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13 March 2015

Workplace Relations Framework  
Productivity Commission  
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CANBERRA CITY ACT 2601

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Dear Sir, Ms

## **SUBMISSION FROM PEABODY ENERGY TO THE PRODUCTIVITY COMMISSION REVIEW OF THE WORKPLACE RELATIONS FRAMEWORK**

Thank you for the opportunity to provide comment on various aspects relating to the Commission's review.

Peabody Energy Australia is a subsidiary of Peabody Energy (NYSE: BTU), the world's largest private-sector coal company. Peabody Energy has been active since 1883 and currently has majority interests in 27 coal operations located throughout all major U.S. coal-producing regions. Peabody Energy operates 10 coal mine operations in Australia (including six in Queensland), servicing export and domestic markets with a diverse product range of coal through multiple coal ports. In 2014, Peabody's Australian operations achieved total sales of 38.2 million tons primarily to steel producers in Japan, Europe, Taiwan, Korea, India and South America, as well as to electricity generators in Australia and Asia.

We also support the submission to the Commission from the Minerals Council of Australia on behalf of the Australian resources sector.

### **Comments for consideration**

Our comments are based on a realistic awareness that the business environment continually changes. Australia's industrial relations regime needs to be fair for all, while being flexible enough to respond to changing market conditions.

If we are to remain competitive during times such as the current downturn in the commodity cycle, the legislation needs to be modernised and made relevant via an emphasis on flexible bargaining practices and an emphasis on performance-based rewards (such as bonuses).

We list below a range of what we believe are issues associated with the Fair Work Act (2009), along with implications for employers and feasible solutions:

#### **Issue 1: Transfer of business provisions inhibit productivity and efficiency**

- New employer 'inherits' old employer's industrial relations framework in the transfer of business situation.
- Affects M&A transactions as well as in-sourcing/out-sourcing transactions

#### Implications for employers

- The new employer may be forced to inherit and apply terms and conditions of employment which are uncommercial or inconsistent with the new employer's existing arrangements.
- Because the transferred terms apply only to transferring employees, this can result in different categories of employees (the old workforce and the new workforce) doing similar work on different terms of employment, which is undesirable.
- The old employer's business may have failed because of uncommercial industrial instruments. The transfer of business provisions prevent what may be a necessary process of renewal.
- Particularly problematic in in-sourcing/out-sourcing situations where there may be a need for a completely different industrial relations approach.
- Generally interferes with commercial activity, labour productivity and effective and harmonious industrial relations.

#### Suggested remedy

- An employer who has an existing industrial relations framework (including under an enterprise agreement or employment contracts) which is compliant with the NES and would pass the 'better off overall test' against the applicable Modern Award should not have to inherit a previous employer's terms and conditions of employment in any circumstances.

#### **Issue 2: Enterprise agreement process is flawed**

- The process is extraordinarily legally complex and full of procedural trip wires which can retrospectively invalidate a successful enterprise agreement process.
- The good faith bargaining (GFB) principles are fine in theory but often result in one aggressive bargaining representative (which may represent only a minority of the workforce) dominating the process, particularly against inexperienced or poorly resourced employers. Employees themselves are often forgotten in the process.
- Procedural requirements (requests for information etc) are sometimes being used oppressively.
- 'Better off overall' test (BOOT) is being applied inflexibly against the relevant Modern Award and does not take into account innovative benefits which are often of real advantage to employees – for example flexible arrangements and access to bonus systems.

#### Implications for employers

- Employers can successfully negotiate a compliant enterprise agreement directly with its employees with majority or even unanimous support and then have an external party (for example a union) stymie the approval process by allegations of technical procedural non-compliance.
- Enterprise agreement negotiations can be 'high jacked' by aggressive and experienced bargaining representatives (often union representatives) who may have an agenda broader than the particular workplace, and who may negotiate on a basis not necessarily in the interests of the particular workforce.
- By the use of the coercive powers associated with the GFB principles, enterprise agreement negotiations can be unreasonably delayed and made prohibitively expensive.
- Because a 'line by line' approach to the BOOT is taken by many FWC Commissioners, there is reduced scope for employers and their employees to negotiate genuinely innovative arrangements, unless those arrangements are consistent in every respect with the underlying Modern Award. This has a negative effect on productivity and inhibits employers and their employees reaching agreement which suit them.

