SUBMISSION OF BHP BILLITON LIMITED TO THE SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

8 January 2009

Our reference
RAJB NK 03 1429 3626

FAIR WORK BILL 2008

Introduction

1. BHP Billiton Limited is a global leader in the resources industry. It is distinguished from other resources companies by the combination of the quality of its assets, its deep inventory of growth products, its customer focussed marketing, its diversification across countries, commodities and markets, and its petroleum business. BHP Billiton occupies significant positions in major commodity businesses including aluminium, energy coal and metallurgical coal, copper, manganese, iron ore, uranium, nickel, silver and titanium minerals, and has substantial interest in oil, gas, liquefied natural gas and diamonds.

2. As at 30 June 2008, BHP Billiton had approximately 41 000 employees working in over 100 operations in 25 countries.

3. BHP Billiton considers there to be much which is positive in the Fair Work Bill 2008 including, in particular:

   (a) the stated object linking enterprise bargaining with the delivery of productivity benefits;

   (b) its retention and extension of the national system of workplace relations;

   (c) its simplicity in presentation;

   (d) the preservation of the rules surrounding industrial action and the boycott provisions in the *Trade Practices Act 1974*; and

   (e) the facility for a guarantee of annual earnings allowing flexibility for high income earners to operate consensually outside the sphere of modern awards.

4. BHP Billiton comments in this submission only on specific matters of a technical nature where, in its view, an important systemic feature can be improved consistently with the general approach advanced in the Government's *Forward with Fairness* policy. The matters commented upon relate to the following subjects:

   (a) Right of entry;

   (b) Non-union agreements;

   (c) Greenfields agreements;

   (d) Protected industrial action – employee claim action;

   (e) Industrial action related workplace determinations;

(f) Adverse action and workplace rights;

(g) Industrial action;

(h) Redundancy provisions;

(i) Demarcation disputes;

(j) Transfer of business; and

(k) Transitional arrangements.

5. The **schedule** to this submission contains ways in which the matters raised by BHP Billiton could be resolved if that course were considered appropriate.

Right of Entry

6. Part 3-4 of the Fair Work Bill will give a statutory right of entry to union officers who are permit holders in two situations:

(a) to investigate suspected contraventions of the Act, or a term of a fair work instrument which relates to, or affects, a member of the permit holder's organisation whose industrial interests the organisation is entitled to represent and who performs work on the premises to be entered; or

(b) to hold discussions with one or more persons who perform work on the premises to be entered, whose industrial interests the permit holder's organisation is entitled to represent, and who wish to participate in the discussions.

7. These statutory rights of entry are broadly comparable with the provisions presently operative under Part 15 of the *Workplace Relations Act 1996* but, under that Act, there is an additional criterion connected with award or agreement coverage. Where a suspected award or other instrument contravention is being investigated, *it must be one which binds the permit holder's organisation.* Where the entry is for the purpose of holding discussions with employees, the employees must be persons who carry out work *covered by an award or collective agreement binding upon the permit holder's organisation.*

8. BHP Billiton submits that a connection with actual representation of the industrial interests of employees, as evidenced by being bound by relevant instruments, is an important connection which should be retained if the statutory right of entry is to be limited to its proper purposes, and not put in aid of organisations pursuing their own institutional concerns. This will meet the objects stated in clause 480 of the Bill. Failing to require the connection mentioned with actual representation means that the statutory rights will exceed what is fair and reasonable to meet the intended objects. Those rights might instead be used in a way which unnecessarily promotes demarcation disputes and industrial disharmony contrary to the public interest.

9. In making this submission, BHP Billiton recognises that the manner in which awards and other industrial instruments will bind employee organisations under the Fair Work Bill differs from how this is achieved under the *Workplace Relations Act 1996.* A different conceptual approach is involved. Nevertheless, BHP Billiton urges that consideration be given to amending the Bill so as to preserve, in the new environment, this important brake on the statutory right to enter premises and to exercise the other powers laid out in Part 3-4.

10. A second and independent issue arising in connection with right of entry concerns clause 482 of the Fair Work Bill. BHP Billiton urges a limitation on clause 482(1)(c) so that the permit holder will only have an entitlement to inspect or copy documents concerning a person who is not the subject of the suspected contravention if that person agrees.

