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8 January 2009

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

BY EMAIL

Dear Mr Carter,

INQUIRY INTO THE FAIR WORK BILL 2008

Please find below the submission by Enterprise Initiatives Pty Ltd to the Inquiry by the Senate Standing Committee on Education Employment and Workplace Relations into the Fair Work Bill 2008.

Please note: Several of the employers who have issued complaint letters contained in Annexure B to these submissions have requested that their letters not be published via the internet. For this reason we request that Annexure B is removed when these submissions are published electronically. Annexures A and B to this submission have been attached as separate PDF documents.

Enterprise Initiatives welcomes the opportunity to contribute to this Inquiry.

Please do not hesitate to contact me directly should you require further information.

Yours Sincerely

Ben Thompson
Chief Executive Officer
Enterprise Initiatives Pty Ltd

SUBMISSION TO THE SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS:

INQUIRY INTO THE FAIR WORK BILL 2008

SUBMISSION BY

ENTERPRISE INITIATIVES PTY LTD

JANUARY 2009

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1. Background

1.1 Enterprise Initiatives (EI) has been Australia's leading provider of workplace agreements for 18 years. Since making our first workplace agreement in 1992 we have assisted over 4000 small, medium and large businesses implement fair, flexible and simple workplace systems using collective and enterprise bargaining.

1.2 EI has worked with nine previous pieces of State and Federal industrial reforms and witnessed their ultimate success or failure; our most recent submissions to Senate were made in response to the introduction of WorkChoices in November 2005. We are highly qualified to anticipate the effect of the Bill on employers in Australia.

1.3 EI has had serious concerns about the framework for agreement making and assessment since 7 May 2007, when the Fairness Test was introduced into the Workplace Relations Act 1996 (Cth) ("the Act"). These concerns relate particularly to the assessment of workplace agreements by the current responsible government body, the Workplace Authority, under the Fairness Test and, since 19 March 2008, the No-Disadvantage Test.

1.4 It is essential that these causes of these concerns are addressed by amendments to the Fair Work Bill ("the Bill") if the Bill is to stand any chance of achieve its primary objectives.

1.5 EI has raised our concerns with the Minister for Workplace Relations and the Workplace Authority Director, Barbara Bennett, via:

- 1.3.1 Letter of complaint to the Minister Julia Gillard and Ms Barbara Bennett on 9 September 2008 (a copy is enclosed in Annexure A);
- 1.3.2 Letter of complaint to Minister Julia Gillard on 30 September 2008 (a copy is enclosed in Annexure A);
- 1.3.3 Telephone conference with Ms Barbara Bennett on 29 October 2008.

1.6 EI welcomes the opportunity to raise these concerns in this submission to the Inquiry into the Bill, in the hope that they may be addressed prior to the implementation by the Bill of the new government regulatory institution, Fair Work Australia ("FWA").

2. Transparency and accountability during agreement assessment.

2.1 One of the objects of the Bill stated in Section 3(f) is the achievement of "productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action". We have focused for the purposes of this submission on the fundamental tenets of transparency and accountability necessary to achieve this objective, and in particular, our concerns regarding FWA's ability to perform its functions in a manner conducive to the achievement of that objective in its assessment of agreements under the new Better-Off-Overall Test.

2.2 The Bill grants to FWA in section 577(2)(b) the function of "providing assistance and advice about, and undertaking activities to promote public understanding of, its functions and activities". Furthermore, sections 577(c) & (d) of the Bill requires FWA to perform its functions in a "manner that is open and transparent", and "promotes harmonious and cooperative workplace relations". EI has serious concerns regarding the ability of FWA to fulfil these obligations unless the following barriers to transparency and accountability, evident in the Workplace Authority, are addressed prior to FWA's induction.

2.3 EI's and our client's experience (as evidenced herein and in Annexure B) is that the Workplace Authority has actively avoided providing transparency, guidance or reasonable assistance regarding the assessment of workplace agreements against the Fairness Test and the No-Disadvantage Test. These failures represent systemic breaches of the functions of the Workplace Authority Director as granted by s150B of the current Workplace Relations Act; in particular, the Workplace Authority Director's duty pursuant to section 150B(1)(b) of the Act, "to provide education, assistance and advice to employees, employers and organisations in relation to their rights and obligations".

2.4 The Workplace Authority has consistently refused to explain how it calculates rates of pay it considers would pass applicable tests. Notices issued pursuant to section 346P(2) of the prevailing Act stating that an agreement has not passed the Fairness Test ("undertakings") contain no information as to how the assessment of the agreement was conducted. Instead, each undertaking contains only a 'pro-forma' paragraph regarding the removal or modification of protected award conditions, with no information specific to the relevant agreement or reference instrument.

