newcastle office of the Fair Work Commission at about 4:00pm on 21/11/14 to ask about reimbursement for my expenses. The Commission's representative told me there was no-one at the Commission I could contact with regards to such a matter, that I was not entitled to reimbursement, and that if I disagreed with that I would have to seek legal advice from a solicitor. When I told him I was unhappy that that would cost yet more money, he suggested I could contact Newcastle's legal aid service. That was unacceptable to me in terms of the sheer amount of extra time involved, on top of the impositions to which I had already been subjected.

I then found by searching online there is a specific page on the Fair Work Commission's website through which I could lodge a complaint, which I did on 22/11/14. The Commission responded in writing (via email) on 8/2/15 (seventy nine days later). For reasons outlined in that response, the Commission refused my request for reimbursement of my lost money and time.

The full content of my complaint email is as follows. Please note; some of the passages in the following section were transcribed to compile the above "details of events."

MY COMPLAINT TO THE FAIR WORK COMMISSION

From: Paws a While Boarding Kennels [mailto:petboarding@optusnet.com.au]

Sent: Saturday, 22 November 2014 9:53 AM

To: Complaints

Cc: B.Billson.MP@aph.gov.au

Subject: FairWork lax procedures and arbitrary rescheduling cost small business and taxpayers how much every year? C2014/6934

Sir/Madam,

On Friday 21/11/2014, I attended a scheduled hearing with relation to the above "General Protections" matter (C2014/6934) at 12:00pm in the Newcastle Fair Work Commission office. My solicitor was also in attendance. The applicant in the matter did not show up.

Rather than dismiss the claim, or hear it in the applicant's absence, the Commission spent half an hour unsuccessfully trying to call the applicant on the phone. When they eventually got the applicant on the phone, she said she didn't know the hearing was scheduled at all. It was confirmed that the applicant had been notified by email, but she asserted that she hadn't seen it.

The Commission then re-scheduled the hearing for December 19 as a phone conference.

This is totally unacceptable in terms of the financial burden and liability it places on me for having attended the appointment on Friday. I attended the hearing as ordered, and brought my legal representative as recommended. I had to re-arrange my entire schedule and put extra staff on at my business. As of Friday I now have a pending legal bill for my solicitor's attendance on top of the original appointment I had to make with him to engage him in this matter.

It is not my fault that the applicant did not show up to attend the matter she brought before the Commission, yet I am expected to wear the costs and accept the inconvenience, neither of which is any small issue. This is completely absurd, and patently unfair on the face of it.

Leaving aside any speculation as to whether or not the Commission would have re-scheduled the hearing irrespective of the applicant's excuse, at the core of this situation is the fact I am now substantially out of pocket because the Fair Work Commission did nothing at all to ensure the successful delivery of the notice to both parties, or enforce their attendance. When I directed my concerns over the phone on Friday to [the Fair Work Commission], I pointed out that there are ways to check that emails have been sent and received. His answer was that the applicant had a 'Hotmail' email address, so "*anything could have happened.*"

That is frankly an appalling excuse, and still has nothing whatsoever to do with me. The applicant nominated the email address, and if the Fair Work Commission regards certain email services as being unreliable or unsuitable, it should insist on another means of communication. Even if the solutions to such a terrible "problem" weren't already plentiful and obvious (e.g. return-receipt emails, registered mail, etc etc), it is still not my fault that the applicant did not attend on Friday. I see no recourse except to insist that all of my expenses for Friday be reimbursed by the Fair Work Commission, and/or that the application be dismissed. I will be following up this complaint with legal advice, and I have also made an appointment to speak to my local M.P.

Cont'd

My Complaint to the Fair Work Commission (Cont'd)

I intend to pursue every course available to me in rectifying this and I will notify any person, government department, or business body with an interest in the fair treatment of small business owners. The lax attitude and terrible lack of accountability in the Fair Work Commission's notification process, not to mention the Commission's cavalier approach to whether or not people show up at all, is surely a matter for correction at a legislative level in order to put proper procedures in place. It is also a matter for concern regarding the waste of time and resources on the part of the Fair Work Commission.

Apart from that, it seems that in any other tribunal the non-attendance of the applicant would result in the matter being dismissed, but on Friday I learned that the Fair Work Commission takes a uniquely tolerant approach, and will reward applicants with any number of opportunities to reschedule at the respondent's expense for no good reason at all. In the words of [the Fair Work Commission], "*they are entitled to an opportunity to be heard.*" I thought Friday was that opportunity. It seems like a more accurate statement to say applicants are entitled to many opportunities to show up. Or, the Fair Work Commission is entitled to many opportunities to get one simple notification to them, and is further entitled to not enforce that they attend at all.

