BLAKE DAWSON WALDRON

L A W Y E R S

BHP LIMITED

Transmission of Business and Workplace Relations Issues Ministerial Discussion Paper

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Transmission of Business and Workplace Relations Issues

Ministerial Discussion Paper

INTRODUCTION

1. BHP Limited makes this submission to the Minister for Employment, Workplace Relations and Small Business in response to the Ministerial Discussion Paper "Transmission of Business and Workplace Relations Issues".

2. This submission will address some of the issues raised in the Discussion Paper and respond to the reform options which have been proposed.

TRANSMISSION OF "BUSINESS"

3. The Discussion Paper examines the recent expansion of the Courts' view of the circumstances which give rise to a transmission of business. A consideration of the case law in this area shows a recent move from the historical propositions that in order for there to be a transmission of business, the activity or part of the business which is transmitted must be capable of being regarded as a business[1] or "going concern".[2]

4. There also had to be an actual transmission of a business.[3] The *Crosilla* decision is an example where contracting out or outsourcing motel cleaning to a professional cleaning company was held not to amount to transmission of the motel business. The business remained intact, but an activity necessary to be performed within the business was now supplied from outside.

5. More recently, and mainly in the context of the *Workplace Relations Act*, the Courts have applied a much more expansive interpretation to the concept of a transmission of business, either not following or putting in doubt the earlier authorities.

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[1] *Re Hayman v Neill* [1960] AR 363

[2] *Kenmir Limited v Frizzel* [1968] 1 WLR 329

[3] *Crosilla v Challenge Property Services* (1982) 2 IR 448

6. The consequence of the current judicial interpretation would appear to be that any time a bundle of work activities (eg cleaning, telephone answering, maintenance services, provision of legal services) is contracted out by an employer, any awards or agreements under the *Workplace Relations Act* binding the employer will be binding on the contractor.

Support for the "Going Concern" Test and the Prescription of Indicia of Transmission

7. BHP supports the return to the earlier interpretation of the transmission of business provisions. Specifically, it supports combining the "going concern" test with the prescription of indicia of transmission.

8. The Discussion Paper[4] suggests two formulations of this test. The first provides that:

   - a business or part of a business must be acquired as a going concern; and
   - that each of a specified list of indicia of transmission must be present.

   The second formulation provides that:

   - a business or part of a business must be acquired as a going concern; and
   - that *some* of a specified list of indicia of transmission must be present.

9. BHP supports the second of these formulations. While the "going concern" test should, in most cases, be sufficient to clarify that there must be a transfer of a *business* (and not just a bundle of work activities) in order for a transmission of business to occur, it is desirable that any residual uncertainty in applying this approach be avoided by prescribing an indicative list of features.

10. BHP submits that it is not desirable to produce an exhaustive list of indicia which must be present in order to satisfy the transmission of business test. The danger with this approach is that there will inevitably be circumstances where, but for the absence of one factor, there is clearly a transmission of business. Conversely, there may be situations where several of the indicia are present, but the going concern test is still not satisfied.

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[4] Option (4) para. 127 ff.

11. BHP supports, therefore, a test which is the "going concern" test, with legislative guidance by way of stated indicia which will ordinarily be present in order to satisfy the test.

A New Test - Transfer of Business "As a Business"

12. An alternative to the adoption of the approach set out above is the approach adopted in the United Kingdom and described in the Discussion Paper.[5] The Discussion Paper suggests that the relevant transmission of business sections of the *Workplace Relations Act* may be amended to provide that transmission will occur where there is a transfer of a business or part of a business "where the part of the business is a stand alone business (even if it is absorbed into a bigger business by the transmittee)".

13. While BHP would support this "stand alone business" approach, it considers that it is preferable to aid it in the manner described above, with the stated but non-exhaustive indicia so that a court will be less likely to stray from the legislative intention.

AWARDS

14. BHP acknowledges the historical rationale for the transmission of business provisions in respect of awards. This is to ensure that industrial settlements reached or arbitrated at a workplace cannot be sidestepped through a change in the ownership of the business or identity of the employer.

15. BHP also supports the preservation of a safety net of award terms and conditions where businesses are transferred from one employer to another.

Transmission of Award as Safety Net where Transmittee Employer has no Award

16. Where a transmittor employer is covered by an award and the transmittee employer has no award in place, it makes sense that the award should apply to the transmittee employer in order to provide a safety net for employees who are transferred with the business.

17. Where, by contrast, the transmittee employer is already covered by an award providing appropriate safety net conditions for the category of work involved, it may not be

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[5] Para. 139

appropriate for the transmittor's award to prevail. If it did, there may be unnecessary and inconvenient consequences for the new employer as well as for other employees in the transmittee's business.

