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FAIR WORK AMENDMENT BILL 2013
Submission by BHP Billiton to Senate Committee
15 April 2013

Introduction

1. This submission is made by BHP Billiton.

2. BHP Billiton welcomes the opportunity to offer its views about aspects of the Fair Work Amendment Bill 2013 (the Amendment Bill). BHP Billiton is a substantial employer in Australia. It has exposure to the operation of the *Fair Work Act 2009* both directly and indirectly around Australia. It is concerned to help ensure that the Act as amended will achieve its legitimate purposes and not unreasonably interfere with the efficient operation of its businesses.

3. BHP Billiton strives to be an employer of choice. It encourages openness, trust, teamwork and diversity across its workplaces. It is concerned to ensure that its people are treated fairly and with respect, and that all employees have the opportunity to achieve to their full potential.

4. Five key principles underpin BHP Billiton's industrial relations philosophy. These are:

   - Efficient and productive workplaces – achieved through industrial relationships that allow for a culture of continuous improvement and ready acceptance of change;

   - Direct employee engagement and alignment with the success of the business – pivotal to which are open and honest employee communications, involvement and personal development;

   - Mutually beneficial industrial arrangements – whereby competitive remuneration and attractive conditions of employment are, wherever possible, aligned with the key drivers of operational success;

   - Management's retention of the ultimate responsibility and right to run the business – with employee consultation not elevated to a right of veto over operational decision-making; and

   - Respect for an employee's unequivocal right to have the representative of his or her choice – whether that be an eligible union or otherwise.

5. These principles are reasonable and should be able to be realised under the Fair Work Act and associated legislation. BHP Billiton is concerned, however, that some of the proposed amendments will make this difficult. It has the following additional concerns:

   (a) The balance promised, and some of the specific commitments given, in the Forward with Fairness – Policy Implementation Plan (issued in August 2007) will be compromised.

   (b) The proposed amendments will add unnecessary regulatory burden and cost and will not assist the industry's productivity agenda at a critical time.

Overview of submission

6. This submission is targetted at particular matters where BHP Billiton's experience leads it to have a strong view about an aspect of the Amendment Bill. The matters in respect of which it makes its submission are:

   (a) Right to request flexible working arrangements;

   (b) Consultation about changes to rosters or working hours;

   (c) Anti-bullying measures; and

   (d) Right of entry changes.

7. This submission is limited to matters arising under the Amendment Bill which raise issues of direct and serious concern for BHP Billiton.

Right to request flexible working arrangements

8. This provision radically expands the work of s 65 of the Act. Section 65 was introduced by the Fair Work Bill 2008 with the specific purpose of supporting a parent or other carer of a child under school age. This responded to an identified and particular need within the community concerned with child care. The Amendment Bill would now extend the rights to make a request to cater for a range of additional circumstances, including any parent of a school age or younger child, any other carer, any employee with a disability, any employee aged 55 or older, any employee experiencing domestic violence and any employee who provides care or support to a person experiencing domestic violence. The provision would lose its original focus and now apply to virtually all employees.

9. Under the current provisions, an employer may refuse a request for flexible working arrangements on reasonable business grounds giving details of the reasons for the refusal. The proposed new subsection 65(5A) purports to exemplify *reasonable business grounds* but in doing so changes the circumstances in which an employer could refuse the request. Under the new provision, it would now be necessary, for example, to show that the working arrangements requested would be likely to result in a significant loss in efficiency or productivity, or have a significant negative impact on customer service. The additions codify and narrow the broadly based reasonable business grounds criterion. They make it more difficult for an employer to resist a request. These alterations to the test to apply when considering a request are being advanced contrary to the express recommendations of the Fair Work Act Review Panel in paragraph 5.2.6 of its Report (see page 99).

10. In summary, the revised provisions:

    (a) would radically expand the number of requests required to be considered by an employer in connection with its working arrangements because of the extension of the entitlement to virtually the whole workforce over almost an entire working career; and

(b) at the same time would significantly reduce the employer's capacity to refuse a request and adhere to its preferred working arrangements.

11. This is an unreasonable and unnecessary incursion into the operations of an employer's business. Employers are motivated to run their operations efficiently and co-operatively with their workforces. They routinely accommodate legitimate requests of employees having regard to the needs of the business and without the need for this legislative prescription. They do this because, amongst any other reasons, it is necessary to attract and retain the staff which will be essential for the success of their business.

