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19 May 2011

Senator the Hon Chris Evans
Minister for Tertiary Education, Skills, Jobs and
Workplace Relations
Parliament House
CANBERRA ACT 2600

Business Council of Australia

Dear Minister

MONITORING THE OPERATION OF THE *FAIR WORK ACT 2009*

As you will be aware, the provisions of the *Fair Work Act 2009* (FW Act) collective bargaining and associated matters will have been in operation for two years as of 1 July 2011. Those relating to modern awards and the National Employment Standards (NES) will have been in operation for 18 months on that date.

Over the period that the legislation has been in operation, the Business Council of Australia (BCA) has been monitoring the operation of the legislation in a number of ways, including by conducting regular feedback meetings with its members, both in group discussions and on a one-on-one basis. This process has served to highlight a number of issues that are of concern to significant numbers of BCA members. The purpose of this letter is to draw these matters to your attention, and to open a dialogue between the BCA and the government as to possible ways of addressing these concerns.

1. Executive Summary

The BCA has identified eight areas that are of particular concern to its members, and where it considers that there is a demonstrated need for legislative change. It has also identified a number of issues where it is not clear whether legislative action is feasible or necessary at this stage.

The areas that appear to require legislative intervention include:

- Scope of the general protections in Part 3-1 of the FW Act. The BCA does not take issue with the need to protect employees (and others) against unwarranted adverse action for industrial reasons. However, the unqualified character of the proscriptions set out in sections 340, 343 and 346 of the FW Act has the effect that the protective net is cast too wide – especially in light of the 'multiple reasons' and reverse onus provisions in sections 360 and 361. The BCA considers that the generality of the statutory proscriptions should be subject to a qualifier such as 'wholly or mainly'.

- Ascertaining 'majority support' for collective bargaining. The BCA considers that the existing provision enabling Fair Work Australia (FWA) to 'work out' whether a

majority of employees want to engage in collective bargaining by 'any method' it considers appropriate is potentially open to abuse – for example by employees being misled or pressurized into signing a petition in support of commencement of collective bargaining. This leads the BCA to the view that majority support determinations (MSD) should be available only on the basis of a secret ballot.

- MSDs as a pre-condition for protected action ballots. The BCA considers that FWA should not be able to make orders for protected action ballots in situations where the parties have not yet commenced bargaining unless the employees/union have first obtained an MSD.

- Intra-group transfers and the transfer of business provisions. The BCA considers that in their present form sections 22(7)(a) and 311(6) of the FW Act have the undesirable effect of requiring the transfer of industrial instruments from one entity to another within a corporate group in situations where an employee transfers employment between entities within such a group as part of a process of career progression.

- Establishing a 'connection' between 'old' and 'new' employers under section 311(3). The term 'arrangement' in section 311(3) is a source of unnecessary uncertainty – especially when applied to intangible assets such as good will. At the very least, the subsection needs to be amended to make clear that there needs to be some articulated and deliberate transaction or agreement for the transfer of assets. It is also necessary to amend section 311(3) to make clear that a 'connection' can be established in reliance upon this provision only where the 'new' employer actually assumes ownership of any assets that were formerly 'used' or 'enjoyed' by the 'old' employer.

- Definition of outsourcing and in-sourcing. The BCA is not comfortable with the fact that outsourcing and in-sourcing can constitute a transfer of business for purposes of the FW Act, but if the concept is to be retained, there should at least be a more clear delineation of what will constitute an outsourcing and an in-sourcing for purposes of section 311(4) and (5).

- Access to Individual Flexibility Arrangements. The BCA is most concerned at the reluctance of some trade unions to agree to the inclusion of meaningful flexibility clauses in enterprise agreements made under the FW Act, and to encourage their members to enter into Individual Flexibility Arrangements (IFA) in accordance with such flexibility clauses as may be agreed. Ideally, all enterprise agreements should be required to include a flexibility clause which conforms to specified legislative minima. At the very least they should be required to include the model flexibility clause that is set out in Schedule 2.2 to the Fair Work Regulations 2009.