These entitlements are not only invalid, they are at odds with my interests and the interests of all small business owners, not to mention the interests of the Fair Work Commission itself. Now there will be more of the Commission's time wasted, instead of the matter being over already.

I on the other hand don't seem to be entitled to anything, least of all my time and money. The Fair Work Commission's attitude towards me and Friday's expensive fiasco is that I can just roll over and wear it, because they're the authority and this is how they do things.

I found this whole situation very surprising, because I had assumed the Commission's time and resources would be in such high demand that people who wasted them would be penalised. Instead I observed a process in which the applicant is automatically regarded as a victim and treated almost like a lost child, and the respondent can be penalised for doing the right thing without any hearing, with literally no limit or regard or consideration at all. I can only count myself immensely lucky that the hearing wasn't set down to be convened in Sydney.

This level of disorganisation and bias is compounded by the fact that people can bypass the protections in place for small businesses when it comes to dismissal complaints in the first place, and face no possible expense or penalty for lodging and pursuing even the most incoherent, frivolous or vexatious "general protections" applications to begin with. It's little wonder there's a Federal Government budget crisis, and so many small businesses buckle and close every year.

THE FAIR WORK COMMISSION'S RESPONSE TO MY COMPLAINT

Mr Michael Corling
Paws a While Boarding Kennels
267 Woodberry Road
Millers Forest NSW 2322

8 February 2015
Via email:

Dear Mr Corling

I write in response to your initial letter of complaint that you emailed to the Fair Work Commission (the Commission) on 22 November 2014. This letter is in follow up to my initial email response in 1 December 2014 and our subsequent email exchanges.

You have asked the Fair Work Commission to reimburse your legal fees because of an applicant's non-attendance at a conference convened by the Commission on Friday 21 November 2014. You attended with your legal representative as the respondent in the matter (C2014/6934). The applicant claimed to have not received the notice of listing for the matter via the email address provided in the application.

I have conducted inquiries into both what happened leading up to the conference and the avenues of recourse to address your request. This includes speaking with [the Member's Associate] whom you spoke with on the day.

What happened with the email?

I would firstly like to state that the Commission does not deem a particular form of email address as being unreliable and we have no evidence of such in this instance. I agree with you that stating that accepting a hotmail address is unreliable, that 'anything could happen' and then not addressing the issue is unreasonable. Please be assured that this is not the Commission's standard way of operating and that we have addressed this as a training and communication issue.

Our records show that an email was sent to the applicant, using the address provided on the application form, and attaching the notice of listing on 30 October 2014. I asked the system administrators to check if the system generated an error log for that action and they confirm that there are no such records. Our records also show that the user, [the Member's Associate], did not receive an 'undeliverable' message in his email account. I can therefore only conclude that the email was sent and there was no evidence showing [the Member's Associate] that it was not sent or was somehow undeliverable.

I acknowledge that it is both costly and frustrating when a party does not attend a conference and I am sorry that this was your experience. The Commission is trialling better ways to mitigate non-attendance.

The Commission ran a pilot program in 2013-14 using system-generated SMSs to remind parties of conference dates in unfair dismissal matters and this pilot will be extended to include some other matters.

The Fair Work Commission's Response to my Complaint (Cont'd)

Legislative Framework

General protections matters are dealt with by Members of the Commission. Members are independent, statutory appointees. Whilst Members share and use common systems, each Member is responsible for the conduct of their matter, including corresponding to the parties, within the legislative framework of the Fair Work Act 2009 ('the Act').

The Act governs both the role of the Commission and its limits in dealing with general protections applications. If an application is made under s.365 of the Act (general protections claims involving dismissal), the Commission must deal with this dispute (s.368). The Act provides that the Commission may deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion. The Commission cannot arbitrate these matters unless satisfied that all reasonable attempts have been made to resolve the matter voluntarily, and then only if both parties consent.

In your letter, you asked for the Commission to dismiss the application because the applicant failed to attend a conference. The Commission must deal with the dispute and has limited powers to dismiss applications. Under s.587 of the Act, the Commission is excluded from dismissing general protections applications that it would deem frivolous, vexatious or having no reasonable prospect of success. The Commission may direct parties to attend conferences (s.592) but cannot penalise non-attendance.