12. The changes are not necessary and will raise expectations of employees in a way which may be unrealistic. When taken together with the wide variety of protections under the Fair Work Act, including adverse action provisions which focus upon workplace rights amongst other things, and other legislation to do with discrimination and occupational health and safety, they create an unreasonable burden on businesses. The new workplace right created could be a vehicle for inappropriate adverse action or other legal claims.

Consultation about changes to rosters or working hours

13. The changes proposed by the Amendment Bill are not in response to any recommendation by the Fair Work Act Review Panel. They do not respond to any known problem.

14. Enterprise agreements are required by s 205 of the Fair Work Act to contain a provision requiring consultation if there are to be major workplace changes which are to have a significant effect on employees. The Fair Work Regulations set out a model consultation term which is incorporated if the matter is not otherwise dealt with in an agreement. The model consultation term is comprehensive and adequate for its purpose. It broadly reflects provisions introduced as a result of the *Termination, Change and Redundancy Case* (1984) 294 CAR 175. It has stood the test of time. The consultation occurs after the employer has made a definite decision. The discussion required is limited to the introduction of the change, the effect it is likely to have on employees, and measures the employer may take to avert or mitigate the adverse effects.

15. Consultation about workplace change has been a matter about which there has traditionally been industrial bargaining. Employers have striven to achieve agility in responding to operational needs, changed market conditions or customer demand. Rosters and the capacity to change or introduce new rosters are critical to this agility. In progressive enterprise agreements, employers have succeeded in moving away from employee or union veto over such roster changes to more streamlined consultative provisions involving affected employees which support the quick implementation of necessary changes. In some cases, employees have been happy in the context of an overall enterprise agreement to accept notification provisions without the formal requirement for prior consultation. A package of benefits will have been received by employees under enterprise agreements in exchange for provisions which include this arrangement.

16. In any event, it is wrong in principle to be superimposing upon an employer and its workforce these additional consultation obligations where they would be inconsistent with those agreed to in an enterprise agreement. It will cause unnecessary confusion between the parties because these new obligations may conflict with or be inconsistent with obligations in an agreement.

17. There is no need to interfere with these matters by adding to s 205 of the Act. The current provisions are fully adequate for their purpose. The interference proposed is regressive and should not be countenanced. The new requirement in relation to changes to rosters or ordinary hours is not expressly limited to a circumstance where the employer has made a definite decision to introduce the change. Neither are the discussions limited, in effect, to such steps as may be available to mitigate adverse effects on employees. An employer would now be required to invite and then consider views about the impact of the change, including any impact on family or caring responsibilities, upon the employees. This raises, unfairly for the employees, an expectation that

rosters or ordinary hours of work will be able to be structured around those matters. This would not often be the case and it is wrong-headed for the legislation to approach the issue in that way. The new provision is likely to produce grievances, disputes and unmeritorious adverse action claims in a way which serves no good purpose.

18. It will be unmanageable, even chaotic, if an employer is obliged to consult employees every time it contemplates a possible roster change or change of working hours. Indeed, the Amendment Bill (as explained in the Explanatory Memorandum) appears to require consultation even where a change may only apply to one employee.

19. The Amendment Bill also proposes a new s 145(a) specifying that a modern award must include a term requiring an employer to consult employees about a change to their regular roster or ordinary hours of work. Modern awards presently contain a standard provision dealing with consultation regarding major workplace change. This provision was included by a Full Bench of a predecessor of the Fair Work Commission consistently with the long line of industrial arbitration provisions about consultation going back to the *Termination, Change and Redundancy Case*, and probably earlier. It was not required to include such a provision but chose to do so because it was regarded as appropriate. There is no need now to introduce a mandatory provision about one aspect of workplace change, namely changes concerned with rosters or ordinary hours of work. The provision relating to modern awards suffers from the same serious defects – raising expectations inappropriately, etc – as are identified in the preceding paragraphs concerned with enterprise agreements.

20. Employers and employees deal with the relevant issues now, taking into account the needs of the operation and employees' aspirations. They do this for their own reasons. An employer is keen to attract and retain good staff. An employee will be keen to work in satisfying employment which meets his or her needs. Further legislative intervention as proposed in Part 4 of the Amendment Bill is unwelcome and unnecessary.

Anti-bullying measures

21. Bullying has no place in the workplace. As evidence has come to light that such practices have emerged within the Australian workforce, employers have responded with appropriate policies and – in the majority of cases – education and training to ensure bullying is eradicated or does not occur. Bullying should not be categorized as an industrial matter, conducive to remedy through the Fair Work Act. Its inclusion in the Fair Work Act will make management, already a difficult and complex task, even more difficult.

