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Certified Agreement and Transmission of Business Redundancy Issues

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SUMMARY

This paper will examine the concept in industrial law which is commonly called "transmission of business". This shorthand can be a little misleading but will be used throughout the paper for ease of reference.

Transmission of business is an important concept for two main reasons: (a) it delineates the circumstances in which a newcomer to a business will become legally bound to apply any industrial awards or enterprise agreements which were binding on the original employer; and (b) it can establish a boundary for the purposes of determining when an employer is no longer liable to provide redundancy benefits to an employee or a group of employees.

It is quite a significant concept because, depending upon the way in which it is interpreted, a business may be exposed to liability in the millions (sometimes even the hundreds of millions) of dollars.

Given the financial consequences which flow from a finding of "transmission of business", one would hope that the law has evolved sufficiently precise criteria to determine where the boundary actually lies. Unfortunately this is not really the case. Although the concept has received elucidation in recent times by the High Court (both in relation to transmission of award respondency and redundancy) significant issues of uncertainty still remain. As a consequence, whenever a range of transactions (going from asset sales right down to outsourcing deals) are being explored it is necessary for a team of employment lawyers to pore over the detail before advising (often in heavily qualified terms) as to whether the proposed arrangement is or is not a transmission of business for industrial relations purposes. Whilst this is all very gratifying (and profitable) for the lawyers concerned, it is something which the economy could do without.

It is surprising (and more than a little disappointing) that the proposed Commonwealth industrial relations reforms do not seem to have anything to say about this area. If ever there were a field of industrial law where legislative codification might be beneficial for everybody, it would seem that this is it.

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LEGISLATIVE PROVISIONS

The relevant provisions of the *Workplace Relations Act* are s 149(1)(d) and s 170MB.

Section 149(1)(d) is in the following terms:

> "Subject to any order of the Commission, an award determining an industrial dispute is binding on:
>
> …
>
> (d) any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who is a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer."

Section 170MB is expressed as follows:

> "If:
>
> (a) an employer is bound by a certified agreement; and
>
> …
>
> (c) at a later time, a new employer becomes the successor, transmittee or assignee (whether immediate or not) of the whole or a part of the business concerned; …
>
> then, from the later time:
>
> (d) subject to any order of the Commission made under subsection 170MBP(2) the new employer is bound by the certified agreement, to the extent that it relates to the whole or the part of the business;
>
> (e) the previous employer ceases to be bound by the certified agreement, to the extent that it relates to the whole or the part of the business; and
>
> (f) a reference … to the employer includes a reference to the new employer, and ceases to refer to the previous employer, to the extent that the context relates to the whole or the part of the business."

There are substantial similarities between the provisions. The key formulation "successor transmittee or assignee to or of the business or part of the business" is the same for both. The provisions are also similar in that the Commission may issue an order modifying the position. The jurisdiction of the Commission to do so, whilst clear, has been exercised very sparingly.

The provisions are dissimilar in that an industrial award is binding upon the new employer it will bind that employer for all purposes. This means that if the employer has existing staff whose employment fits within the classifications of the new award, then it will have to treat those employees under that award. Section 170MB makes it clear that the new employer's obligation to apply the enterprise agreement relates only to that part of the business over which it has assumed control as part of the transaction.

It is easier to understand the public policy purpose behind these provisions than it is to understand the full extent of circumstances in which they will or will not apply.

It is clear that a system centred upon the use of industrial awards as a basic means of codifying terms of employment and where further conditions are contained in a locally negotiated agreement, must have some means of preventing an unscrupulous employer from using stratagems to throw off those obligations. One such stratagem springs obviously to mind – the employer setting up a new company and migrating the business to that entity. Without s 149(1)(d), the use of this manoeuvre would deprive employees of the award under which they have once worked. It is not hard to imagine a range of more subtle arrangements to which an unscrupulous employer may have resort with the aim of casting off award obligations and doubtless this was in the mind of the legislature when the predecessor of s 149(1)(d) was first introduced into the legislation. This is certainly the reason why the provision uses a series of compounding terms, "successor, transmittee or assignee". Similarly, the provision is triggered by dealings with part of a business, not simply all of the business.