Your request

I note that your matter has now been resolved. Our inquiries show that the applicant was notified of the conference date via the email address provided in her application. There is no evidence to suggest to us that this notice was not appropriately delivered by the Commission to the applicant.

The legislative framework requires the Commission to deal with general protections applications and be satisfied that all reasonable attempts have been made to assist the parties resolve the dispute. The Act also provides (s.611) that a person must bear their own costs in relation to a matter before the Commission. There is an avenue for redeeming costs from the other party to a matter under s611 and an application can be made to the Commission to consider this question (see Form F6). This is a link to the legislative provision: https://www.fwc.gov.au/documents/documents/legislation/fw_act/FW_Act-04.htm#P8888_818477

The Commission is very conscious of the time and money spent by it and the parties in arranging conferences to resolve disputes between employees and employers. We do so within the bounds of the legislation that we administer. We continuously review and improve our services and introducing a reminder system for a conference is one of the ways we are trying to improve our service and efficiency.

I invite you to call me if you are unsatisfied with my response or if you would like to provide any further information that may assist. My direct line is [supplied]. There is information on our website about our complaints process including how to contact the Commonwealth Ombudsman if you are not satisfied with my response: complaints and feedback. (*hyperlink removed*)

Yours sincerely



DEMONSTRATED PROBLEMS WITH THE FAIR WORK COMMISSION'S PROCESSES

As I mentioned in my introduction, this case, as well as the Fair Work Commission's response to my complaint, led me to conclude that

1. The Commission's processes are not balanced, they favour employee applicants, and
2. They ignore the costs and practicalities facing businesses in dealing with matters before the Commission.

It has subsequently been shown to me that the driving factor is apparently the Fair Work Act itself, and it certainly seems to be the case that the costs and practicalities facing businesses are not properly considered in the Act. However it is not reasonable for the Fair Work Commission to invoke the Act for all of its actions when it should be obvious to the Commission that –

1. there is the potential for unfair impositions on both parties, (especially business owners), and
2. there is also the wasted time and wasted resources of the Fair Work Commission to consider, and
3. there are simple measures available to prevent both of those problems, even without any changes to any legislation.

If indeed the Fair Work Commission really did, as [REDACTED] said, "*take seriously the time and money spent by it and the parties in arranging conferences to resolve disputes between employees and employers,*" then the very nature of the Fair Work Act's limitations would **compel** the Commission to take any number of very simple steps to ensure attendance, or ensure notice for cancellations to prevent or at least mitigate the waste of time, money, and productivity for all concerned. To date, apart from lip service, I have seen no evidence whatsoever that the Commission takes these matters seriously at all.

In raising my concerns with the Fair Work Commission, and also the Office of the Commonwealth Ombudsman, I expressed my astonishment at the fact that the Fair Work Commission used no measures such as reminders or "*read receipt*" emails to make sure both parties attended. I put this point to [the Commonwealth Ombudsman's office], and his answer in effect was, "well, why *should* they?" His reasoning was that because I managed to show up for the conference, the Commission is vindicated and the responsibility lies solely with the applicant.

The aforementioned reasoning, to me, is indicative of a culture of departmental indifference, in which people employed by the Government rely solely on the bare minimum requirements of their jobs as set out by the law, despite the fact that adhering to those parameters causes problems, and going beyond those parameters would only be of benefit for all of the parties concerned, and would not breach the law in any way. What I saw was that no-one in the Fair Work Commission takes any initiative, or cares at all about any waste of time and money - before *or* after the fact.

Demonstrably, that's because they don't *have* to care, and the issues themselves are not compulsion enough for them to take action, however little that action might be. And everyone, including the Commonwealth Ombudsman, points to fact that they did the bare minimum as if that shows they did an outstanding job. That being the case, it's clear the minimum requirements need to be lifted.

Cont'd

Demonstrated Problems with the Fair Work Commission's Processes (Cont'd)

To add to the problem, (as outlined in my Details of Events and my Complaint to the Fair Work Commission), when I called the Fair Work Commission in Newcastle to ask about recouping my costs, I was not informed correctly about the options available for me to seek redress and claim my costs under the Fair Work Act. Instead of being told about that, and the applicable "Form F6" on the Fair Work Commission's website, I was told to call Legal Aid.