- Contractor Clauses. There appears to be considerable confusion as to the extent to which enterprise agreements can regulate the use of contract and agency labour. The BCA considers that the FW Act should make clear that a term which purports to regulate, or have the effect of regulating, use of contract and agency labour would be an 'unlawful term' for purposes of section 194 of the FW Act.

The policy issues to which the BCA wishes to draw the attention of the government include:

- Trade-off of superannuation contributions. The BCA considers that it should be clear public policy that the projected increases in employer superannuation contributions over the period 2013–20 should be set-off against minimum wage increases.

- Greenfields agreements in the resources sector. A number of BCA members have expressed grave concern about the practice of unions in the resources sector using conclusion of greenfields agreements for major new projects as leverage for exaggerated employee claims which may then flow through to the rest of the resources sector, and eventually to other parts of the economy.

2. Legislative Issues

2.1 Adverse Action

The general protections that are set out in Part 3-1 of the FW Act are exceedingly wide-ranging in scope, and provide levels of protection against victimisation and other forms of discriminatory treatment that are extremely high by international standards. They are given added force by the fact that section 360 provides that if a particular course of conduct is to any extent motivated by a particular reason then that conduct is taken to have been engaged in for that reason for purposes of Part 3-1, whilst section 361 stipulates that where a person is alleged to have acted for a particular reason then it is for the person taking the action to prove that it was not motivated by the proscribed reason.

The BCA notes that, until recently, few cases involving alleged breaches of Part 3-1 have found their way to FWA or the courts. However, many members have advised that employees and/or unions have routinely been threatening proceedings under Part 3-1 in order to gain some strategic advantage in disputes (for example about individual disciplinary matters or proposed changes to work practices) and/or to secure the payment of 'go-away money'. Furthermore, it now appears that significant numbers of cases are being dealt with by FWA, and the Federal Magistrates Court and the Federal Court of Australia. The outcomes of some of these decisions are themselves a further cause for concern – most notably the decision of the majority of Full Court of the Federal Court in Barclay v Board of Bendigo Regional Institute of Technical and Further Education [2011] FCAFC 14. The effect of this decision is to cast significant doubt upon the capacity of employers to discipline or dismiss employees who also happen to be union officials.

The BCA does not condone victimisation or discriminatory treatment in the workplace, but at the same time it considers that in its current form Part 3-1 does not strike an appropriate balance between the interests of employers and would-be complainants. It suggests that this imbalance could in some measure be redressed by amending section 340(1) so as to provide that a person must not take adverse action against another person 'wholly or mainly' for the reasons proscribed in paras (a) and (b) of that subsection. It would also be necessary to make corresponding changes to the proscription set out in section 340(2).

The BCA considers that such a change would not prevent meritorious applicants being able to obtain relief in respect of any unlawful treatment to which they may have been subjected, but would prevent unmeritorious claimants from deriving leverage from the fact that it may sometimes be hard to prove that conduct which on its face might constitute 'adverse action' was not motivated to any degree by a proscribed ground in situations where the dominant reason for that action was in fact

something other than the proscribed ground. It would also help mitigate some of the uncertainty flowing from the decision in Barclay.

We also suggest that a similar change should be made to section 343(1) so that it proscribes 'any action against another person wholly or mainly with intent to coerce to other person' to do or not to do the things set out in paras (a) and (b) of that subsection.

2.2 Majority Support Determinations

As presently drafted, section 237(3) of the FW Act permits FWA to 'work out' whether a majority of employees want to engage in collective bargaining by using 'any method FWA considers appropriate'. The BCA notes that para 979 of the Explanatory Memorandum for the Fair Work Bill suggested that these 'methods' might include 'a secret ballot, survey, written statements or a petition'. It also notes that in practice FWA has used all of these techniques, plus union membership records and union 'pledge cards' in working out whether there is majority support for collective bargaining in particular situations.

A number of members have expressed concern about the use of techniques other than secret ballots for this purpose. These concerns derive from the possibility that employees may be subjected to inappropriate pressure to sign petitions or pledge cards, and/or or misled as to the nature of any petition or other document they may be asked to sign.

It is suggested that this problem could readily be addressed by requiring that MSDs may be made only on the basis of a secret ballot conducted by the Australian Electoral Commission (AEC). As with protected action ballots, the cost of such ballots should be borne out of public funds – otherwise groups of employees other than unions might be dissuaded from seeking the making of MSDs.

