ENTERPRISE INITIATIVES PTY LTD

Submission to the
Senate Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

Monday 14 November 2005

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INTRODUCTION

About Enterprise Initiatives

Enterprise Initiatives is a small business. We have advised and assisted over 2000 mainly small businesses to make agreements since 1991. The Employment Advocate has credited Enterprise Initiative with lodging a significant proportion of small business AWAs (over 12,000). We have also lodged the majority of non-union Certified Agreements approved by the AIRC for small businesses in the last 3 years.

Enterprise Initiatives was responsible for the first Australian Small Business Enterprise Agreement made under the NSW Greiner government's Industrial Relations Act in 1992. We have led the campaign for greater flexibility under the existing No-Disadvantage Test and have pioneered penalty free AWAs and Non-Union Agreements approved by the OEA and AIRC, respectively.

We are intimately aware of the needs and concerns of small business clients. Enterprise Initiatives have worked with seven previous pieces of State and Federal industrial reforms and witnessed their ultimate success or failure. We are well qualified to anticipate the likely effects of the Bill on small business.

Enterprise Initiatives is a passionate advocate for those who want to enjoy workplace freedom by making their own legal and appropriate arrangements.

OUR PHILOSOPHY

1. We favour;

   a) Employment agreements made directly, at the enterprise level, without unwanted third party interference and unnecessary procedural requirements and

   b) People in business who want self-control, responsibility, choice and compliance and who reward for individual merit.

2. We do not act as a negotiator between small business employers and their employees in making agreements

We believe:

3. The economy and society as a whole benefits in proportion to accessibility and uptake of such agreements.

4. Common law contracts underpinned by legislated minimums and other statutes provides the optimum mechanism for effective agreement making and compliance.

5. Collective agreements made at the enterprise are and will remain the most efficient and effective catalyst for increasing productivity, meeting legal rights and obligations, adding value to the business asset and satisfying individual needs.

SCOPE OF THIS SUBMISSION

Purpose

This submission gives non-partisan, non-political and constructive comment to the Senate to improve the efficacy of the Workplace Relations Amendment (WorkChoices) Bill 2005 ("the Bill") in achieving its objects.

Comments are limited to agreement making with regard to the proposed changes likely effect on small business, drawing from relevant cases, data and anecdotal evidence.

Background to Submissions

There is broad agreement that, deregulation of the Australia's labour market in recent years by various governments is necessary and beneficial.

All improvements have been characterized by an opting out from traditional industrial instruments such as awards and award type collective agreements in favour of approved collective and individual instruments made at the enterprise or by independent contracts.

Endemic to this process is the increasing declaration of independence of enterprises and individuals from employer and employee registered bodies who claim (legitimately or otherwise) to represent them and their interests.

At each new phase of deregulation legislators confront the task of balancing and eliminating the risk of unintended loss of entitlement and remuneration for those who choose to opt out, against improving and protecting their ambit of choice in doing so.

It cannot be denied that the success of the Bill will turn largely on increasing uptake of individual and collective agreements by employers, especially small business.

Employers are and will increasingly be the initiators of approved agreements. It is correctly observed that under the operation of the 'Act' individual agreements (AWAs) are a failure and the Department responsible (OEA) for their promotion and approval has chronically failed to meet the Governments expectation and its own standards. According to the Bill this same department is charged with similar responsibilities (save for inspection, enforcement and approval) for both individual and collective agreements.

Non-union agreements are in a minority due to their risk, cost and uncertainty. Access to the agreement making process is now critical. It is not limited by union interference or employer apathy.

The parties of small business can be encouraged by new legislated minimums and stronger enforcement regimes. Conversely the traditional and increasingly irrelevant employer and employee bodies and processes cast a long shadow

over this Bill. In seeking to universalize the future workplace relations regime significant and unnecessary procedural requirements have been added to agreement making. Uncertainty is increased due to an opaque and interminable procedure of investigating agreements, which can lead to their voiding. This alone might far outweigh the apparent advantage of all agreements being approved, on lodgement.

Under the Bill it is unlikely an agreement can be made without knowledge of a relevant award or without recourse to a government bureaucracy or independent service provider. This brings into question the efficacy of the Bill in achieving its own objects, likely impact on costs of its administration for the taxpayer and accessibility of its rights and freedoms to people in small business. It is this sector on which the failure of its detail falls most heavily.

I respectfully commend to the Senate our recommendations for consideration and, if appropriate, further action. With the time and resources now available we are confident minor amendments to the Bill, prior scrutiny of its procedures and/or a review after 6 months can mollify the issues.

FIVE IMPEDIMENTS TO SMALL BUSINESS AGREEMENT MAKING

1. *Compulsory Matters in Agreements*

WorkChoices introduces 14 compulsory agreement matters. Currently AWAs and Certified Agreements have only three (3) compulsory matters; these are a nominal expiry date, a dispute resolution clause and an anti-discrimination clause.

Under WorkChoices AWAs and Certified Agreements will cover the following matters:

- Mechanical provisions – 1) a nominal expiry date and 2) a dispute resolution clause

- Minimum conditions – 3) wages, 4) annual leave 5) personal/careers leave 6) parental leave 7) maximum ordinary hours

- Protected Award Matters – 8) public holidays 9) rest breaks 10) incentive based payments and bonuses 11) annual leave loadings 12) allowances 13) penalty rates and 14) shift/overtime loadings

This can mean an employer having to negotiate each matter for each separate employee. The outcome of total or partial elimination of any of the matters lessens the ambit or rewarding all employees equitably for merit, adversely increases the employers payroll administration cost, increases the risk of unintentional noncompliance, reduces the value of the business asset and the prospect of reemployment of employees on transmission of the business. Again it will lessen the opportunity for first time entrants to the workforce by the sector that traditionally provides the majority of such opportunities, particularly to younger employees.