11. This limitation is already recognised in clause 482(1)(b) in connection with interviews of non-members. The same principle should be followed in respect of documents. It is legitimate for a permit holder to be able to inspect and copy materials relating to members where a contravention is suspected. Some limitation on the permit holder's power should be retained when considering documents concerning a person outside the immediate enquiry. Such documents are inherently personal and may often be quite sensitive. The annotation about the *Privacy Act 1988* points to the problem, but BHP Billiton considers that it is an insufficient response.

Non-union agreements

12. The *Forward with Fairness* policy contemplates that there will be an avenue for agreement making available to employers and their employees independently of trade unions not brought to the bargaining table by the employees in the enterprise[1].

13. The way in which employee organisations come to be covered by collective agreements under the Fair Work Bill is different from the equivalent provisions in the *Workplace Relations Act 1996*. The key consideration under the Fair Work Bill will be whether an employee organisation is a *bargaining representative*. Other than in the case of greenfields agreements, the persons who are bargaining representatives for a proposed enterprise agreement include an employee organisation which has a member employed in the enterprise who has not appointed another bargaining representative.

14. Employees sometimes choose to be members of more than one employee organisation. Sometimes an employee chooses to be a member of an employee organisation for limited purposes which may not include active industrial representation in connection with a particular enterprise bargaining arrangement. A member's purpose may be limited, for example, to access to insurances or other financial products on favourable terms. There is also the question of whether a non-financial member will qualify. This is important given that it is common for employee organisations not to purge from their list of members persons who have simply ceased to pay fees rather than submiting a formal resignation. BHP Billiton submits that mere passive membership of one in-scope employee is an insufficient basis for an employee organisation to be regarded as a bargaining representative. Moreover, the Bill as it stands appears not in substance to meet the relevant commitment in the *Forward with Fairness* policy.

15. BHP Billiton therefore urges that consideration be given to altering the automatic inclusion of an employee organisation as a person covered by an enterprise agreement where it has played no active role and has not been asked by any in-scope employee to undertake a bargaining representative role.

Greenfields agreements

16. The Fair Work Bill enables a greenfields agreement to be made with one or more relevant employee organisations. A *relevant employee organisation* is an employee organisation which is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement in relation to work to be performed under the agreement[2]. An employer wishing to make a greenfields agreement will be required to give notice of its intention to make the agreement to each such relevant employee organisation and to provide a copy of the notices to Fair Work Australia. The employer and each of the relevant employee organisations will then be bargaining representatives for the agreement[3]. The bargaining representatives will be required to bargain in good faith. It will not be permissible for an employer not to recognise or bargain with

[1] See *Forward with Fairness Policy Implementation Plan*, August 2007, page 13.

[2] See clauses 12 and 172 of the Bill.

[3] See clauses 175 and 177 of the Bill.

any particular bargaining representative, although there would be some powers available to Fair Work Australia to resolve difficulties in this area.

17. This scheme contrasts markedly with the present and longstanding historical arrangement under which it is and was permissible for an employer to bargain with a particular employee organisation with a legitimate coverage relating to the enterprise or project and to reach an agreement which would be approved under the *Workplace Relations Act 1996.*

18. BHP Billiton is concerned that the provisions of the Fair Work Bill will render it practically impossible to exclude from the negotiations any potentially interested union. This will impede significantly both the overriding statutory object of providing productive workplace relations which promote national economic prosperity and the object of Part 2-4 to deliver productivity benefits.

19. BHP Billiton's experience is that breakthrough changes in arrangements at a workplace are sometimes facilitated by access to greenfields agreements. They can enable novel arrangements to be piloted with new staff, experience of them gained (including by the union officials), and then introduced cooperatively in other workplaces with established workforces and union relationships. This is a desirable feature which must not be lost. It encourages innovation and experimentation. It is not unfair to anyone. The better off overall test will need to be satisfied. By contrast, the arrangements proposed risk being a serious drag on innovation and a force for conservatism.

20. BHP Billiton submits that consideration should be given to restoring the capacity of an employer establishing a new business to select one union or only a limited number of unions with which to reach a greenfields agreement subject to the following qualifications designed to respect the evident policy considerations in the current provisions in the Bill:

    (a) once an enterprise agreement has been settled with one or more employee organisations selected for the purpose, there should be a gazettal or similar requirement enabling other employee organisations to be aware of the intention to make an agreement; and

    (b) there should be an opportunity for other employee organisations with a legitimate interest at that point to become bound by the enterprise agreement, but not to interfere with the terms agreed.