22. The current legislative proposals are not helpful in dealing with the problem of bullying. Issues of concern are outlined below:

    (a) The investigation, conciliation and enforcement regimes applicable under workplace health and safety legislation or anti-discrimination legislation are the most appropriate mechanisms for tackling bullying in the workplace. Federal and state authorities already have enforcement mechanisms to deal with bullying, including health and safety inspectors. Adding another layer, in this case a Fair Work Commission member, to existing enforcement mechanisms imposes an additional burden for no good reason and will be confusing.

    (b) Introducing anti-bullying provisions into the Fair Work Act will encourage forum shopping – indeed, this possibility is specifically invited by the proposed s 789FH, which would make inapplicable a provision of the *Work Health and Safety Act 2011* designed to prevent proceedings under multiple statutes.

    (c) The proposed amendments may encourage misconceived claims. If a supervisor or manager has a clear and direct management style, an employee may perceive bullying where another person would not come to that conclusion. The same problem of perception

surrounds the proposed defence of reasonable management action carried out in a reasonable manner.

(d) The proposed amendments may encourage mischievous claims. Some employees will quickly learn that by raising an allegation of bullying, legitimate management measures can be de-railed even if only for weeks or months.

(e) The Amendment Bill suffers from the absence of an exception to the vicarious liability of an employer where some bullying may occur even though the employer has taken all reasonable steps to prevent an employee from acting unlawfully (see, for example, s 18E of the *Racial Discrimination Act 1975*).

(f) The requirement in the proposed s 789FE that the Fair Work Commission must start to deal with a bullying application within 14 days after it is made will add further to the workload of the Fair Work Commission with the consequence that other matters legitimately needing the Commission's attention will be pushed back.

23. In summary, the provisions are not the best way to resolve or avoid bullying episodes.

Right of entry

24. A statutory right of entry has long been included in industrial legislation for certain limited purposes, namely:

(a) to investigate breaches of industrial law, awards or agreements;

(b) to hold discussions with employees who are members or who are eligible to be members of the union; or

(c) to investigate breaches of occupational health and safety law.

This formulation should be uncontroversial. It is the formulation given on page 23 of the Forward with Fairness – Policy Implementation Plan.

25. Beyond these purposes, it is inappropriate that an employer be compelled to allow uninvited persons to enter its premises, much less to require that the employer go to lengths such as providing accommodation. It should be remembered that the statutory rights of entry are exceptions to the general principle, fundamental in Australian society, that nobody has a right to enter another's premises without permission.

26. The legislative provisions proposed need to be measured against these legitimate purposes. To the extent that they go beyond them, undermine them or are unreasonably burdensome, the provisions should be rejected. BHP Billiton contends that the provisions identified below manifestly fail the test of legitimacy measured against these purposes. They tilt the balance far too strongly away from the need to allow an employer to go about its business (and for employees to go about their business) without undue inconvenience.

27. The Forward with Fairness – Policy Implementation Plan said that Labor would maintain the existing right of entry rules. This has been shown not to be the case. There was a radical expansion of statutory rights of entry with the introduction of the Fair Work Act because of the removal of the former connection between a union's rights of entry and its status as a union covered by an award or agreement applicable to the workplace. The amendments now proposed, discussed in more detail below, will make further significant changes to the right of entry rules. The provisions, as amended, will lose touch with the legitimate purposes to be served. The amendments appear to serve a partisan purpose, namely furthering the organising interests of unions. The balance promised in the Forward with Fairness – Policy Implementation Plan is to be further compromised.

Location of interviews and discussions

28. The Amendment Bill is calculated to force an employer to allow a union official exercising a right of entry to go into crib rooms and other places where employees take their meals. Depending on the circumstances, this could ordain a manifestly inappropriate intrusion upon employees who are entitled to privacy during a meal break. There is no current problem which requires this supposed solution. The Fair Work Commission is well used to assisting in the resolution of disputes about the location of interviews and discussions. The legitimate legislative purposes are already met. Both employers and employees are entitled to look to Parliament to protect them from having to submit to unwelcomed intrusions beyond the achievement of those purposes.

Power to resolve disputes regarding frequency of visits

29. BHP Billiton welcomes the initiative to give the Fair Work Commission a role in resolving disputes regarding the frequency of visits. BHP Billiton has previously drawn attention to this problem – see, for example, paragraph 84 of its submission of 17 February 2012 to the Fair Work Act Review Panel and section 8.3 of the Panel's Report.