18. Currently there are ways in which the transmittee employer can attempt to overcome this problem. These include applying for an order from the Commission that the transmittor's award will not apply, seeking to establish a new award which will supersede the transmittor employer's award and applying to vary that award so that it will not apply to the transmittee. These processes can be very time consuming.

19. BHP submits that where a transmittee employer is already bound by an award, section 149(l)(d) should provide that the transmittor's award will *not* apply to a transmittee employer unless the Commission orders otherwise on the application of a party to the award or an employer bound by the award. Where the transmittee employer is not bound by an award, it would be appropriate for section 149(l)(d) to continue to operate as it does now (subject to the introduction of the "going concern" test).

CERTIFIED AGREEMENTS

Enterprise Bargaining and Particular Needs of a Business

20. Enterprise bargaining is designed to allow a forum for parties (employer, employees and unions) to negotiate the most appropriate form of industrial instrument for their workplace. Certified agreements are an avenue for the parties to introduce flexibility and to accommodate the peculiarities of a workplace in setting terms and conditions which govern employment. While an award will usually set the minimum terms and conditions and provide a safety net for employees, certified agreements are tailored to the particular needs of a workplace.

21. It would usually be incongruous, therefore, for a certified agreement binding at one particular workplace to become binding at another, even where there is a transmission of business. It would contradict the underlying policy of providing a means through which employers and employees negotiate terms and conditions which are particular to them and their workplace. If there is an existing certified agreement in position at the transmittee employer's workplace, it should be respected.

22. At the same time, employees should not be deprived of their bargain merely because of a commercial adjustment. BHP therefore proposes the concept of a "sunset" arrangement, whereby a transmittor employer's certified agreement would move across to the transmittee employer, but for only a short period of time, say 3 months, after which it would lapse. This 3 month period would provide an opportunity for both the new employer and the employees to assess the applicability of the existing certified agreement to the transmittee business and would provide the parties with sufficient time to consider an alternative industrial instrument for the new environment, if appropriate.

23. Alternatively, it may be appropriate for the *Workplace Relations Act* to be amended to provide that certified agreements would not become binding on a new employer unless the Commission makes an order that such transmission would be appropriate.

24. At the very minimum, it is a serious omission that section 170MB does not, at present, allow for its non-operation where the Industrial Relations Commission is satisfied that it is not industrially appropriate for the section to have effect or full effect.

AUSTRALIAN WORKPLACE AGREEMENTS

25. BHP supports legislative reform which ensures that the validity of an AWA is not affected by a certified agreement which becomes binding on a transmittee employer by virtue of a transmission of business. This should be the case whether the making of the AWA predates, coincides with, or post-dates the transmission of business. Section 170VQ(6) should be amended to achieve this result. There is no legitimate policy consideration which should be allowed to cut down the freedom of the employer and employee to enter into an AWA in these circumstances and have it prevail.

26. BHP also supports the proposition in the Discussion Paper[6] that the Employment Advocate (or the Industrial Relations Commission) should have a power to prevent or cease the application of an AWA to a transmittee employer where industrially appropriate.

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[6] Para. 185-186

REDUNDANCY PAY

27. This subject matter is not dealt with extensively in the Discussion Paper, but it does logically arise for consideration. If an employer contracts out or sells off a business (in circumstances which amount now or in the future to a transmission of business), it may choose:

    (a) To require that employees transfer their employment to the new employer or otherwise forego redundancy pay entitlements; or

    (b) To pay employees partial redundancy benefits where they transfer to a new employer on less favourable terms; or

    (c) To pay employees full redundancy benefits where their employment is terminated, despite the fact that they may apply for employment with the new employer at a later time.

28. It would be appropriate to introduce into the *Workplace Relations Act* the notion that the operation of sections 149(l)(d), 170MB and 170VS should give way where employees have received appropriate redundancy payments.

PART XA

29. Recent decisions of the Federal Court in *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council*[7] and *Maritime Union of Australia v Burnie Port Corporation Pty Ltd*[8] indicate unexpected and legislatively unintended applications of Part XA of the *Workplace Relations Act* to ordinary decisions in the context of outsourcing and recruitment.

30. Unless reversed on appeal or by later decisions, they will become a serious impediment to regular outsourcing and contracting decisions, such as have been quite usual in Australia and comparable countries overseas for many years.

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[7] [2000] FCA 1231 (4 September 2000)

[8] [2000] FCA 1189 (24 August 2000)

31. The *Workplace Relations Act* needs amendment to make it clear that utilisation of statutory options for certified agreements and AWAs, in circumstances not breaching sections 170NC or 170WG, is by itself not contrary to Part XA.

CONCLUSION

32. BHP would be pleased to expand upon any of these matters if required. For further discussion, please contact:

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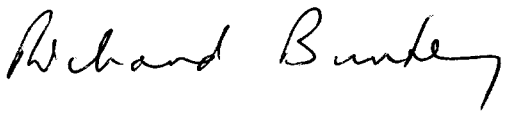

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