Protected industrial action – employee claim action

21. Clause 409 of the Fair Work Bill describes employee claim action. It is industrial action organised or engaged in for the purpose of supporting or advancing claims that are about, or are reasonably believed to be about, permitted matters. *Permitted matters* are described in clause 172 of the Bill. They are essentially matters pertaining to the relationship between an employer and its employees, matters pertaining to the relationship between the employer and relevant employee organisations, matters concerned with deductions from wages, and machinery matters about how the agreement will operate.

22. It is a matter of notoriety that from time to time employee organisations advance causes which are not permitted matters. For example, BHP Billiton has itself faced claims in earlier years, supported by industrial action, that it should insist on particular commodity prices. Many employers in the public and private sectors have had to contend with political or other non-industrial claims backed by industrial action but sometimes swept up with other legitimate industrial claims.

23. The *Workplace Relations Act 1996* in its pre-Work Choices terms, as interpreted by the High Court in the *Electrolux* case[4], had the effect that industrial action in pursuit of a set of claims

[4] *Electrolux Home Products Pty Ltd v AWU & Ors* (2004) 221 CLR 309.

which included matters outside the permitted range rendered the industrial action non protected. It is of great importance, and in the public interest, that the same approach be taken in the Fair Work Bill.

24. This is a matter of critical importance to the integrity of the system. It is a matter which ought to be regarded as important by all employers (even public sector employers), as major policy decisions come to be made about political issues which can have an effect on employees – for example, trading emission schemes, global warming strategies, measures to ameliorate the global financial crisis, or the development of a national school curriculum. It must be clear that the availability of protected action does not extend to such causes, and that a union strategy to pursue such causes under cover of a set of otherwise legitimate claims will not be facilitated.

Industrial action related workplace determinations

25. Clause 267(2) and clause 274(2) of the Fair Work Bill have the effect that Fair Work Australia will be required in circumstances covered by those clauses to include in a workplace determination terms agreed at the end of the post-industrial action negotiating period.

26. BHP Billiton seeks only a clarification, which is consistent with the intended operation of these provisions, to the effect that such an agreed term must be one which is unconditionally agreed. For example, it is common in workplace negotiations to indicate that a certain term will be agreed if other matters are agreed upon. It is desirable that this approach be able to be continued since otherwise there will be a negative impact on the integrity and utility of post-industrial action negotiations.

27. An industrial action related workplace determination may be sought in circumstances where protected industrial action has been terminated by a Fair Work Australia order under clause 423(2) of the Bill – namely, because the industrial action is causing or threatening to cause significant economic hardship to the employer or the employees. BHP Billiton suggests that there be a limitation on the power to arbitrate where Fair Work Australia is reasonably satisfied that the harm was inflicted, or self-inflicted, in order to force an arbitration. Otherwise it would be inconsistent with the Bill's overriding concern to facilitate bargaining in good faith.

Adverse action and workplace rights

28. Careful consideration must be given to the intervention opportunities available in decision making affecting practical operations where an employee or other person contends that one of the many workplace rights recognised by the Fair Work Bill will or may be compromised. BHP Billiton draws attention to the low threshold for the grant of interlocutory injunctions and the potential stultifying effect upon productivity and efficiency if ordinary operational matters are able to be arrested, perhaps ex parte and certainly without the opportunity to consider contested evidence, by a Federal Court Judge or Magistrate on the application of an employee or his or her union.

29. Consistent with long standing public policy, the judicial role in the enforcement of industrial instruments such as awards and enterprise agreements should be limited to an after the event prosecution for breach, a claim for payment of wages, or declaratory or other orders concerned with the correct interpretation of the instrument.

30. The same longstanding public policy should be continued in the case of an intended dismissal. This policy has long operated in respect of both statutory rights against unfair or unlawful dismissal and claims in the ordinary courts for specific performance of personal service contracts such as contracts of employment.

31. The policy is a sound one. It balances:

(a) the need for certainty in the operation of private and public sector organisations;

(b) the impracticality of attempting judicial supervision of personal service contracts such as contracts of employment; and

(c) the rights of employees to have matters considered in a *no costs environment* where arising under industrial legislation.

