



Australian Government

# Fair Work OMBUDSMAN

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## ENFORCEABLE UNDERTAKING

Dated ....13/3.....2012

Given by

**Buxton (Sandringham) Pty Ltd**

**(ABN: 76 855 269 290)**

**ACN: 102 644 888)**

to

**The Commonwealth of Australia**

**(as represented by the Office of the Fair Work Ombudsman)**

**concerning contraventions of Commonwealth workplace laws**

## Details

| Parties                      | FWO and Buxton (Sandringham) Pty Ltd |   |
|------------------------------|--------------------------------------|---|
| FWO                          | Name                                 | Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman)   |
|                              | ABN                                  | 43 884 188 232  |
|                              | Address                              | The Fair Work Ombudsman<br>GPO Box 9887<br>Melbourne Vic 3000   |
|                              | Telephone                            | 03 9954 2657  |
|                              | Fax                                  | 02 6267 4474  |
|                              | Attention                            | Karsten Lehn, Executive Director, Complex Investigations and Innovation, FWO  |
| Buxton (Sandringham) Pty Ltd | Name                                 | Buxton (Sandringham) Pty Ltd  |
|                              | ABN / ACN                            | 76 855 269 290 / 102 644 888  |
|                              | Incorporated in                      | Victoria  |
|                              | Address                              | 7 Bay Road, Sandringham, Vic 3191   |
|                              | Telephone                            | 03 9598 8222  |
|                              | Fax                                  | 03 9598 5702  |
|                              | Attention                            | Director  |
|                              | Name                                 | Mark Earle  |
|                              | Address                              | 7 Bay Road, Sandringham, Vic 3191   |
| Telephone                    | 0419 310707                          |   |
| Recitals                     | A                                    | On 30 September 2010, the Office of the Fair Work Ombudsman (FWO) commenced an investigation into allegations that Buxton (Sandringham) Pty Ltd contravened Commonwealth workplace laws.  |
|                              | B                                    | By reason of the matters set out in Attachment "A" (Background), the FWO has determined, and Buxton (Sandringham) Pty Ltd acknowledges, that Buxton (Sandringham) Pty Ltd contravened Commonwealth workplace laws.                |
|                              | C                                    | The parties have agreed to resolve the contravention without the need to resort to civil penalty litigation by way of this Enforceable Undertaking ("EU") made pursuant to section 715 of the <i>Fair Work Act 2009</i> (FW Act). |

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**Governing law**      Victoria

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**Date of agreement**      See Signing page

**General terms**

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**1      Admission of contravention**

By reason of the matters described in Attachment "A" (Background), which are admitted without demur by Buxton (Sandringham) Pty Ltd, Buxton (Sandringham) Pty Ltd contravened Commonwealth workplace laws in the respects set out in Attachment "B" ("Contravention").

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**2      Limit of admission**

2.1      The FWO acknowledges that the terms of this EU:

(a) are solely for the purposes of resolving the FWO investigation into the Contravention; and

(b) must not be interpreted as an admission by Buxton (Sandringham) Pty Ltd of liability for any matter, other than as expressly provided in this EU.

2.2      No assertion or matter in this EU may be relied upon as an admission by any person to support a cause of action in any other civil penalty proceeding.

2.3      However, this term does not prevent any matter in this EU being relied upon in future proceedings in order to inform a relevant Court or tribunal of the details of the conduct that was the evidentiary foundation for the Buxton (Sandringham) Pty Ltd entering into this EU.

2.4      This means that the FWO reserves the right to rely on the terms of this EU and the admissions in respect of any future proceedings brought by the FWO against Buxton (Sandringham) Pty Ltd in relation to any future contraventions of Commonwealth workplace laws.

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**3      Enforceable undertakings**

Buxton (Sandringham) Pty Ltd **NOW UNDERTAKES** that, in consideration of the FWO agreeing not to apply for any orders under Division 2 of Part 4-1 of the FW Act in relation to the Contravention (as evidenced by the FWO's acceptance of this EU endorsed below), Buxton (Sandringham) Pty Ltd must do all those activities and things set out in Attachment "C" (Undertakings).