The BCA acknowledges that introducing a mandatory ballot requirement might give rise to some delay in the bargaining process. On the other hand, the AEC clearly manages to conduct protected action ballots under Division 8 of Part 3-3 of the FW Act within a very tight timeframe, and there does not appear to be any good reason why it should not be able to do the same in the present context.

There is also some risk that introducing a mandatory ballot requirement might encourage the 'Americanisation' of the Australian workplace relations system: for example, by encouraging litigation about the nature of the questions to be put to ballot, and about what can be said, and how it can be said, in support or opposition to a proposed ballot.

The BCA clearly recognises that this would not be a desirable outcome, and also considers that it is not an inevitable one. In the first place, the consequences of a successful ballot are very different as between the two systems: in the United States a successful recognition ballot gives the relevant union the exclusive right to bargain for an agreement in respect of the employees covered by the ballot. A successful ballot under the FW Act does not do this: rather, it provides a trigger for the commencement of bargaining (including for the making of bargaining orders), with all employees retaining the right to appoint the bargaining representative of their choice. Furthermore, the exercise of good sense and judgment on the part of FWA in framing the questions to be put etc should ensure that the excessive litigiousness of

the American system is not imported into Australia. The restraint so far exhibited by FWA in relation to the importation of North American jurisprudence in relation to good faith bargaining provides some cause for optimism in this respect.

2.3 MSDs as a Pre-Condition of Protected Action Ballots

In JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia [2010] FWAFB 9963 a Full Bench of FWA, in a majority decision, determined that in principle FWA could grant an application for a protected action ballot in a situation where the Transport Workers' Union of Australia had unsuccessfully been trying to persuade Richards to commence negotiations for an enterprise agreement for a period of more than eight months. The Company (supported by the Australian Mines and Metals Association and the Australian Chamber of Commerce and Industry as interveners) argued that the proper course would have been for the union as bargaining representative for its members to have applied for an MSD, rather than seeking to use industrial action to persuade the Company to enter into negotiations.

In the course of their joint opinion Vice President Lawler and Commissioner Bissett acknowledged that if the circumstances of the case had permitted recourse to the Explanatory Memorandum for the Fair Work Bill for assistance in interpreting section 443(1)(b) of the FW Act, 'this would likely lead to the adoption of the construction for which the appellant contends' (para [72]). However, they went on to determine that it was not possible to look to the Explanatory Memorandum for assistance due to the fact that (ibid) 'after section 443(1)(b) has been construed in the context of the FW Act as a whole, and having regard to the relevant object and purpose, it has a meaning – its ordinary meaning – that is clear and is neither ambiguous nor obscure'.

In contrast, Senior Deputy President O'Callaghan came to the conclusion that the meaning of section 443(1)(b) is uncertain or ambiguous, and in consequence felt able to refer to the provisions of the Explanatory Memorandum that supported the view that protected action ballots were available only where the parties were actually bargaining and/or an MSD had been made under section 236. These passages are conveniently summarised and analysed at paras [171]-[175] of the decision of Senior Deputy President O'Callaghan.

This analysis led the Senior Deputy President to conclude that (para [164]):

In my opinion the FW Act, taken as a whole, requires that bargaining be occurring before a protected action ballot can be granted. The FW Act provides a mechanism whereby employers can be required to bargain, if the majority of employees confirm through a majority support determination, that they wish to bargain. I consider that it logically follows that where an employer has declined to bargain, a bargaining representative who is genuinely trying to reach agreement should then establish that there is employee support for bargaining for an agreement because, absent that support, no agreement is possible.

His Honour was confirmed in this view by the 'significant consequences' that flowed from the question of 'whether or not a protected action ballot is available before bargaining has commenced'. They include:

- 'Whether protected industrial action can occur if a majority of employees reject a bargaining proposal through the majority support determination process' (para

[167]). In other words, his Honour was concerned that there was a logical inconsistency in the notion that a group of employees could seek a protected action ballot in circumstances where the majority of employees in a particular enterprise did not want to engage in collective bargaining in the first place. He was reinforced in this view by the fact that the constituency for a protected action ballot is likely to be smaller than for an MSD.

