

WORKSITE RESOLUTIONS



17 February 2015

CONSULTANTS IN AUSTRALIAN WORKPLACE AGREEMENTS ®

Workplace Relations Framework,
Productivity Commission
G.P.O. Box 1428
CANBERRA CITY- ACT - 2601

Via Email : workplace.relations@pc.gov.au

Dear Commission Members,

RE : Review of Australian Workplace Relations Framework

Further to your invitation for written submissions into the Australian Workplace Relations Framework as advertised in the Australian media on **23 January 2015**, it is with pleasure that I provide the following comments and opinions for the Commissions consideration.

My comments and opinions are based upon some 27 years experience of having worked for various organizations, in positions of considerable responsibility related to Industrial and Employee Relations management.

During the past 20 years of private practice, I have been successful for implementing in excess of 350-workplace agreements for various organizations primarily in the small business sector, pursuant to three commonwealth acts of parliament.

I refer to the ***Industrial Relations Act 1988 (Cth)*** being the predecessor for enterprise bargaining, followed by the ***Workplace Relations Act 1996 (Cth)*** which redefined the whole process of workplace agreements, and finally the present ***Fair Work Act 2009 (Cth)*** which effectively has taken the enterprise bargaining process back some 27 years to when I first commenced.

The assessment and approval process under the Hawke/Keating Government's ***Industrial Relations Act 1988 (Cth)*** was quite legalistic and onerous. The procedure of presenting an application before the then Australian Industrial Relations Commission generally required the appearance of a legally qualified representative, which made an application cost prohibitive for most small businesses.

We then move onto the sweeping changes introduced by the Howard Government under the auspices of the ***Workplace Relations Act 1996 (Cth)*** which streamlined the whole application process, thus opening up the opportunity for consultancy services such as mine to assist small businesses, which continues to this day.

And then finally we have the Rudd/Gillard Government's ***Fair Work Act 2009 (Cth)*** which has made the whole application process so complex for those of us representing small businesses, that we have effectively turned full circle back to 1988 when the first enterprise agreements were introduced. The initial process requires providing employees with 21 days notice of their representational rights, followed by a further 7 days notice prior to a vote on the proposed agreement. If any of these procedures are not complied with correctly, the Commission Member must refuse the application without proceeding to its assessment.

Presently the process of filing and ultimately having an agreement approved can be long and arduous for small businesses. This is despite the Fair Work Commissions assurances through their Annual Report that the process of filing, appearing and having an enterprise agreement certified has been improved, when in fact the time frame can take several months.

We note at page 32 of the Fair Work Commission's Annual Report 2013-14, Section 185 agreement applications were approved as follows:

- 59.2% of agreements finalized within 3 weeks,
- 92.8% of agreements finalized within 8 weeks,
- 98.4% of agreements finalized within 12 weeks

However at the time of preparing this submission there are some 16 applications within a particular Industry Sector awaiting approval. Some of those applications go back as far as September 2014, however one application which the Union was a party to, was approved within 2 weeks of having been filed with the Fair Work Commission.

Regarding the Commission's application process, I would refer to the comments made by President Justice Giudice in the Knightwatch Security Full Bench Appeal decision [i], where he stated in part: *"The average time for dealing with applications to certify agreements of the kind dealt with in s.170LK is 32 days. Eighty-five per cent of such agreements are certified within 48 days of application being made. While some delay is inevitable when the case involves mathematical calculations of some complexity, the delay in the determination of this matter is clearly unacceptable and reflects poorly on the Commission."*

Based upon the comments made by the former President some 11 years ago, it could safely be stated that the system has not vastly improved despite greater resources provided by the Commonwealth Government to the Fair Work Commission since that time.

* To that end we would recommend that the present application process be subject to strict time frame controls, by which if the agreement is not approved or heard it may be forwarded onto an independent panel of review and assessment or Appeal such as the Expert Panel within of the Fair Work Commission.