I can only speculate as to why the Commission's representative didn't provide me with such basic information. He may have been remiss, or perhaps in his estimation it would not have been impartial of him to provide me with that information. If the latter is true, the representative was wrong because I was merely enquiring about what to what I *could* do, not what I *should* do.

Furthermore, the question of impartiality was not an issue in [REDACTED] response to my complaint, which informed me that there is an "*avenue for redeeming costs from the other party to a matter under s611 and an application can be made to the Commission to consider this question (see Form F6).*"

Because fourteen days is the deadline for filing a Form F6, that information would only have been helpful if I had received it when I asked for it on the day of the cancelled conference, or when I lodged my complaint the next day. Instead, I was told seventy nine days later. Apart from that, s611 of the Act deals only with vexatious claims, and upon further inquiry the relevant section appeared to me to be s375, under which a costs claim can be filed for "unreasonable behaviour" by either party.

It is clear from my situation that the present system is insufficient whereby the aggrieved party *might* be able to "request" from the Fair Work Commission an order for costs from the other party, especially when no-one informed me about that option, even when I asked. Apparently before attending any matter at the Fair Work Commission, I needed to read the entire Fair Work Act, or read it in full shortly afterwards.

DEMONSTRATED PROBLEMS WITH THE FAIR WORK ACT

- ***There is no direct or automatic penalty for failing to attend a Fair Work Commission conference without notice, and***
- ***The Fair Work Commission cannot dismiss certain applications, least of all for non-attendance.***

As a layman in these matters, I sincerely defer to anyone who knows the exact reason for the points above, and I accept that my lack of knowledge in that regard might invalidate my argument against them. However, whatever the reason(s) might be, the ramifications that need to be considered actually extend beyond the fact that the lack of any penalty for non-attendance means either party's costs can be doubled (as mine were), or they can (ostensibly) be tripled, or quadrupled, or stretched out to infinity.

That is dire enough on its own, but the most serious implication in this matter is the fact that, knowing there is no penalty, an applicant could **deliberately** fail to attend (especially if they can concoct an excuse which doesn't leave them open to a costs claim), in order to **intentionally** impose costs and cause inconvenience to the respondent, then shortly afterwards contact the respondent to propose a more favourable settlement for themselves before the rescheduled mediation. It also seems like a respondent could do almost the same thing to an applicant, especially if the respondent knew that the applicant had engaged paid representation.

The lack of any direct penalty for non-attendance in a "no costs" matter (especially a matter involving the likelihood of a pecuniary settlement), actually incentivises non-attendance, especially for the applicant. It is a source of wonder to me that such an obviously problematic convergence can legally exist.

CONCLUSION

As I mentioned earlier in this submission, I am a layman when it comes to the difficulties law makers must face when formulating legislation to balance the needs of employees and employers. As such, I can only comment about the ways in which this matter has affected me, and then suggest what I consider to be very simple solutions.

The events I outlined in this submission have now directly cost me far in excess of \$1000 above what the matter would have cost if the applicant had attended the conference, especially taking into account the time I have had to waste since then. Add to that the costs imposed on the Fair Work Commission, and by extrapolation it's easy to imagine that the cost to the Government, and businesses of all sizes nationwide, might easily run into millions of dollars annually.

No doubt my ideas about the possible solutions to my concerns have been made apparent throughout this submission, but to summarise I would respectfully ask the Productivity Commission to recommend that the Fair Work Act (2009) be changed so that applications are dismissed if applicants fail, without notice, or a suitable reason, to appear at their own matter.

The implications of the Act also need to be closely examined with regards to the potential for manipulation of the process through non-attendance by either party.

If for some reason the Fair Work Act can't be changed to address these kinds of problems, then the Fair Work Commission's mandate should include strict national rules and requirements for everyone in the Commission to take all available – and suitably specified - steps to prevent or mitigate those problems.

PART TWO

Penalty Rates

Having this opportunity to make a submission to this inquiry, I would be remiss if I didn't add my own contribution to the discussion about penalty rates.

It's highly doubtful that there are any aspects that haven't been considered in the debate about penalty rates over many years. From my perspective as a long time employee turned employer, the question has always been about whether or not businesses would simply "pocket the money."

I can only say that if penalty rates were removed, my wife and I would employ more people, because that would be of great personal benefit to us in terms of our own lifestyle, fitness and health. The real price of penalty rates to us is our time, not our money. In order to gain more free time and take better care of ourselves, without penalty rates we would still budget the same amount for wages overall as we do now.