- The difficulties that flowed from permitting bargaining representatives to seek a protected action ballot in circumstances where employees had not yet been notified of their representational rights and their capacity to nominate a bargaining representative other than their union (para [168]).

- The possibility that the concept of genuinely trying to reach agreement could be reduced to a requirement that there simply be a request for negotiations, since on the majority view an applicant for a protected action ballot could show that they were genuinely trying to reach agreement even before bargaining had commenced (para [169]).

With respect, the BCA shares the concerns expressed by Senior Deputy President O'Callaghan, and also considers that his Honour's reading of the requirements of Part 2-4 is correct. The fact that the majority came to a different conclusion suggests that there is room for doubt on the matter. That being so, the BCA suggests that, in order to put the matter to rest, the FW Act should be amended to make clear that FWA cannot grant a protected action ballot application in circumstances where bargaining has not commenced and/or FWA has made an MSD. As is clear from the Explanatory Memorandum, such an amendment would be fully consistent with the intention of the Fair Work Bill as originally introduced in, and enacted by, the parliament.

2.4 Intra-group Transfers and the Transfer of Business Provisions

A number of BCA members have identified what may be an unintended consequence of the interaction of the transfer of business provisions in Part 2-8 of the FW Act and the extended meanings of 'service' and 'continuous service' set out in section 22 of the FW Act.

This problem derives from the fact that section 311(6) provides that, for purposes of Part 2-8, there is a relevant 'connection' between an old and a new employer where the new employer is an associated entity (within the meaning of section 50AAA of the Corporations Act 2001) of the old employer at the time that the transferring employee becomes employed by the new employer. This means that, assuming that the work performed for the new employer is 'the same, or substantially the same, as the work the employee performed for the old employer' (section 311(1)(c)), any industrial instrument that covered the employee with the old employer would also cover the new employer in relation to that employee. Furthermore, section 22(5) and (7) have the effect that the transferring employee's service with the old employer counts as service with the new employer, irrespective of whether there has been a transfer of business as between the two associated entities.

Taken together, these provisions can operate as a disincentive to internal transfers within corporate groups – for example where a pilot at a regional airline seeks to transfer to a larger carrier within the same corporate group as part of a career-advancement strategy. The combined effect of sections 311(6) and 22(5) and (7) is

that the new employer would find themselves having both to recognise continuity of service as between the two employers, and to observe the terms of the regional airline's agreement in relation to the transferring employee whilst its other employees were covered by its existing agreement. Assuming that the terms of that agreement were more advantageous than those of the transferring agreement, the new employer (and employee) would have to choose between: (i) living with an anomalous situation whereby the terms and conditions of pilots doing the same work were governed by different industrial instruments; (ii) making up the difference between the entitlements under the two agreements by (express or implied) contract, but still observing any relevant procedural or administrative provisions of the 'old' agreement; or (iii) applying to FWA for an order under section 318 of the FW Act to the effect that what would otherwise be a transferring instrument is not to apply to the transferring employees. If the terms of the 'old' agreement were in any way superior to those of the new employer's agreement, then it would not be possible to 'contract down' to the level of the new employer's agreement, given that it is not possible lawfully to contract in a manner that is inconsistent with an agreement under the FW Act. It might also be difficult to persuade FWA to exercise its discretion in favour of ordering that the employer's agreement not transfer in such circumstances. This suggests that only the first of the three options noted above would be available in such circumstances.

The difficulties associated with the application of section 311(6) may be compounded by the fact that section 389(2) of the FW Act has the effect that a 'redundancy' is not to be regarded as 'genuine' for purposes of Part 3-2 if 'it would have been reasonable in all the circumstances' for an employee whose position has been made redundant to have been redeployed within 'the enterprise of an associated entity of the employer'. Not only does this impose a significant administrative and logistical burden upon large corporate groups, it may also have the consequence that employees who are successfully redeployed may bring with them transferring industrial instruments in the manner outlined above.