#### Suggested remedy

- Simplify procedural requirements, with any procedural non-compliance only to invalidate the process if genuine deception or significant unfairness is established.
- Relax the application of the GFB requirements so that bargaining representatives who represent less than a threshold of the employees (say 10%) are only entitled to participation in the process but do not have access to coercive powers including the right to require the provision of extensive information or to make applications for bargaining orders.

- Require FWC to take into account and give appropriate weight to any benefit which employees have taken into account in accepting the employer's offer, whether or not it can be quantified under the Modern Award or 'matched' to a particular Modern Award provision. Allow FWC to approve an enterprise agreement in those circumstances even if some aspects of the enterprise agreement (for example the spread of ordinary hours or overtime or penalty rates) are lower than or inconsistent with the Modern Award.

### **Issue 3: Insufficient checks and balances on damaging industrial action**

- For most employers there is virtually unlimited capacity for unions and employees to take protected industrial action. The threshold for terminating (or even suspending) protected industrial action is very high, and in most workplaces could never be met.
- Industrial action does not have to be proportionate in terms of its damage to the employer versus the benefit to employees if demands are met. Therefore the economic leverage can be huge.

#### **Implications for employers**

- The irresponsible use of this economic leverage can and has led to uneconomic wage settlements which, in the long term, jeopardise jobs, productivity and the competitiveness of industry.

#### **Suggested remedy**

- Unions and employees should be required to demonstrate preparedness to offer productivity and efficiency 'trade offs' prior to taking industrial action in support of a claim for more than a CPI wage increase.
- If the economic damage to employers is vastly disproportionate to the benefit achievable by employees by taking protected industrial action, the employer, should at its election, be able to access compulsory arbitration.
- To achieve fairness, there could be a minimum arbitrated wage outcome in these circumstances (for example CPI).

### **Issue 4: Multiplication of legal avenues to prevent ordinary workplace processes**

- There has been significant increase in the range of legal tactics available to employees and unions to delay or avoid ordinary workplace processes, including performance management and workplace restructuring. These include:
  - Adverse action claims.
  - Bullying applications.
  - The strategic use of dispute resolution procedures (including status quo provisions).
  - The strategic use of consultation provisions, including associated litigation.
- Increasingly these remedies provide for the availability of interlocutory injunctions, where the threshold for the making of orders is low. The Federal Court and the Federal Circuit Court are routinely making interim orders, including to reinstate employees or to prevent workplace processes from proceeding, before there has been any finding of wrongdoing by the employer.

#### **Implications for employers**

- The legal fees associated with defending these claims are very significant.
- Ordinary process of change and workplace management are being delayed, or in some cases prevented irrespective of whether there is any genuine unlawfulness or unfairness associated with them.
- Employers become tentative and avoid making necessary decisions to improve workplace processes and deal with underperformance, which has an effect on productivity, efficiency and competitiveness.

#### **Suggested remedy**

- Review the operation and scope of the adverse action provisions, including the appropriateness of interlocutory relief in the absence of a finding of wrongdoing by the employer.

- Allow FWC Commissioners to refuse to proceed in relation to bullying allegations if satisfied the employer has adequate procedures for dealing with bullying in place, and there is no compelling evidence of genuine bullying (as opposed to management action).
- Strengthen the capacity of the Federal Court and Federal Circuit Court to award costs against unsuccessful application, particularly where interlocutory relief is granted but not sustained at final hearing.

Thank you for the opportunity to provide these comments. If you need any further information regarding this submission, please contact Ian Gray

Yours sincerely

Geoff Woodcroft  
Vice President Human Resources