2.5 Similarly, information provided pursuant to section 346P(3)(a) as to how the agreement may be varied to pass the Fairness Test stipulates rates only, with no information as to how the rates requested were calculated with reference to the specific circumstances of the employer and employees. Instead, employers

are required to sign undertakings to increase the rates of pay in their agreement, without any understanding of how those rates were calculated and in fact no guarantee that they were reached correctly. Doing so is the only option which will guarantee that the agreement in question continues to operate; although the opportunity to 'provide other equivalent compensation' is ostensibly offered by the undertaking, if the compensation suggested by the employer is not considered by the Workplace Authority to meet the requirements of the Fairness Test, the agreement ceases to operate without further opportunity to vary. Again, such a decision is reached by the Workplace Authority with no disclosure of the methods via which the assessment is conducted. The effective result of this system is that employers are required to change the rates in their agreement previously agreed upon between employers and employees to rates arbitrarily reached by a third party, with no information as to how those rates were calculated. Any other action on the employer's behalf results in a substantial risk to the life of the agreement. EI submits that such a system represents a denial of procedural fairness to employers, and impinges upon basic freedom of bargaining principles between employers and employees.

2.6 **A denial of procedural fairness alone in these circumstances is unacceptable, what is more alarming is that the Workplace Authority's methods of assessing agreements and their decisions are often obviously and definitively wrong yet employers have no option but to accept them.** This issue is further explained in Section 3 below.

2.7 Similarly, notices issued pursuant to section 346M of the current Act regarding agreements which do not pass the No-Disadvantage Test provide no information as to how the particular assessment was conducted, and little to no guidance as to how the agreement can be varied so as to pass the No-Disadvantage Test. Information regarding the assessment and methods of variation is limited to a series of 'dot points' on the notice specifying which terms and conditions of the relevant reference instrument the Workplace Authority considers the agreement to have reduced. No information is disclosed regarding the methods of calculation used to conduct the assessment, or suggested rates of pay which may allow the agreement to pass the No-Disadvantage Test.

2.8 EI, having in the past enjoyed an open and cooperative relationship with the Workplace Authority's predecessor, the Office of the Employment Advocate, has made consistent attempts to gain information and understanding of how the Workplace Authority conducts its assessment of agreements against the legislative tests. The Workplace Authority has actively avoided open communications with employers and their representatives. The Workplace Authority frequently refuses to let employers or their representatives speak directly with their assessors and require all inbound calls to be channelled via their call centre. This is effectively stonewalling.

2.9 In the event that EI has, through repeated efforts, gained direct access to Workplace Authority assessors, those assessors have in most cases been instructed not to share detailed information regarding the processes involved in agreement's assessment. For example, on 1 October 2008, a Fairness Test assessor who had previously agreed to share with EI information regarding her calculations in assessing of several of EI's agreements, informed EI that she had been instructed by her supervisors not to share this information, as previously agreed, in case she was viewed as sharing with a bargaining agent information regarding "what is required to pass the test".

2.10 Similarly, attempts to gain "education, assistance and advice" from assessors regarding assessments under the No-Disadvantage Test have been continually made in vain. The Workplace Authority has instituted a policy whereby assessors of agreements under the No-Disadvantage Test contact employer representatives before issuing a notice pursuant to section 346M that an agreement will not pass the No-Disadvantage Test. EI has repeatedly during such phone calls asked for information regarding calculations used in assessment, and for an indication of the amount rates of pay should be increased in order to pass the No-Disadvantage Test. EI is continually informed that assessors "can't" disclose any information beyond what is contained in the section 346M notice, due to the Workplace Authority's "policy". Assessors have also declined to document any such phone calls via email.

2.11 These policies are entirely counter-productive to fair and open agreement-making. EI submits that if FWA adopts similar attitudes and policies it will cannot meet its functions in an "open and transparent" manner, nor foster an environment of "harmonious and cooperative workplace relations", as required by sections 577(c) & (d) of the Bill. This issue is explained further in Section 6 below.