Some Fair Work Commission Members, who are responsible for key industry panels, are most cautious if the proposed agreement is from the private industry sector. However if an agreement is either filed by a Union or a relevant Union seeks to be a party to such an agreement, then the Commission Member(s) take a totally different perspective and will as previously noted approve the agreement without hesitation or delay.

In my own experience over the past 20 years I have represented clients in two major Full Bench Appeals [i] and [ii], which highlighted to the Full Bench, practices which occur within the Fair Work Commission and the former Australian Industrial Relations Commission without their knowledge. Despite my being successful in winning both Appeals, which drew attention to the relevant Members actions, the repercussions were significant upon all future applications when I had to once again face the relevant Member, who made their feelings known about their decision(s) being quashed.

* To that end we would recommend that the present process involving alleged actions of bias or significant delays by a Fair Work Commission member, which are subject to a formal complaint to the President then addressed in the Parliament, be processed by an independent panel of review outside of the Fair Work Commission.

As the Commission will no doubt be aware during the period of the Rudd/Gillard Government, the usual convention of appointments to the bench being made equally from Government, Union or Employer Associations was dispensed with, and so we now have a majority of Commission Members who have come through from the Union movement.

I refer to articles from the **Australian Financial Review** dated **2 April 2012**, **10 April 2012** and **10 November 2012**, which emphasized the situation of appointments for life on very generous salaries, not to mention fully paid for overseas study tours at tax payer expense, which will remain with the Commission for years to come.

Further not only are the Commission Members remunerations and associated benefits a significant cost upon the public purse, but also the administrative cost of running the Commission now runs at \$79.996 million per annum as confirmed at pages 89 and 170 of the 2013-14 Annual Report to the Minister.

On that basis one must ask are the Australian public receiving value for money, when many of the Commission members are affiliated with outside organizations, which they continue with on a paid basis when they retire or resign from their commission appointment.

Given the Fair Work Commission is in fact a tribunal and not a court of law; to my mind appointments for life are completely unfounded. The task of reviewing such appointments would not be a simple one, and would obviously be met with considerable opposition mainly from Commission members themselves.

I would draw the Commissions attention to "*The Gleeson Report*" which was conducted by Mr. G. Gleeson AC, Mr. Justice L.T. Olsson and Professor A. Fels dated 1 March 1991. The basis of this report, which was commissioned by the late Senator Peter Cook on behalf of the Hawke Government, was to review the structure, remuneration and workings of the then Australian Industrial Relations Commission.

The summary of recommendations in that report did not address the issue of appointments for life as compared to fixed tenures, which operate in some state jurisdictions. Rather the focus was on remunerations, which over time have escalated to such an extent that they now surpass those of Federal Members of Parliament.

In contrast the Commission may wish to consider the likes of the Victorian Civil & Administrative Tribunal (V.C.A.T.), which makes its appointments for a period of 5 years by the Governor in Council on the recommendation of the Attorney General. Further such appointments are made after applications have been called for from suitably qualified persons across Private, Government and Community Sectors.

We note that the position of Expert Panel Member within the Fair Work Commission who provides comment and opinion for all National Wage Reviews, are for a period of 5 years on a Part-time basis and are subject to a Government Agency interview process, after being recommended through a recruitment agency.

The present structure of the Fair Work Commission is that such appointments appear in the majority of cases to be focused on those legally qualified, rather than with considerable experience in Industrial Relations or Human Resources management.

Further an appointment for life can and does impact considerably upon a Governments policies, in the areas of unemployment and the very basic issue of an affordable minimum hourly rate of pay, and its flow-on effect to small business, which in turn will contribute, to the nations inflation level.

* To that end we would recommend that the present process involving appointments to the Fair Work Commission which are made by the Governor-General of Australia on the recommendation of the Australian Government of the day, be replaced by an independent panel of review outside of the Fair Work Commission.

Finally in the matter of wage rates, the general public believe and understand that a person is entitled to a fair and reasonable hourly rate of pay, however what they are unaware of is the compounding effect penalty rates and shift allowances have upon small businesses, which employ over 48% of the nations work force.