The BCA recognises that some, but not all, of these difficulties can be resolved by application to FWA under section 318. However, even assuming a favourable outcome for such an application, the entire exercise appears to impose an unnecessary administrative burden without any significant advantages to either employer or employee, or any obvious benefits in terms of attainment of government policy objectives. It seems appropriate, therefore, that section 311(6) be amended to make clear that there needs to be something more than the mere transfer of work to establish the existence of a 'connection' in the relevant sense. As will appear presently, the most obvious way to do this would be to provide that there needs to be a transfer of business rather than just work to establish a 'connection' under this provision.

If the redeployment option is to be retained as an express consideration in determining whether a 'redundancy' is 'genuine', then section 389(2)(b) should at least be qualified so that it is necessary to explore redeployment opportunities only with associated entities which carry on similar business to the 'old' employer, and which do so within reasonable geographical proximity to the old employer.

2.5 Establishing a 'connection' under section 311(3)

Section 311(3) of the FW Act deals with what might be described as the 'classic' concept of transfer (or 'transmission' in the former iterations of these provisions) of

business: that is, the situation where one entity transfers all or part of its business to another entity. The concept is well-recognised, and has been subject to interpretation by the High Court on a number of occasions. The problem is that section 311(3) adopts an approach to this issue which creates considerable uncertainty in practice, and which appears to extend the reach of the concept of 'transfer' to a number of situations which the BCA considers should not constitute a transfer of business in the relevant sense.

The problem appears to be twofold. First, the concept of 'arrangement' is not sufficiently precise. Would it, for example, encompass a situation where an 'old' employer encouraged its former employees to accept employment with a new employer on the basis of an (express or implied) 'understanding' between the two employers that the old employer would encourage and/or facilitate the transfer of employees, but where there was no formal contractual provision to that effect? Again, can the former employees of the old employer, and/or their accrued skills and experience, be regarded as 'assets (whether tangible or intangible)' for purposes of subsection (3)? Employees are certainly not chattels that can be bought and sold in the same way as other assets of the business, but it is not at all inconceivable that that for purposes of section 311(3) the 'asset' could be seen to be the benefit to the new employer of having access to an experienced and stable workforce as a consequence of the old employer encouraging or facilitating the transfer of the workforce. This suggests that the term 'arrangement' should be defined to make clear that it encompasses only situations where there is a clear and articulated commercial transaction between the old and new employers.

This leads to the second set of difficulties associated with section 311(3): the lack of clarity as to what will constitute 'beneficial use' of assets in this context. As the subsection is presently framed, for example, it appears that a 'connection' can be established where, in consequence of an 'arrangement' between the old and new employers, the 'new' employer has use of some or all of the same physical assets as the 'old' employer, but where those assets are owned by, and made available by, a third party. Similar issues could arise in relation to 'intangible' assets such as the 'goodwill' of a business that is operated by the old and the new employers on behalf of a third party, or intellectual property that is owned by a third party but which is used for purposes of the 'transferred' business. The BCA considers that these are not situations which ought to constitute a 'connection' for purposes of section 311, and suggests that the appropriate course would be amend subsection (3) to make clear that it applies only where the new employer actually assumes ownership of the asset in accordance with a formal transaction between the old and new employers (as proposed in the previous paragraph).

2.6 Defining 'outsourcing' and 'in-sourcing'

The BCA is not persuaded that it is appropriate that a 'connection' can be established by means of an 'outsourcing' or 'in-sourcing' as contemplated by section 311 (4) and (5). Quite apart from anything else, in many instances this acts as a disincentive for businesses that provide services on an outsourced basis to engage employees of the 'old' employer. This can generate a 'double whammy', whereby the employees of the old employer lose their jobs, and the new employer is deprived of the benefit of the skills and experience of the existing workforce. However, if government remains of the view that the transfer of business provisions ought to extend to outsourcing and in-sourcing, it should at least introduce amendments to ensure that outsourcing and in-sourcing can establish a 'connection' only where

there is a transfer of business as between the old and the new employer, rather than just a change in the identity of the service-provider.

2.7 Access to Individual Flexibility Agreements

The BCA notes that the stated objects of the FW Act include providing a regulatory regime that is 'fair to working Australians', that is 'flexible for businesses' and 'promote(s) productivity and economic growth for Australia's future economic prosperity' (section 3(a)).