2.12 The Workplace Authority has also refused to consider additional information regarding agreement creation provided by EI, such as full and complete wage rate calculations and correct work patterns, when they assess or re-assess an agreement. In an attempt to call the Workplace Authority's attention to the thorough methods of calculations used by EI, we commenced from October 2008 submitting, along with the additional information regarding agreements requested by the Workplace Authority, copies of the Microsoft Excel Calculators used by EI in the agreement creation process. It should be noted that this calculator has been formulated, refined and accepted by the Office of Employment Advocate (OEA) and the Australian Industrial Relations Commission (AIRC) under the previous Part VIE- No-Disadvantage Test and demonstrates that all relevant award penalties, allowances and other conditions are fairly compensated for in agreements as required under Section 346M & 346D of the prevailing and current Acts. The Workplace Authority has outright refused to consider these calculators in its assessment against the relevant legislative tests. For example, a Workplace Authority assessor, when asked on or about 4 December 2008 if he had looked at a submitted calculator

in relation to a particular agreement replied, "I saw it, but it had no bearing on my assessment".

3. Inconsistent and incorrect assessment processes and results

3.1 EI's concerns regarding the lack of transparency on the part of the Workplace Authority are amplified by the recurrent inconsistencies and errors we regularly observe in its assessment processes and results. EI has attempted to reconcile the Workplace Authority's assessments against the rate calculation methods we have established over 18 years of making workplace agreements. Our analysis shows that the Workplace Authority consistently makes errors when assessing workplace agreements against the relevant legislative tests.

3.2 The Workplace Authority uses inconsistent and inaccurate assessment methods. EI have found that different assessors require different information to assess the same forms of agreement and often require information in a form that is open to radical misinterpretation.

3.3 Examples of blatant errors and inconsistencies in assessments include:

(i) Different results for identical agreements. For example, two agreements, both lodged on 4 December 2007 by EI, were assessed by two different Workplace Authority assessors, both of whom requested additional information from EI at different times and in different forms. The content of the information supplied by EI was also identical, although supplied in different forms. One agreement passed the Fairness Test without any need for variation on 16 December 2008. The second failed the Fairness Test and an undertakings notice was received by EI on 30 December 2008.

(ii) Use of entirely incorrect reference instruments. For example, an agreement, lodged by EI on 28 September 2008, was assessed on 21 October 2008. The undertakings notice indicated that the agreement was assessed with reference to (a) the Retail and Wholesale Industry – Shop Employees – Australian Capital Territory – Award 2000; (b) the Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000; (c) the Bread Trade (Victoria) Award 1999, and; (d) the Bakers (Australian Capital Territory) Award 1998. The correct reference instruments were (a) the National Fast Food Retail Award; (b) the Shop Employees (State) Award; and (c) the Bread Industry (State) Award.

3.4 EI has attempted to address the repeated errors and inconsistencies in the Workplace Authority's assessments using the vehicle of reconsideration requests. To date EI has lodged reconsideration requests with respect to approximately 120 workplace agreements lodged under the Fairness Test. In

these requests we address our concerns regarding the errors in the Workplace Authority's assessment of these agreements, including:

(i) The Workplace Authority's use of incorrect rates of pay for comparisons;

(ii) The Workplace Authority's use of incorrect working patterns or disregarding working patterns submitted with the workplace agreements;

(iii) The Workplace Authority's use of incorrect penalty rates for comparison (for example, mistaking a fixed Saturday allowance for hourly increases on a Saturday); and

(iv) The Workplace Authority's misinterpretation of the legal requirements of the Fairness Test.

In each reconsideration request EI calls for the provision of detailed information regarding the methods used by the Workplace Authority both in its original assessment and its treatment of the reconsideration request. However, the Workplace Authority's responses to reconsideration requests received to date by EI contain no detailed information regarding either the original assessment or reconsideration. The responses simply state the Workplace Authority's position regarding the agreement, i.e., whether or not it believes it erred in its original assessment, thus expressly ignoring EI's request for information regarding how the Fairness Test was conducted.

3.5 In a recent example, the Workplace Authority took 14 months to review an agreement against the Fairness Test and issue an undertaking. The undertaking shows that the Workplace Authority has failed to read the agreement and identify the penalty rates it contains. As a result the relevant employer was given 14 days to accept the incorrect undertakings (which would increase their total employment costs by approximately 20%) or revert back to an award that does not support their business operations or employee's preferences for more flexible conditions.