32. Where an employee or an employee organisation anticipates some non-conformity by an employer with an industrial instrument the immediate recourse should be to Fair Work Australia under a dispute settlement procedure, not to the courts by application for injunctive relief. The same ought to be the case where an employee or his or her representative anticipates a termination of employment.

33. In summary, BHP Billiton submits that the interest of productivity and efficiency, and the public interest, require that the non-availability of interlocutory relief should be continued in the areas identified. To do so will not compromise any legitimate rights of employees.

34. Additionally, BHP Billiton submits that careful consideration should be given to the way in which the workplace rights provisions will operate in respect of *pre-employment circumstances*. There is a risk that employers will not be able to undertake normal pre-employment reference checking if the Bill is enacted in its present form. Similarly, decisions to utilise a labour hire company or a contract miner might now be decisions able to be attacked in the courts on the basis that some workplace right is being infringed – eg, on the basis that only one of the considerations was that direct employment might have been under a more expensive enterprise agreement. These are quite disproportionate outcomes which could significantly impede ordinary productivity and efficiency objectives in public and private sector operations. They indicate that a reconsideration of the detail of the laws to apply in respect of pre-employment situations should be undertaken.

Industrial action

35. BHP Billiton raises two matters about industrial action.

36. It is not uncommon for protected industrial action to be accompanied by unlawful picketing activities involving tortious or other unlawful conduct for which it can be difficult to hold the union accountable at law even though it is plainly likely that the conduct is being orchestrated by the union or certain of its officers. The Fair Work Bill has in mind that protected action by unions and employees is legitimate in defined circumstances and also that an employer may respond in certain ways, notably by lockout. The no work no pay provisions in the Bill (Part 3-3, Division 9) impose practical limits on the amount of industrial action likely to be taken by employees. Fair Work Australia will have the responsibility and power to intervene in particular circumstances. All of these features are designed to produce an appropriate balance. The balance will be compromised if protected industrial action is able to be continued in concert with unlawful picketing activities.

37. *Industrial action* is defined in clause 19 of the Fair Work Bill in a manner broadly comparable with the current definition in the *Workplace Relations Act 1996,* which was inserted as part of the Work Choices amendments. It contemplates action *by employees*. In the great generality of cases, this description will be adequate. However, it misses and leaves unregulated an area of industrial action able to be taken by persons within a particular calling who are engaged under casual or seasonal or similar arrangements. For example, there are some critical callings of employees engaged in off-shore oil and gas operations who are in limited supply and only offer for employment through casual terms. Their engagement is routinely formalised at the point of commencement of a swing or similar work period. A concerted refusal of those persons at a point immediately prior to the commencement of a swing is industrial action in the ordinary sense but would presently not come within the statutory definition. This exposes even an employer with an in term enterprise agreement to ungovernable industrial action and neither Fair Work Australia nor the courts would have a power to intervene. For example, clauses 417 and 418 would not be effective in such a situation. It is important, therefore, that the definition of industrial action be

expanded so that it includes an industrially motivated concerted refusal of persons to accept or offer for work in circumstances where there is a legitimate expectation that they will accept or offer for that work – eg, they have mustered for work at the prospective employer's expense to an agreed pick-up point – or that some other mechanism be formed to deal with the matter. This will be an important protection for the integrity of the system.

Redundancy provisions

38. Clause 385 of the Fair Work Bill excludes from unfair dismissal relief a person whose dismissal was a case of genuine redundancy. *Genuine redundancy* is defined in clause 389 in a way which does not include a situation where it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise or an associated enterprise.

39. BHP Billiton considers that some legislative guidance is desirable in connection with the approach to this provision. It may be accepted that an employer's decision to dismiss an employee under the cloak of redundancy might be open to examination where the same or a specific role was readily available. However, the provision could create difficulty if poorly applied to an employer with diversified operations all over the country. It would be unfortunate, for instance, if a genuine retrenchment of an employee in the Illawarra was not to be a *genuine redundancy* because there was a vacancy in an associated employer's operations in North Queensland or in South Australia.