30. At the same time, BHP Billiton suggests that the proposed s 505A needs improvement. In particular, the apparent test in determining whether there has been too great a frequency of visits is that they "would require an unreasonable diversion of the occupier's critical resources" (see the proposed s 505A(4)). This is not a satisfactory test. The right of entry is not some right at large for union officials. It is really a right established in the interests of employees to achieve the purposes set out above. The fact that an employer may be required unreasonably to divert critical resources is an example of a situation where there has been an unjustified frequency of visits. However, it is only one example. A union official should not have a statutory right to enter premises more often than is reasonably suited to the achievement of the legitimate legislative objects. This is so whether or not "critical resources" need to be diverted unreasonably. If the Fair Work Commission is asked to look at the matter by an employer subjected to a high frequency of unwelcome visits, the Commission should be entitled to look at the real issue and not be limited to an assessment about the unreasonable diversion of critical resources.

31. A useful amendment to the legislation would be to set out a positive obligation upon union officers only to utilise their statutory rights of entry for legitimate purposes and in a reasonable manner. Such an obligation would assist when considering a matter such as frequency of visits. The approach taken in other parts of the Act to onus of proof about purpose and intention should be followed. That is, where a challenge is made, it would be for the union officer to demonstrate to the Fair Work Commission or relevant court that he or she was acting consistently with this obligation.

Provision of transport for access to remote areas

32. BHP Billiton accepts that there will be a limited number of situations where there is no practical means of entering a workplace in a remote area without some employer support in transport arrangements. It is not aware of this issue creating a genuine problem. However, it recognises that the proposed ss 521B and 521D are aimed at avoiding a problem which could arise in this respect.

33. There is an improvement which BHP Billiton suggests for the proposed s 521D(2)(a). This section requires that to provide transport to the premises would not cause the occupier undue inconvenience. It is important to clarify that the union officer exercising a right of entry would have no status requiring, for example, that he or she has priority for an aeroplane or helicopter seat over and above another person with a legitimate reason to have that seat. For example, the seat may already have been given, or may later be given, to a company auditor or senior executive or operational employee or contractor returning to site. It is desirable that the section make clear that, while an employer or occupier should co-operate in the relevant situation to permit the transport, the union official must accept the opportunities made available in the ordinary course of the employer or occupier's business.

Provision of accommodation for access to remote areas

34. The proposed ss 521A and 521C would require that an occupier or employer in a remote location provide overnight accommodation, potentially for several nights, for a union official exercising a statutory right of entry. This is an unprecedented, unnecessary and unacceptable proposal. It does not have its origin in any recommendation of the Fair Work Act Review Panel.

35. Employees who work at a remote mine or resources project, mine construction site or other similar remote workplace will typically spend recreational hours in an established accommodation village throughout which any resident has free access to dining rooms, bars, sporting facilities, meeting rooms, etc. The accommodation village is effectively the employee's home away from home. There are strict limitations on any outsiders who are permitted to enter uninvited. This applies even in the case of family members who would not usually be allowed on site except in rare circumstances. It will make a mockery of an employee's right to private enjoyment of his or her free time and living accommodation, without pressure from a visiting union official, if that official is required to be accommodated overnight in the same village. It will make irrelevant any issue about the route to be taken in a workplace or whether an employer can resist a requirement to permit access to the crib room at meal times.

36. The unfortunate fact is that some union officers exercising a right of entry do seek to impose upon employees considerable pressure to join the union and to participate in union activities. Decisions of the Fair Work Commission and its predecessors show that strong tactics can be used by union officers. Indeed, it is unfortunate and ironic that a Bill, some aspects of which are aimed at removing bullying conduct at work, includes other provisions which will very likely facilitate bullying by union officers of employees trying to enjoy recreational time in privacy and in peace. The Amendment Bill offers no solution to this. The interaction between the proposed bullying provisions and the right of entry provisions is left wholly unresolved.

37. It is one thing for a union official to have a statutory right of access to a workplace in order to confer with employees who wish to speak to the union official. It is quite another to mandate by legislation that a union official should have the right to enter, uninvited, shared living and recreational facilities during recreational hours to pursue what may be high pressure recruitment efforts aimed at non-member employees or members reluctant to engage in some union sponsored activity. It would be completely inadequate and unfair to suggest that it is open to the employer to challenge the union official's right to retain a permit following any inappropriate conduct. An occupier or employer may well be oblivious to what is going on. Employees are unlikely to complain for fear of group pressures or even victimization.

38. BHP Billiton is an employer in several remote locations around Australia. It is not aware of any situation where union officials wishing to exercise a right of entry have not been able to achieve that aim in a reasonable way. It contends that the proposed legislation dealing with accommodation at remote locations should be wholly rejected.

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