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**4      Commencement of enforceable undertaking**

This EU comes into effect when:

(a) the EU is executed by Buxton (Sandringham) Pty Ltd; and

(b) the FWO accepts the EU executed by the Buxton (Sandringham) Pty Ltd (as evidenced by the FWO's acceptance of this EU endorsed below).

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**5 Acknowledgements**

Buxton (Sandringham) Pty Ltd acknowledges that:

- (a) the undertakings it has given in this EU are reasonable in the circumstances;
- (b) this EU is given to and accepted by the FWO pursuant to section 715 of the FW Act;
- (c) the FWO may:
  - (i) make this EU (and any of the Attachments) available for public inspection, including by posting it on the FWO internet site at [www.fwo.gov.au](http://www.fwo.gov.au) (subject to the FWO taking any necessary steps to the redaction of the names of any person affected by the Contravention);
  - (ii) release a copy of this EU (and any of the Attachments to it) pursuant to any relevant request under the Freedom of Information Act 1982 (Cth);
  - (iii) issue a media release in relation to this EU;
  - (iv) from time to time, publicly refer to the EU (and any of the Attachments to it) and its terms;
  - (v) rely upon the admissions made by Buxton (Sandringham) Pty Ltd in paragraph 1 above in respect of any decision about enforcement action to be taken in respect of any future non-compliance by the Buxton (Sandringham) Pty Ltd with Commonwealth workplace relations obligations.
- (d) consistent with the Note to section 715(4) of the FW Act, this EU in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this EU; and
- (e) if Buxton (Sandringham) Pty Ltd contravenes any of the terms of this EU:
  - (i) the FWO may apply to any of the Courts set out in section 715(6) of the FW Act, for orders under section 715(7) of the FW Act; and
  - (ii) this EU may be provided to the Court as evidence of the admissions made by Buxton (Sandringham) Pty Ltd in paragraph 1, and also in respect of the question of costs; and
  - (iii) this EU is to be taken as having been withdrawn by Buxton (Sandringham) Pty Ltd for the purposes of section 715(3) of the FW Act if the FWO gives its written consent (in which case the FWO may apply for orders against Buxton (Sandringham) Pty Ltd under Division 2 of Part 4-1 of the FW Act).

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**6 No inconsistent statements**

Buxton (Sandringham) Pty Ltd:

- (a) must not; and
- (b) must ensure that each of its officers, employees or agents, do not,

make any statement, orally or in writing, or otherwise which conveys or implies or reasonably conveys or implies anything inconsistent with admission or acknowledgements contained in this EU.

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**7 Termination by the FWO**

At any time, the FWO may, by notice in writing, terminate this EU (that is, immediately and without notice) if Buxton (Sandringham) Pty Ltd commits, in the opinion of the FWO, a serious or persistent contravention or non-observance of a term or terms of this EU.

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**8 Withdrawal from or variation to this EU**

Consistent with section 715(3) of the FW Act, Buxton (Sandringham) Pty Ltd may withdraw from or vary this EU at any time, but only with the consent of the FWO.

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**9 Continuing obligations**

**9.1 General survival**

Any provision of this EU remaining to be performed or observed by Buxton (Sandringham) Pty Ltd or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal by Buxton (Sandringham) Pty Ltd remains in full force and effect and is binding on Buxton (Sandringham) Pty Ltd after this EU ends.

**9.2 Survival**

Without limiting the generality of clause 9.1 ("General survival"), the following clauses survive termination of this EU for whatever reason (including termination by the FWO or withdrawal by Buxton (Sandringham) Pty Ltd:

- (a) Clause 1 (Admission of contravention); and
- (b) Clause 6 (No inconsistent statements).

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**10 Legally binding agreement**

These terms are intended to have immediate effect on all parties upon acceptance by the FWO of this EU (as evidenced by the FWO's acceptance of this EU endorsed below).

