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CONSULTANTS IN AUSTRALIAN WORKPLACE AGREEMENTS ®

2 September 2015

Mr. Peter Harris AO,
Chairman,
Productivity Commission
G.P.O. Box 1428
CANBERRA CITY- ACT - 2601

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

Dear Mr. Harris,

RE : *Review of Australian Workplace Relations Framework*

Further to the release of your draft findings on 4 August 2015 into the Australian Workplace Relations Framework, we note that the Productivity Commission has offered participants to elaborate further on their submissions.

As the Commission will recall our submission focused primarily on the issues involving the formulating and registering of Enterprise Agreements, followed by the self-auditing process of Individual Flexibility Arrangements.

As we explained the present process of filing and ultimately having an Enterprise 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 then went on to explain how small businesses are seeking to address the situation of Award penalty rates and shift allowances through workplace agreements, paying a loaded hourly rate of pay to compensate for the loss of penalty rates and shift allowances.

We then raised the prospect that the Abbott Government has given a commitment that it will not reintroduce Australian Workplace Agreements or AWA's, but rather review ***Individual Flexibility Arrangements***. We asked that the Commission consider the registration of such arrangements, with the Fair Work Commissions own Chief Administration Officer utilizing the services of the "Enterprise Bargaining Unit".

As we explained at the present time the onus is upon the employer to ensure all the legal requirements have been met for ***Individual Flexibility Arrangements***. 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.

We then stated employers are reluctant to enter into a legally binding agreement with their employees, unless they have the assurance that a government authority has firstly assessed such a document and secondly been issued with an approval certificate, which is a major reason why employers are not implementing such agreements.

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We then noted the Commission in its findings at page 36 of its draft report overview stated, *"...there have been very few instances where the Fair Work Ombudsman has acted against an employer in respect of an individual flexibility arrangement."*

Though this may well be the case, we would draw the Commissions attention to two high profile cases, which involved significant penalties and costs to employers who had breached the specifics of drafting, formulating and implementing such an agreement for their employees.

In the matter of the ***Fair Work Ombudsman v Australian Shooting Academy Pty. Ltd.***, we note the employer for breaching the terms of an Award and the Fair Work Act 2009 (Cth), when entering into an Individual Flexibility Arrangement with its employees was fined and penalized a total of $37,146.00.

In the matter of the ***Fair Work Ombudsman v Henna Group Pty. Ltd.***, we note by virtue of the employer having underpaid their employees, by way of penalty rates for weekends and public holidays, despite paying above the Award was fined and penalized a total of $220,000.

We would say in both instances the employers in good faith undertook to utilize the benefits of an ***Individual Flexibility Arrangement.*** However the outcome could have been far more beneficial to both employer and employees, had there been assistance provided in the specifics of drafting, formulating and implementing such an agreement, which would have prevented the catastrophic outcome to each business.

In support of this scenario we note the former Fair Work Ombudsman – Nicholas Wilson, while addressing the Industrial Relations Society of Victoria Annual General Meeting on Friday 8 October 2010, stated in all high profile prosecutions his office ensured maximum press coverage. This would of course highlight the court outcome, but more significantly deter those employers who considered proceeding down the path of an invalid arrangement.

As reported he stated *"The more general deterrence can engage the community, the less sharks, shames and shams we need to spend time on."*

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 expand further on the enclosed issues in further detail if so requested.

Yours Sincerely,

Robert Graham
Principal Consultant

Fair Work Ombudsman v Australian Shooting Academy Pty. Ltd. [2011] FCA 1064
Fair Work Ombudsman v Henna Group Pty. Ltd. [2012] FMCA 244
Workplace Insight – IRSV Annual General Meeting – 12 October 2010