40. Finally on this matter, BHP Billiton suggests that clause 533(c) be reviewed. This provision indicates that a Fair Work Australia order, in the context of notification and consultation about economic, technological, structural, etc, changes, can be sought by unions *other than unions with members affected*. There is no justification for extending this right to such unions. BHP Billiton considers that the matter is adequately catered for in paragraphs (a) and (b) of clause 533.

Demarcation disputes

41. One of the features of the Fair Work Bill is the licence given to a union to become involved in the industrial relations of any employer if one or more of its employees is eligible for membership of that union. This is a feature which, on occasion, is likely to lead to demarcation issues. Such issues can be very destructive of productivity and harmonious industrial relations. There is already some protection in this area provided by section 409(5) of the Bill. Industrial action in connection with a demarcation dispute will not be protected action. But more is needed, especially in this new environment with a greater capacity for such demarcation disputes to arise.

42. BHP Billiton therefore urges the inclusion, either in this Bill or a later Bill, of provisions akin to clause 133 of Schedule 1 of the *Workplace Relations Act 1996*[5]. Moreover, a decision to exclude a union or a section of a union from exercising representational rights in respect of particular employees must carry the consequence that the union is also excluded from playing any bargaining representative role in respect of these employees.

Transfer of business

43. BHP Billiton urges that consideration be given to building in a broad discretionary power available to Fair Work Australia upon application by legitimately interested persons, including the old employer, to determine what should be the application of instruments following a transfer of business *in advance of the transfers being undertaken*. This will be consistent with both fairness all round and the achievement of a productive and efficient workplace.

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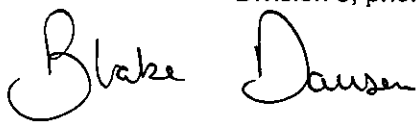
[5] See also section142A of the *Conciliation and Arbitration Act 1904*, sections 118 and 118A of the *Industrial Relations Act 1988*, and section 118A of the *Workplace Relations Act 1996* prior to the enactment of Schedule 1 – Registration and Accountability of Organisations.

Transitional arrangements

44. BHP Billiton recognises that the introduction of the provisions of the Fair Work Bill will be subject to legislative arrangements yet to be bought forward. It takes this opportunity to urge two important matters in connection with industrial instruments presently operating under the *Workplace Relations Act 1996*:

(a) there should be no access to protected action during the period prior to the nominal expiry date of those agreements; and

(b) there be no access to the new bargaining processes established in Part 2-4, particularly Division 8, prior to the nominal expiry date of such agreements being reached.



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Schedule

Suggested amendments to resolve issues identified by BHP Billiton Limited

The following suggestions are advanced to resolve issues identified in BHP Billiton's submission to the Senate Education, Employment and Workplace Relations Committee in relation to the Inquiry into the Fair Work Bill 2008. It is recognised that there may be other means available but the suggestions in this schedule are advanced in the spirit of practical cooperation.

Right of Entry

1. In subclause 481(2), insert the words "and must cover the permit holder's organisation."

2. In clause 484:

   (a) renumber subclause (c) as subclause (d); and

   (b) insert the following:

   "(c) who are covered by a fair work instrument which covers the permit holder's organisation; and"

3. Insert at the conclusion of paragraph 482(1)(c) the following words:

   "provided that, in the case of a record or document personal to a person not the subject of the suspected contravention, that person agrees to the inspection by or provision of a copy to the permit holder."

Non-union agreements

4. In paragraph 176(1)(b) delete the words "unless the employee has appointed another person under paragraph (c) as his or her bargaining representative for the agreement" and substitute the words "if the employee has requested the employee organisation to act as his or her bargaining representative for the agreement."

Greenfields agreements

5. Delete clause 175 and substitute the following:

   "175 Relevant employee organisations to be given notice of employer's intention to make greenfields agreements etc.

   Notice of intention to make greenfields agreement

   (1) An employer that agrees to bargain, or initiates bargaining, for a proposed greenfields agreement must take all reasonable steps to give notice of its intention to make the agreement to one or more employee organisations that is a relevant employee organisation in relation to the agreement.

   Content of notice

   (2) The notice must state that the relevant employee organisation is a bargaining representative for the agreement.

   How notices are given

   (3) The regulations may prescribe how notices under subsection (1) may be given."