The BCA fully endorses these objectives. It also considers that if they are to be achieved it is of the utmost importance that employers have the capacity to reach arrangements with individual employees as to the manner in which industrial instruments which cover those employees are to operate in practice so as to accommodate the needs of both businesses and individuals. This is clearly recognised in sections 144(1) and 202(1) of the FW Act, which require that both modern awards and enterprise agreements contain a 'flexibility term' that enables 'an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement [or award] in relation to the employee and the employer, in order to meet the genuine needs of the employee and the employer'.

The BCA notes that the Australian Industrial Relations Commission adopted a model flexibility clause for purposes of the award modernisation process, and that that model clause then formed the basis of the model flexibility term that is set out in Schedule 2.2 to the Fair Work Regulations, and which is to be assumed to be part of all enterprise agreements in situations where the parties have not agreed upon an individual flexibility clause for themselves.

This approach is not without its merits as a matter of principle. Unfortunately, many BCA members have found that these provisions are not operating in a satisfactory manner. First, employees appear to be reluctant to make IFAs under either modern awards or enterprise agreements, and there is some anecdotal evidence to suggest that employees are exercising their right unilaterally to terminate IFAs simply because they no longer wish to work in a flexible manner as contemplated by the flexibility clause. Second, and even more worrying, certain unions are reluctant to make agreements that include even the model clause, let alone a clause that is tailored to the circumstances of a given business. These same unions also appear actively to discourage their members from entering into IFAs under such clauses as have been agreed – whilst (presumably) taking care not to engage in conduct that might be characterised as 'adverse action' for purposes of Part 3-1 of the FW Act.

The BCA views these developments with great concern. They need to be addressed as a matter of urgency. It is suggested, therefore, that the union recalcitrance issue could appropriately be addressed by amending the FW Act to require that an enterprise agreement cannot be approved by FWA unless it contains a flexibility clause that meets specified criteria. Those criteria should clearly include those presently set out in section 203, but should also include more robust, substantive requirements such as those set out in the model clause. An alternative approach would be to require that agreements must include a flexibility term that provides a degree of flexibility that is at least equivalent to the terms of the current model clause (or a modified version thereof). This would be a 'second-best' option due to the fact that it would not provide sufficient incentive for parties to develop flexibility terms that

were truly adapted to the circumstances of their business, but would still be preferable to the current situation where a number of unions are simply not prepared to agree to any flexibility term that has the capacity to provide any meaningful degree of flexibility.

The problem of employee reluctance to enter into IFAs is perhaps more intractable. The BCA recognises that its members have an important role to play in helping employees to appreciate the benefits of such arrangements both for themselves and for their employers. The Fair Work Ombudsman should also be encouraged to exercise vigilance to ensure that employees are not being coerced into refusing to enter into IFAs and/or to terminate them in situations where they have in fact made an IFA. Beyond that, the BCA considers that it would be appropriate to explore the possibility of permitting employers to make offers of employment conditional upon the employee being prepared to enter into, and maintain, an IFA at least for the nominal life of the relevant enterprise agreement – with an option unilaterally to terminate on (say) 28 days' notice after that time. It would also be necessary to make provision for situations where either the employee or the employer had good reason to terminate the IFA during the nominal life of the enterprise agreement – for example because of a major change in the employee's personal circumstances, or significant change in market conditions.

A possibly less contentious option would be to place an onus upon employees who refuse an employer's reasonable request to enter into an IFA to demonstrate that it was reasonable for them to decline the request. This again should be qualified by a capacity to terminate in the event of changed circumstances, and subject to the option of permitting unilateral termination after the nominal expiry date of the agreement.

It must be recognised that any attempt to introduce provision along the lines outlined above is likely to attract strong opposition from the trade union movement. That does not alter the fact that the issue needs to be addressed as a matter of priority, otherwise continuing inflexibilities in the labour market must inevitably compromise the attainment of the statutory objects noted earlier.

2.8 Contractor Clauses

The use of contract and agency labour has been a contentious issue in Australian industrial relations for many years. Unions tend to see it as a threat to their membership base, and to the terms and conditions of those they represent. From a business perspective, on the other hand, the capacity to engage labour on this basis can provide a vital element of flexibility in the organisation of work. Without it, the competitiveness of many businesses would be severely compromised.