Small business employers will be deterred from using WorkChoices agreements because of these complexities and rigidities.

Recommendation Further simplify the mandatory content of workplace agreements.

2. *Conflicted functions of the Employment Advocate*

The Bill on its face reduces uncertainty of agreement making by lessening approval delays in part by ensuring remedies which can result in voiding all or part of an agreement are determined in a civil court. The value of the Bill in realizing confidence of employers will not be affected by this change.

In the past the OEA has voided AWAs not because the 'Act' permitted it but because it failed to prevent it. So unless the Bill and its related procedures are complete and unambiguous employer confidence will remain low.

It is sobering for employers to note that in the 9 ½ years since enactment of the 'Act' there is no case law and no procedure gazetted to legitimize the practice of the OEAs voiding of an AWA.

Many of the issues of voiding or threat of voiding have arisen from procedural requirements for making an agreement being met by the parties. These include the giving of notice, information statements, dates, and signatures etcetera

The Bill in the absence of procedures does not limit the time available for parties to lodge complaints and no limit on the time for their investigation. The employer regardless of a finding faces financial risk and damage to employment relations.

Sub section 83BB (1)(k) of the Bill proposes the Employment Advocate

"disclose information to workplace inspectors that the Employment Advocate considers on reasonable grounds is likely to assist the inspectors in performing their functions".

This can only be correctly interpreted as allowing the Employment Advocate to initiate investigations by reporting inadequacies of approved agreements or allegations regarding them.

Section 83BB (1) (k) also compromises other functions of the Employment Advocate.

"a) to promote the making of workplace agreements

b) provide assistance and advice to employees and employers (especially small business) …"

"c) to provide education to employees and employers …"

Small business employers require expeditious and transparent investigation and determination of procedural aspects in agreement making. The Senate can accept no lesser standards than those enjoyed by the parties until now in the Australian Industrial Relations Commission if claims for the Bill's improved uptake of agreements are to be credible.

Recommendation Prosecutions regarding procedural aspects of agreement making be lodged with the relevant court within a fixed maximum period no greater than 90 days. and The offending section 83BB(1)(k) be removed from the Bill.

3. *Unwanted Bureaucratic Involvement*

WorkChoices introduces more third party interference into the agreement making process. The OEA will be provided broad powers to intervene in the content of agreements.

Under WorkChoices the OEA may be asked to check agreements by employees or employers before they are made. The OEA will also be permitted to explain the terms and conditions of proposed agreements to employees.

Good employment relations is typified by trust, direct dealing and genuine understanding. Small business is accustomed to this type of employer/employee relations. A sure litmus test of the efficacy of any new legislation, which purports to improve such relations, is that its complexity requires the insertion of a bureaucrat for access.

The OEA is likely to continue to be the purveyor of framework and/or template agreements directly or through favoured service providers. Enterprise Initiatives has consistently raised questions regarding the efficacy of OEA frameworks and templates and what becomes patronage by the OEA of providers willing to promote OEA proscribed agreements.

Furthermore the ambit for individual employee and enterprise choice and diversity leading to improved competition and productivity is reduced to the extent that business is forced by convenience to use one size fits all documents.

Recommendation Ensure that Senate approval is contingent on unambiguous and workable procedures for the Bill's operation for agreement making. These should be publicly reviewed and gazetted within six months of the Bill's operation against outcomes.

4. *Parental/Guardian Approval of AWAs*

WorkChoices introduces the requirement for a parent or guardian to approve an AWA for employees under 18. This presents an additional regulatory burden for small business which is, in our extensive experience over 9 $^{1/2}$ years, entirely unnecessary.

It makes no sense that employees under 18 require parental/guardian approval of AWAs when the same junior employees can make a collective agreement without parental/guardian consent. At once the Bill proposes employers be permitted to make Employer Greenfield Agreements without employee approval whatsoever. Greenfield agreements automatically bind all future employees (including juniors) without further consent for 12 months. Why then should parents or guardian's be required to approve AWAs for employees under 18, that at the worst case, cannot be any lower than an agreement made unilaterally by the employer?

If the Government believes the Fair Pay and Conditions Standard really represents an effective employee safety net why is parental or guardian approval necessary to protect employees under 18?

Approximately 85% of all employees in retail and fast food industry are under 18. Requiring employers in these industries to negotiate AWAs with parents / guardians of the majority of their employees is a significant new regulatory burden for small business employers.

This adds to the risks of unintentional non-compliance and penalties for employers as employees will take an agreement home and non/late lodgement occurs. The most lamentable outcome of such additional regulation could be a reduction of employment opportunities for young and first time entrants to the workforce.

Recommendation Remove the requirement for parent/guardian approval of AWAs for employees under 18.

5. *Time limits for lodgement of Agreements*

WorkChoices introduces a 14 day time limit for the lodgement of AWAs and Certified Agreements with the OEA. Currently this time limit is 21 days. We find even 21 days is an unsuitably short period for the receipt and lodgement of all necessary materials.

Worse still WorkChoices introduces financial penalties for failing to meet the procedural requirements for lodgement within 14 days.

Significant numbers of small business employers fail to lodge AWAs with the OEA because they consider the administrative and procedural requirements too onerous and costly. If WorkChoices introduces a narrower window for lodgement and financial and other penalties for late lodgement other small business employers will become less likely to use AWAs.

Together with additional burden of finding understanding and negotiating additional award matters and providing additional signed letters to partially cash out annual leave this shorter period increases the employer burden exponentially.

Recommendation Extend the Bill's time limit for lodgement of AWAs and Certified Agreements with the OEA to at least 21 days.