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**11 Entire agreement**

This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter. No oral explanation or information provided by either party to the other:

- (a) affects the meaning or interpretation of this EU; or
- (b) constitutes any collateral agreement, warranty or understanding between the FWO and Buxton (Sandringham) Pty Ltd.

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**12 No representations or warranties**

Buxton (Sandringham) Pty Ltd acknowledges that in entering into this EU they have not relied on any representations or warranties about the subject matter of this EU except as provided in this EU.

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**13 Construction**

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of, or seeks to rely on, this EU or any part of it.

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**14 Costs**

- 14.1 The parties must pay their own legal and other costs and expenses in connection with the preparation, execution and completion of this EU and other related documentation.

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**15 Severance**

If the whole or any part of a provision of this EU is void, unenforceable or illegal in a jurisdiction it is severed for that jurisdiction. The remainder of the agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This clause has no effect if the severance alters the basic nature of this EU or is contrary to public policy.

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**16 Competency**

Buxton (Sandringham) Pty Ltd acknowledges that:

- (a) before executing this EU, Buxton (Sandringham) Pty Ltd was given the opportunity to seek independent legal and other advice of their choice;
- (b) in the light of any advice provided to Buxton (Sandringham) Pty Ltd, they considered their position;
- (c) if Buxton (Sandringham) Pty Ltd has been advised by their solicitors, they have been advised by them as to the terms of this EU; and
- (d) Buxton (Sandringham) Pty Ltd fully understands the effect of this EU.

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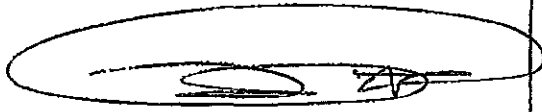
**17 Governing law**

This EU is governed by the law in force in the place specified in the Details. Each party submits to the non-exclusive jurisdiction of the courts of that place.

Signing page

Dated: .....13/3.....2012

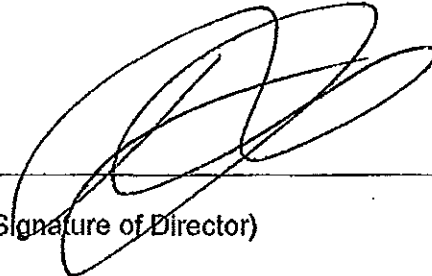
EXECUTED by BUXTON  
(SANDRINGHAM) PTY LTD in  
accordance with section 127(1) of the  
Corporations Law:



(Signature of Secretary/Director)

Diana JONES

(Name of Secretary/Director in Full)



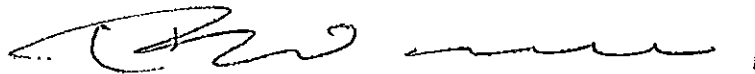
(Signature of Director)

MARK EARLE

(Name of Director in Full)

ACCEPTED by the FAIR WORK OMBUDSMAN

Dated: .....19th March.....2012



NICHOLAS PAUL WILSON  
FAIR WORK OMBUDSMAN

or by his Delegate subject to the  
instrument of delegation made pursuant  
to section 683 of the FW Act and  
executed by Nicholas Paul Wilson on 2  
July 2009.