As the BCA understands the matter, there is clear High Court authority (R v Commonwealth Court Industrial Judges; Ex parte Cocks (1968) 121 CLR 313) to the effect that the decision to engage or not to engage contract labour is a matter that does not 'pertain' to the employer/employee relationship in the requisite sense (see now section 172(1)(a) of the FW Act). It is true that there is judicial support for the view that the terms and conditions that must be observed in relation to the employees of contractors do pertain to the relationship between the principal and its employees (R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia (1978) 140 CLR 470), but Cocks remains authority for the proposition that

the decision to engage or not to engage contract (or agency) labour does not 'pertain' to the employment relationship in the relevant sense.

It appears, however, that some unions have been seeking the inclusion of terms in enterprise agreements that purport to regulate the terms and conditions to be observed by contractors and labour hire agencies in such a way as, in effect, to control the engagement of contract and agency staff. Some members of FWA appear to be not unsympathetic to these endeavours. The BCA considers that this is not only inconsistent with established High Court authority, but also constitutes a potentially severe constraint upon the improved productivity upon which the future of the Australian economy depends. It is suggested, therefore, that the definition of 'unlawful term' in section 194 of the FW Act be amended to make clear that those terms encompass any provision which purports to place restrictions upon the engagement of independent contractors or labour hire agencies, or the terms and conditions which such contractors or agencies must observe in relation to their own employees or contractors. The same effect could be achieved by a similar amendment to the definition of 'objectionable term' in section 12 of the FW Act.

3. Policy Issues

3.1 Increase in Superannuation Guarantee

In May 2010 the government announced that between 2010 and 2013, the minimum employer superannuation contribution would increase from its present level of 9 per cent to 12 per cent. As is right and proper, the potentially significant cost increase is to be phased in over an extended period. The BCA recommends that the cost increases associated with this process should be off-set against any wage increases put in place by FWA as part of its annual wage review process, starting in 2013.

3.2 Greenfields Agreements in the Resources Sector

A number of BCA members have raised concerns at the practice of a number of unions in the resources sector of pressing for extremely generous terms and conditions in the context of negotiations for greenfields agreements to apply to new projects, or new stages in existing projects (such as commissioning a new drilling platform or constructing a new loading facility at a coal port). If agreed to, such agreements can not only provide excessively generous terms and conditions of employment for the employees concerned, they can also raise the baseline for negotiations elsewhere in the resources sector and, eventually, in the broader economy.

It is true that unions do not have the capacity to organise protected industrial action whilst negotiating for such agreements – if only because by definition there are no employees who could take such action. However, the unions can often achieve very much the same result by refusing to sign a greenfields agreement until such time as they get their way. In principle, the employer could simply refuse to sign an agreement on terms that they regard as unacceptable, and commence operations without having any agreement in place. However, it is widely recognised that the industrial and commercial realities of the resources sector are such that in many instances this is simply not feasible.

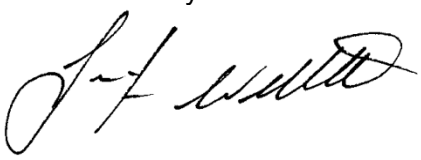
This problem has existed for many years. During the Work Choices era, employers derived some leverage from those provisions which permitted the making of employer greenfields agreements, although even this was of limited value if the

unions in the relevant part of the industry took the view that the terms of the employer greenfields agreement, or even the mere fact of making such an agreement, were unacceptable. Even that limited option is no longer available, following the repeal of the Workplace Relations Act in 2009.

The BCA does not suggest that there is any 'quick-fix' for this problem. It is of the clear view, however, that this issue has the potential to have a significant adverse impact upon future investment decisions in the resources sector. It proposes, therefore, that the government should engage it and other major organisations in the industry in an open and constructive debate about how these issues can most appropriately be addressed.

The BCA suggests that a similar approach should be adopted in relation to the other issues that have been raised in this letter, and would be happy to participate in such consultations as and when appropriate.

Yours sincerely



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