Without the option to employ more people we are forced to work much longer hours ourselves. It should be noted that small business owners already forgo all leave entitlements, including (but not limited to) annual leave, long service leave, and sick leave. In our case, it is a fact we would use any money we might gain to employ more people in order to achieve a better work/life balance for ourselves.

Like many businesses, our operation is intensively centred on weekends and holidays. Those are the times we need employees the most, but our business can't afford them, so we personally work twice the hours.

As I mentioned at the start of this addendum, I'm sure I can't add anything to this discussion that no-one has thought of before. However, I wonder if the Government has considered offsetting penalty rates in the interests of creating job opportunities and helping very small businesses (i.e. those with fewer than five employees).

Under the award that applies to my business, part time work qualifies for a non-overtime Saturday rate of 120%, and a Sunday rate of 150%.

1. If a person, on a part time basis, works two eight hour shifts on Saturday and Sunday for \$20 per hour plus penalty rates, they earn \$864.00 per fortnight before tax.
2. The same person on the dole would receive \$515 per fortnight.
3. Of the \$864.00 per fortnight an employer would pay, \$224.00 is the portion of penalty rates.
4. By paying the above penalty rate portion instead of the dole, the Government would save \$291.00 per fortnight. The person would not be unemployed, and would receive penalty rates.

It goes without saying that this is an idea I'm submitting with the realisation that it is thoroughly incomplete, that it may very well have been investigated before, or it is otherwise terminally naive. However I hope if none of those things is true, the idea might otherwise be examined in principle. Its viability – if indeed it has any viability at all – obviously depends on the legal and ethical practicalities of limiting its scope, and any number of other factors of which I'm no doubt unaware.

Definitions of Discrimination in General Protections

With regards to discrimination, the Protected Attributes listed in General Protections for employees are – Race, Colour, Sex, Sexual Preference, Age, Physical or Mental Disability, Marital Status, Family or Carer's Responsibilities, Pregnancy, Religion, Political Opinion, National Extraction, and Social Origin.

Also, according to the definitions in General Protections, “adverse action” (e.g. dismissal) is not discrimination if the action “*relates to the necessary requirements of the job.*”

Out of all the Protected Attributes, the only one that can have a drastic affect on a person’s work attendance is *Family or Carer's Responsibilities*. In certain circumstances, those responsibilities can lead to extremely erratic and unpredictable work attendance, which is something a very small business simply cannot operate with. In fact, the needs of small businesses are such that irregular work attendance and unpredictable or excessive work absences within a very small number of staff, for any reason at all, can have a terrible effect on the very sustainability of the business itself.

The expectation under the present rules is that small businesses should have a list of people on call, to make up for employees who can only manage to attend work when their circumstances allow them to. That expectation is unreasonable, unrealistic, and adds to the burden placed on small business operators. It presumes there is a raft of suitably trained people on call at any given time, with their lives on hold, waiting to be called for a few hours work at a moment’s notice. That is most definitely not the case.

A person who cannot reliably attend employment in a certain place at a certain time is no more *eligible* for that position than a person with a grade six education is *eligible* for a job as a university professor. That’s not discrimination; it’s a fact of life. Therefore, dismissing a person for poor attendance is not discrimination, regardless of that person’s reason for poor attendance, or their lack of control over that reason. Whatever the case, they are simply not suitable for the job, and if they accept the job with the knowledge that they will have trouble attending, that is tantamount to fraud. Instead, they have an instant case for a discrimination claim. Apart from being absurd, that’s potentially crippling to a small business.

I note the Productivity Commission’s mandate to examine small business and ‘*the ability for employers to flexibly manage and engage with their employees.*’ Under that stipulation, I submit that small businesses – whether indefinitely or at least for the same twelve month period as the exemption from unfair dismissal claims - should be exempt from penalties for dismissing any person who cannot attend work on a regular and predictable basis for any reason whatsoever.

I also submit that, especially in the case of small businesses, the aforementioned exemption is easily predicated on the fact that predictable and regular work attendance is clearly - and therefore *should be entrenched as* - a “***necessary requirement of the job,***” as defined in General Protections.

Thank you for reading my submission. I hereby declare that, where applicable, the information in this submission is true and accurate to the best of my knowledge and belief, and no pertinent information has been withheld.

Yours Sincerely,

Michael Corling