3.6 The serious errors and inconsistencies in assessment process are compounded by the continual procedural and administrative errors made by the Workplace Authority. These include:

(i) Issuing undertakings notices making reference to incorrect agreement name, employer and lodgement date;

(ii) Issuing duplicate undertakings notices with two separate dates 5 days apart (as occurred with respect to 4 separate agreements);

(iii) Issuing notices pursuant to section 346R of the prevailing Act stating that an agreement has ceased to operate due to the employer's failure to lodge signed undertakings within the 14-day period, when in fact such undertakings were lodged within the deadline (as occurred with respect to 4 separate agreements);

(iv) Issuing undertakings with 2 separate dates on the one notice, for example, "29 October 30 2008" (as occurred on at least 4 separate occasions in October 2008);

(v) Issuing undertakings, received by EI in December 2008, dated 3 January 2008, followed by re-issued undertakings with no rates specified;

(vi) Posting undertakings to EI which are not addressed to EI and do not relate to any of EI's clients.

3.7 Such consistent administrative errors on behalf of a government body such as the Workplace Authority are unacceptable, particularly in light of their impact on relevant time-frames imposed upon employers for response to Workplace Authority correspondence. EI as a bargaining agent finds itself in the unfortunate position of needing to continually contact the Workplace Authority to request the re-issue of correct and accurate documentation.

3.8 Ironically, the Workplace Authority demonstrates unwillingness to exercise discretion in the event of even the slightest technical error made on behalf of employers or their representatives. For example, on 6 January 2008 a Team Leader in the Finalisation Division of the Workplace Authority contacted EI regarding a signed undertaking returned by us on behalf of a client. The undertaking was signed and returned within the relevant legislative time-frame; yet unfortunately due to human error a check box had not been ticked. The relevant officer, (who refused to supply her phone number so she could be phoned back after EI had located the relevant document), informed EI that despite her recognition of the employer's intention to comply with the Workplace Authority's decision regarding the agreement, she had "no choice" but to fail the agreement. The effect of this decision is that the agreement, which has been operative for over 14 months and which passes the Fairness Test but for a minor technicality regarding traineeship wage structures, must cease to operate. The effect of this decision is that the small employer concerned will most likely be forced into insolvency because they will have to back pay all employees under the award for the past 14 months. We have referred this matter to Barbara Bennett for review.

3.9 EI submits that these continual errors and inconsistencies, when coupled with the distinct lack of transparency regarding processes for assessment and re-assessment, amount to a complete absence of accountability on the Workplace Authority's behalf for its decisions, and a serious imbalance of power between

the Authority itself and the parties affected by its decisions. This imbalance is only compounded by the Workplace Authority's refusal to exercise discretion regarding technical errors on the behalf of employers, whilst reserving ultimate discretion to make exceptions in its own favour to correct its own continual mistakes.

3.10 We ask the Committee to imagine for a moment that the Australian Tax Office refused to explain how taxes were calculated and issued random tax assessments dating back some 18 months which had to be paid in full within 14 days. Also imagine if tax payers had absolutely no effective right of appeal against the ATO, and the ATO refused to consider evidence provided by tax payers of their compliance. That is equivalent to the situation that many of EI's clients and other businesses face right now with the Workplace Authority. One other major difference is that the ATO can be required to pay compensation when it is wrong, whereas it appears that the Workplace Authority is immune.

3.11 Such a lack of transparency and accountability, if carried on in the induction of Fair Work Australia, will make impossible the performance by Fair Work Australia of its functions as required by sections 577(c) & (d) of the Bill. Such an inability to perform its functions in a transparent and accountable manner will impede the capacity for FWA to promote the Bill's objective to achieve "productivity and fairness through an emphasis on enterprise-level collective bargaining".

4. Excessive delays in assessment and unreasonable time restrictions

4.1 Sections 577(a) & (b) of the Bill require Fair Work Australia to perform its functions in a manner which "is fair and just", and "is quick, informal and avoids unnecessary technicalities". EI is concerned about the ability of Fair Work Australia to honour these obligations without first addressing the serious problems regarding time delay and backlog in assessments currently evident in the Workplace Authority.

4.2 The Workplace Authority has caused excessive delays (up to 18 months) while assessing workplace agreements. EI estimates that since the assessment of collective agreements moved from the Australian Industrial Relations Commission to the Workplace Authority in 2006 the average timeframe for assessment has increased from 21 days to 12 months. This is evidenced by the fact that the bulk of Employee Collective Agreements that EI lodged in the middle of 2007 only began to be reviewed against the Fairness Test in September 2008. Examples of excessive delays in assessment include the following agreements:

(i) Agreement lodged on 12 July 2007, assessed on 13 October 2008, resulting in a request for **15 months backpay**;
(ii) Agreement lodged on 26 October 2007, assessed on 17 December 2008, resulting in a request for **14 months backpay**;
(iii) Agreement lodged on 6 September 2007, assessed on 17 December 2008, resulting in a request for **15 months backpay**;
(iv) Agreement lodged on 10 September 2007, assessed on15 December 2008, resulting in a request for **15 months backpay**;
(v) Agreement lodged on 18 September 2007, assessed on 10 December 2008, resulting in a request for **15 months backpay**;
(vi) Agreement lodged on 31 October 2007, assessed on 10 December 2008, resulting in a request for **14 months backpay**;
(vii) Agreement lodged on 28 September 2007, assessed on 10 December 2008, resulting in a request for **15 months backpay**;
(viii) Agreement lodged on 27 September 2007, assessed on 10 December 2008, resulting in a request for **15 months backpay**;
(ix) Agreement lodged on 10 September 2007, assessed on 30 November 2008, resulting in a request for **14 months backpay**;
(x) Agreement lodged on 10 September 2007, assessed on 24 November 2008, resulting in a request for **14 months backpay**;
(xi) Agreement lodged on 28 September 2007, assessed on 5 December 2008, resulting in a request for **15 months backpay;**
(xii) Agreement lodged on 28 September 2007, and assessed on 26 November 2008, resulting in a request for **14 months backpay**;
(xiii) Agreement lodged on 28 September 2007, assessed on 24 November 2008, resulting in a request for **14 months backpay**.

4.3 In each case above the businesses concerned are small and do not have cash reserves available to back pay employees within 14 days. Even more concerning, we firmly believe that in each case the agreement actually does pass the Fairness Test (if properly assessed taking into account all relevant information) and that no back pay whatsoever is required to be paid.

4.4 These delays in Fairness Test assessments are amplified by the further delays in processing reconsideration requests lodged by EI in response to those assessments. Of the approximately 120 reconsideration requests lodged by EI since May 2007; approximately 15 have been responded to by the Workplace Authority. At least one reconsideration request has been outstanding for approximately 5 months; despite the Workplace Authority confirming its receipt and stating that it is being processed one month after it was lodged, the employer awaits its outcome nearly 4 months later, fully aware that any potential backpay debt, should the reconsideration request not produce a favourable outcome, has continued to accumulate due to the Workplace Authority's extraordinary backlog.

4.5 Conversely, the Workplace Authority has provided unreasonable timeframes (a maximum of 14 days from the date on the notice) for responding to undertakings to vary agreements to pass the Fairness Test. The difficulties of complying with such time-frames are amplified by the Workplace Authority's policy of issuing undertakings via post, despite EI's nomination on every agreement lodgement of email as our preferred method for correspondence. The result of this failure to respect EI's preferred contact method continually results in EI's receipt of undertakings several days after the date on the undertakings, which is the date from which the time-frame begins to run. This discrepancy results in a severe disadvantage to employers, in the reduction of the legislative timeframe by up to 50%. Examples of this include:

(i) One undertaking dated 15 December 2008 and received by EI on 22 December 2008 (loss of 7 out of 14 days);
(ii) Three undertakings dated 16 December 2008 and received by EI on 22 December 2008 (loss of 6 out of 14 days);
(iii) Five undertakings dated 17 December 2008 and received by EI on 22 December 2008 (loss of 5 out of 14 days).

The above-mentioned undertakings were issued despite an express request from EI to the Workplace Authority to refrain from issuing undertakings in the lead-up to the Christmas period due to the difficulties associated with responding within the deadline during this period. This request was unacknowledged by the Workplace Authority, despite EI's retention of a fax transmission report confirming it was received.

4.6 EI accepts that the 14 day timeframe for response to undertakings is mandated by section 346R(7) of the prevailing Act. However, EI submits that section 346R(8) provides the Workplace Authority Director the discretion to extend that period in certain circumstances, a discretion which the Workplace Authority has refused to exercise in even the most reasonable of circumstances when requested by EI. For example, on 3 November 2008 EI contacted the Workplace Authority to request an extension on behalf a client whose daughter had just passed away. The Workplace Infoline, and, upon being contacted, Ms Barbara Bennett, informed EI that no extension was possible due to the time-limit prescribed by the legislation. This refusal appeared particularly harsh given the client's personal circumstances, and particularly unjust given the length of time the Workplace Authority had taken to assess the agreement, lodged on 24 August 2008, and not assessed until 14 months later, on 30 October 2008.