6. Delete from clause 179 subclause (2).

7. Delete from clause 182 subclause (4).

8. In clause 183:

   (a) renumber subclause (2) as subclause (3); and

   (b) insert the following:

   " (2) After a greenfields agreement is made, an employee organisation which was capable of being a bargaining representative for that agreement, had it been so appointed, may give FWA a written notice stating that the organisation wants the enterprise agreement to cover it."

9. Add to clause 187 the following:

   "*Greenfields agreements*

   (5) If the agreement is a greenfields agreement, a notice has been published in a manner prescribed in the regulations stating the intention of the bargaining representatives to seek approval of the agreement."

Protected industrial action – employee claim action

10. In paragraph 409(1)(a), insert the word "only" before "permitted matters."

Industrial action related workplace determinations

11. In subclause 274(2) insert the word "unconditionally" before the words "agreed should be included in the agreement."

Adverse action and workplace rights

12. In clause 341, insert:

   "(6) Despite subsection (3), a prospective employer does not contravene section 340(1) if the prospective employer refuses to employ the prospective employee –

   (a) following and as a result of a personal reference check; or

   (b) in circumstances where there is no vacancy presently available to be filled by the prospective employee."

13. In clause 545:

   (a) renumber subclauses (3) and (4) as (4) and (5), respectively; and

   (b) insert the following:

   "(3) Despite subsection (2), orders the Federal Court or Federal Magistrates Court may make do not include an interim injunction if directed to an apprehended breach or intention to breach the provisions of a modern award, enterprise agreement, contract of employment or the National Employment Standard, or the proposed dismissal of an employee from his or her employment."

Industrial action

14. In clause 409, add the following:

"*Not conducted in concert with unlawful picketing*

(8) The industrial action must not be conducted in concert with tortious or other unlawful conduct by any person or persons which materially impedes access to or egress from premises at which the employees engaging in the industrial action normally work."

15. In subclause 19(1):

(a) renumber paragraph (d) as (e); and

(b) insert the following:

"(d) a concerted failure or refusal by persons within an employee calling to offer for or accept contracts of employment for work where it is reasonable for the prospective employer to expect that those persons will offer for or accept the engagements for the work and the predominant reason for the failure or refusal concerns claims about remuneration or other conditions of employment;"

16. In clause 417:

(a) renumber subclauses (4) and (5) as (5) and (6), respectively; and

(b) insert the following:

"(4) Despite subsection (3), if the conduct amounting to industrial action qualifies as industrial action only by virtue of paragraph 19(1)(d), FWA must not make the order if FWA is satisfied that it would be contrary to the public interest to do so."

17. In clause 418:

(a) delete the words "employees or employers" and substitute "persons" in subclause 418(1); and

(b) insert the following:

"(5) Despite subsection (1), if the conduct amounting to industrial action qualifies as industrial action only by virtue of paragraph 19(1)(d), FWA must not make the order if FWA is satisfied that it would be contrary to the public interest to do so."

Redundancy provisions

18. In clause 389, insert:

"(3) The regulations may prescribe matters to be considered when determining whether it would have been reasonable in all the circumstances for the person to be redeployed as specified in subsection (2)."

19. Delete paragraph (c) from clause 533.

Demarcation disputes

20. BHP Billiton urges the inclusion, either in this Bill or a later Bill dealing with matters presently covered by Schedule 1 of the *Workplace Relations Act 1996*, of provisions akin to section 118A of the *Workplace Relations Act 1996* in its form prior to the creation of Schedule 1. A decision under such a provision to exclude a union or section of a union from exercising representational

rights in respect of particular employees should carry the consequence that the union is excluded from undertaking a bargaining representative role and all other statutory roles under the Fair Work Bill in respect of those employees.

Transfer of business

21. Delete paragraphs 318(2)(a) and 319(2)(a) and substitute, in each case:

"(a) the old employer or the new employer or a person who is likely to be the new employer;"

Transitional arrangements

22. In the transitional legislative arrangements associated with the introduction of the Fair Work Bill, two particular matters must be kept in mind:

(a) there should be no access to protected action during the period prior to the nominal expiry date of any form of agreement recognised by the *Workplace Relations Act 1996*; and

(b) there should be no access to the new bargaining processes established in Part 2-4, particularly Division 8, prior to the nominated expiry dates of such agreements being reached.