## ATTACHMENT "A" (BACKGROUND)

1. On Tuesday, 22 June 2010, Mr Stephen Wigley, a Sales Consultant with Buxton (Sandringham) Pty Ltd contacted [REDACTED] and offered [REDACTED] employment as his Personal Assistant with Buxton (Sandringham) Pty Ltd.
2. Buxton (Sandringham) Pty Ltd is a Licensed Real Estate Agent and part of the Buxton Group which comprises thirteen offices throughout Melbourne.
3. On or about 10 July 2010, [REDACTED] attended the office of Buxton (Sandringham) Pty Ltd and was introduced to Mr Mark Earle and shown around the office. Mark Earle is one of four Directors with Buxton (Sandringham) Pty Ltd.
4. On 12 July 2010, [REDACTED] commenced employment on a casual basis with Buxton (Sandringham) Pty Ltd as Personal Assistant to Stephen Wigley and was to work from 9.00 am to 2.30 pm Monday and Wednesday.
5. On 24 July 2010, [REDACTED] assisted Stephen Wigley at an auction by recording the bids made during the auction. Also present during the auction was Mark Earle and another Director with Buxton (Sandringham) Pty Ltd, William Jowett.
6. At approximately 7.00 pm on 25 July 2010, Stephen Wigley contacted [REDACTED] by telephone and advised that he was not able to keep [REDACTED] on. Stephen Wigley explained that some of the Directors had attended the auction the previous day and were concerned by the fact that [REDACTED] looked too young and was too short, which could be a disadvantage at an auction where there was one or more interested parties and [REDACTED] would not have the presence to effectively negotiate. Stephen Wigley also told [REDACTED] that he needed someone he could turn into a sales person and that this was not possible with the Complainant because of [REDACTED] "overall young look".
7. On 27 July 2010, [REDACTED] emailed Stephen Wigley and asked him to clarify the issues surrounding [REDACTED] employment that were discussed in the telephone conversation on 25 July.
8. On 28 July 2010, Stephen Wigley responded to [REDACTED] email by writing the following:
  - "Hi [REDACTED], When I introduced you to Mark Earle just before you started he had a concern with how young you looked. I took this on board and before you started I let you know this. I took you on knowing that admin would be your main role, however sales and negotiation would be a role I was hoping you would be able to take on. Some of the Directors at the auction on Saturday were worried by your overall young look. This will be an ongoing concern. The reason I have done this now is because the training I would need to do would be a waste of time if I then have this concern six months later."
9. In a letter from Buxton (Sandringham) Pty Ltd to the FWO dated 24 December 2010 and signed by Mark Earle, the following was written:
  - "As mentioned in the attached emails, it was said to [REDACTED] that [REDACTED] age was the main cause of things not working out. This was mentioned and it can be a challenge (especially in our fairly established market place) but not the primary one. Given that [REDACTED] was working at Buxton very briefly, Stephen obviously felt



a little awkward admitting that he had very little work on to justify an assistant and incorrectly used [REDACTED] age as the sole reason”;

- “The email that was sent to [REDACTED] was wrong and was unfortunately sent without my knowledge. It is a lesson we haven’t taken lightly”; and
- “We wish to apologise to [REDACTED] if we have offended [REDACTED] in any way. This was never the intention.”

10. On 7 March 2011, Fair Work Inspector Kerryn Shacklock and Assistant Director Tiina Debevc attended the offices of Buxton (Sandringham) Pty Ltd for the purpose of conducting a Record of Interview with Mark Earle. In this interview, Mark Earle stated that he was introduced to [REDACTED] after Stephen Wigley offered [REDACTED] employment. Mark Earle admitted that upon meeting [REDACTED] he commented to Stephen Wigley that [REDACTED] was young looking if he intended on bringing [REDACTED] into the field.

11. [REDACTED] worked a total of 17.25 hours for the Company and received a payment of \$450.00 gross for the hours worked. No underpayment has been identified in respect to the wages paid to [REDACTED] for the hours [REDACTED] worked.

## ATTACHMENT "B" (CONTRAVENTION)

1. On 25 July 2010, Buxton (Sandringham) Pty Ltd contravened s.351(1) of the FW Act by taking adverse action against [REDACTED] because of [REDACTED] Age ("overall young look"). The circumstances in which Buxton (Sandringham) Pty Ltd took adverse action against [REDACTED] pursuant to s.342(1) of the FW Act was as an employer against an employee whereby Buxton (Sandringham) Pty Ltd dismissed [REDACTED]

## **ATTACHMENT "C" (UNDERTAKINGS)**

Buxton (Sandringham) Pty Ltd undertakes to:

### ***Future workplace relations compliance***

1. Ensure that it complies at all times and in all respects with the FW Act and by developing and implementing recruitment policies and processes, including regarding the termination of employees' employment, to ensure ongoing compliance with Commonwealth workplace laws.
2. Provide, within 63 days (9 weeks) of the date of this EU, the FWO with details of the recruitment policies and processes designed to ensure ongoing compliance with Commonwealth workplace laws.