For example pursuant to the *Security Services Industry Award 2010* the ordinary hourly rate for a level 1 Security Guard working Monday to Friday between 6:00am and 6:00pm is \$18.95. However when that same guard works Monday to Friday between 6:00pm and 6:00am the hourly rate increases to \$23.06, for Saturday is \$28.43, Sunday \$37.90 and Public Holidays \$47.38. Even though the guard is performing the same work irrespective of the time of day, the penalty rates make it impossible for a business to operate profitably.

Accordingly small businesses are seeking to address this situation through workplace agreements, paying a loaded hourly rate of pay to compensate for the loss of penalty rates and shift allowances.

The problem is despite the organizations employees voting unanimously in favor of such an agreement, the relevant Fair Work Commission member will often seek complicated mathematical analysis from the Commissions own "Enterprise Bargaining Unit", who create totally unrelated rostering models, which generally indicate the employees would be financially worse off.

When an application is filed with the Fair Work Commission based upon a previously approved agreement such as the *Lighthouse Protection Group Enterprise Agreement 2012* [iii] as heard by a Senior Commission member, other Commission members are reluctant to approve such an agreement based upon hypothetical rostering model scenarios prepared by the "Enterprise Bargaining Unit".

This is despite the fact that the Senior Commission member who is eminently qualified with a Doctorate in Economics, approved the initial agreement, based upon a valid majority of the employees who voted for the agreement.

If we then move on to the Kennett Government's *Employee Relations Act 1992 (Vic)* the whole issue of filing and registering either Collective or Individual Employment Agreements was a very simple and uncomplicated process.

Pursuant to Section 13 of the above Act, provided the relevant agreement had met the necessary minimum conditions and was signed and dated by the relevant parties, upon filing the documents with the Chief Commission Administration Officer, the parties would receive a stamped copy of their agreement with an approval certificate for the relevant period of operation within two weeks.

As the Commission will be aware even Gough Whitlam prior to the 1972 Federal Election while addressing the MTIA Annual Convention as reported in the **Australian Financial Review** on **6 October 1972** gave his endorsement of Individual Employment Agreements.

Given that the Abbott Government has given a commitment that it will not reintroduce Australian Workplace Agreements, but review *Individual Flexibility Agreements*, I would encourage the Commission to consider their registration with say the Commissions own Chief Administration Officer utilizing the services of the "Enterprise Bargaining Unit".

* To that end we would recommend that the present Individual Flexibility Agreements, in addition to strict time frame controls, be assessed by a newly created Office of the Chief Administration Officer replacing the position of General Manager within the Fair Work Commission.

At the present time the onus is upon the employer to ensure all the legal requirements have been met for an *Individual Flexibility Agreement*. However should an audit be conducted by the Fair Work Ombudsman, which indicates the employer inadvertently under paid an employee, the employer may be liable to face fines of up to \$6,600 for an individual or \$33,000 for an employer who is incorporated.

From a business perspective for an employer to enter into a legally binding agreement with their employees, and not have the assurance that such a document has been approved and issued with a certificate, does not give employers the confidence they need.

The alternative is to make an application before the Fair Work Commission for the approval of an Enterprise Agreement, however as previously indicated such approval is not guaranteed plus there is the onerous task of waiting to have the matter heard and then considered by the relevant Member over a lengthy period of time.

I thank the Commission for inviting members of the public to write to you on these matters, and would welcome the opportunity to discuss the enclosed issues in further detail at a time mutually convenient.

Yours Sincerely

Robert Graham/
Principal Consultant

[i] [2004] AIRCFB - Knightwatch Security [PR943374] 6 February 2004

[ii] [2013] FWCFB 5768 - Macxsec [PR540285] – 15 August 2013

[iii] [2012] FWAA 3742 – Lighthouse Security Enterprise Agreement [PR523282] – 1 May 2012