4.7 Despite this outright refusal to grant an extension, on 30 December 2008 a client of EI's informed us that the Workplace Authority had told them that 10-day extensions were being granted with respect to all undertakings issued over the Christmas period. This information clearly demonstrates that the Workplace Authority is not, as previously claimed, unable to issue extensions

to the 14 day time limit, but rather is unwilling to do so at the specific request of a bargaining agent.

4.8 The extreme delays in assessing agreements lodged under the Fairness Test have not been remedied as promised by the introduction of the No-Disadvantage Test. In the Labor Government's Forward with Fairness Policy as presented to the Australian public before the 2007 federal election, it was stated:

Under Labor's system, collective agreements will be approved by Fair Work Australia within 7 days.

However, EI has lodged 38 workplace agreements since the No-Disadvantage Test came into effect in March 2008. To date, **10 months later**, only 12 (less than 1 third) of these have been assessed.

4.9 EI submits that unless the serious issue of time delays is remedied prior to FWA's induction, performance of its functions in a 'fair, just and quick' manner pursuant to section 577(a) & (b) of the Bill will not be possible.

5. Loss and damage to employers

5.1 All of the issues above and in particular the delays in assessing workplace agreements have caused clients to incur avoidable and excessive back payments. Not only does this place financial stress on a business at a time of global economic uncertainty, it can also damage the valuable relationship that exists between employers and employees. In many cases businesses have been forced to simply accept incorrect rates of pay in their agreements purely to ensure that they continue to operate. In other cases businesses have been forced to lay off employees. In the worst cases businesses have been forced to close down.

5.2 Annexure B contains letters of concern from EI's clients, which detail individual experiences of hardship and difficulty resulting from the Workplace Authority's management of workplace agreement assessment. We believe that these letters provide the clearest possible indication of the problems which underlie the current system and require redress in the future.

6. Transparency Essential for Good Faith Bargaining and Workplace Flexibility

6.1.1 We submit that if the issues outlined above are not addressed by the Bill then the Bill will never meet its objectives.

6.2 We submit that parties cannot bargain in good faith if they do not definitely know what they are required to pay as a legal minimum wages under a proposed collective agreement. This will not be possible unless FWA is require to publish and distribute a universal calculator which enables all parties to calculate the legal minimum wages payable when award terms (such as penalties and loadings) are aggregated into "loaded" rates of pay. If such a calculator is not made available then it is likely that deals reached (in good faith or otherwise) will be mandatorily overridden by FWA as they divine appropriate rates under the Better-Off Overall Test.

6.3 Unless employers can ascertain how much or how little they are legally required to pay under an agreement then they will avoid collective agreement making and will be unable to bargain in good faith if they are forced to the bargaining table.

6.4 Similarly, it is necessary for the same universal calculator to be made available to parties who choose to utilise the Award Flexibility clauses in Modern Awards. The Award Flexibility clause in Modern Awards requires that employees must not be disadvantaged by more flexible arrangements however it does not provide a method for ensuring that this is the case. Unless the method of calculating aggregate or "loaded" rates of pay is unambiguous and universally applied then employers face the risk that a workplace inspector or other third party will adopt a different calculation and thereby impose a back payment and potentially a substantial penalty.

7. Recommendations and Conclusion

7.1 EI recommends that the committee fully investigate each of the matters raised within these submissions including the complaints raised directly by concerned employers.

7.2 EI recommends that the committee take steps to ensure that FWA cannot create barriers to clear and reciprocal communication and accountability such as those currently inherent in the Workplace Authority. For example the committee should recommend that the Bill is amended to:

(i) Require full disclosure by FWA of their methods for assessing the new Better Off Overall Test; in particular the release of a standard calculation method (spreadsheet calculator) upon which all parties can accurately rely to determine their minimum legal wage obligations in workplace agreements;

(ii) Require implementation of open channels of communication to FWA assessors, including the publication of names and contact details on the FWA website and in correspondence;

(iii) Provision of parties to workplace agreements of the specific reasons (including calculations) for why a workplace agreement has passed/failed an assessment.

(iii) Introduce legislative time-frames for assessment and reconsideration of agreements (for example 21 days), which at least reflect the time-frames imposed upon employers to respond to FWA requests. This initiative must be supplemented by legislative implementation of the right to request an extension to time-frames (both before and after the relevant deadline) upon demonstration of reasonable reasons for such a request.

(iv) Make FWA liable to pay damages and compensation for its negligent or unlawful actions which cause loss or harm to an employer or employee.

7.3 The Committee is invited to contact Ben Thompson, our Chief Executive Officer, with any further queries regarding these submissions, on (02) 8823 5929.