### ***Apology***

3. Write and send to [REDACTED] of [REDACTED] within 14 days of executing this EU, a letter of apology in the form of Attachment D to this EU, signed by Mark Earle, Director of Buxton (Sandringham) Pty Ltd.

### ***Monetary compensation***

4. Within 14 days of the execution of this EU, pay to [REDACTED] the amount of \$1,200.00 gross (\$20.00 gross per hour), being compensation for a period of six weeks from the date [REDACTED] was terminated from [REDACTED] employment with Buxton (Sandringham) Pty Ltd until [REDACTED] was able to gain further employment.

### ***Notification to other Buxton Group offices***

5. Within 28 days of executing this EU, cause to be distributed to each of the Buxton Group offices a Company registered memo which is in the form of Attachment E to this EU.
6. Provide the Company registered memo to the FWO no later than 14 days before its distribution to each of the offices within the Buxton Group.
7. Provide evidence of the distribution of the Company registered memo to each of the Buxton Group offices to the FWO no later than 7 days after its distribution.

### ***Buxton (Sandringham) Pty Ltd workplace relations compliance training***

8. Within 63 days of the signing of this EU, organise and ensure the Directors of Buxton (Sandringham) Pty Ltd attend a training course (training course) which deals with;
  - (a) the rights and responsibilities of employers under the FW Act in relation to the employment and termination of employment of employees; and
  - (b) adverse action under the FW Act, in particular, under section 351–Discrimination of the FW Act.
9. Ensure the training course is conducted by an accredited workplace trainer not being anyone who has advised Buxton (Sandringham) Pty Ltd in relation to the subject matter of the Contravention who is approved by the FWO and paid for by Buxton (Sandringham) Pty Ltd.
10. Provide the training materials used in the training course to the FWO no later than 14 days before the training is to be conducted and the training materials must be approved by the FWO.
11. Provide evidence of attendance at the training course and payment of the training course to the FWO within 7 days of the training being provided.

ATTACHMENT "D"

[Buxton (Sandringham) Pty Ltd] letterhead



Date: .....

Dear [REDACTED]

I am writing to let you know about the outcome of an investigation conducted by the Fair Work Ombudsman (FWO), and to offer you a sincere apology on behalf of Buxton (Sandringham) Pty Ltd (Company) for the unfortunate situation which was the subject of the FWO's investigation.

The FWO's investigation looked at the termination of your employment which occurred on Sunday, 25 July 2010, effected by a sales consultant acting with the apparent authority of the Company. Following its investigation, the FWO determined that the Company contravened section 351 (1) of the *Fair Work Act 2009* (FW Act) – Discrimination, by taking adverse action (termination) against you because of your young age.

I wish to express the Company's sincere regret and apologise to you for the Company's failure to comply with its lawful obligations. Furthermore, I have given a commitment to the FWO on behalf of the Company that the prescribed conduct will not occur again.

Signed: .....

Name: .....

## ATTACHMENT "E"

The Office of the Fair Work Ombudsman (FWO) recently investigated allegations that Buxton (Sandringham) Pty Ltd contravened Commonwealth workplace laws in July 2010. The allegations were that Buxton (Sandringham) Pty Ltd breached the anti-discrimination provisions of the of the *Fair Work Act 2009* by taking adverse action against an employee because of the employee's age, in particular, by terminating the employee's employment because of [REDACTED] "overall young look".

Buxton (Sandringham) Pty Ltd has formally admitted to the FWO that it did in fact contravene Commonwealth workplace laws.

An Enforceable Undertaking has been given by Buxton (Sandringham) Pty Ltd to the FWO to reflect these formal admissions (available at [www.fwo.gov.au](http://www.fwo.gov.au)).

Buxton (Sandringham) Pty Ltd expresses its sincere regret and apologises for any inconvenience this action has caused. Furthermore, Buxton (Sandringham) Pty Ltd gives its commitment that such conduct will not occur again and that it will comply with Commonwealth workplace relations laws.