We have the classic pattern, therefore, of legislation with a beneficial intent containing a broad anti-avoidance provision. The classic interpretative dilemma arises – where is the boundary?

There are two main areas where the boundary is important. Firstly, in relation to the type of transaction to which the provision is directed. Secondly, how much of the relevant business must be affected (in other words, what is part of a business).

Part of a Business

The growth in the use of out-sourcing in the late 1980s and through into the 1990s meant that the issue of what constitutes a "part of a business" was first to receive substantial judicial scrutiny.

A number of cases were litigated in the Federal Court (most notably the *North Western Health* case[1] and the case of *PP Consultants Pty Ltd*[2]).

The *North Western Health* case related to an out-sourcing undertaken by the Victorian Government whereby the provision of adult psychiatric health services in the metropolitan region would henceforth be carried out by another agency.

In *PP Consultants*, St George Bank entered into an agreement with the owner of a pharmacy in Byron Bay under which face-to-face retail banking transactions

[1] *North Western Health Care Network v Health Services Union of Australia* [1999] FCA 896.

[2] *FSU v PP Consultants Pty Ltd* [1999] FCA 1251.

would be effected from a counter within the pharmacy and not a stand alone branch of the bank.

In each case, the main issue was whether a part of the business of either the Victorian Government or St George Bank had been involved in a succession, transmission or assignment to someone else. If it had, then that "someone else" would become bound by particular industrial awards.

Each case made it to the Full Federal Court. The judgments issued by the Full Federal Court in both matters relied upon largely the same principles, which can be summarised as follows:

- the legislation is beneficial in nature and so the wording should not be subjected to an overly narrow interpretation;
- in determining whether something is "part of the business" one must look at the activities of the employees which are being carried out;
- if there is a substantial similarity between the activities of the employees, then a transmission has occurred.

So, in the *PP Consultants* case the Full Federal Court held that the activities of the employees who had worked with the Bank and who now carried out banking transactions within the pharmacy were substantially identical and it followed that the pharmacy should be bound by the St George Bank Limited award.

The *North Western* case was not appealed to the High Court, but *PP Consultants* was.[3] The High Court overturned the decision of the Full Federal Court and enunciated a different test with the following features:

- as a first step, one should engage in a legal characterisation of the business of the first party (in this case St George Bank);
- then one should conduct a legal characterisation of the transferred activities in the hands of the alleged successor (the pharmacy);
- if there is a substantial identity in those two characterisations then a transmission of business has occurred.

The High Court characterised the business of St George as the business of banking, namely the taking of deposits and the lending of money. The business of the pharmacy was characterised as a business involving the sale of medicines and related products. There was no substantial identity between the two businesses and so there was no transmission of business.

The decision of the High Court in *PP Consultants* was followed by the Federal Court in the *Stellar Call Centres* case.[4] In that case, *Stellar* had taken over the operation of certain call centres that had previously been conducted by Telstra. At issue was whether Stellar had succeeded to a part of the business of Telstra so that it should therefore be bound by a Telstra industrial award. The business of Telstra

[3] *PP Consultants Pty Ltd v FSU* (2000) 201 CLR 648.
[4] *Stellar Call Centres Pty Ltd v CEPU* [2001] FCA 106.

was characterised as the provision of telecommunication services throughout Australia. The business of Stellar was characterised as being the conduct of call centres. Analysed this way, there was no similarity at all between the businesses and so, not surprisingly, the court found that no transmission of business had taken place.

But the decision of the High Court has still left some areas unresolved. One illustration of this is in the case of *Henry Walker Eltin v CFMEU (HWE)*.[5] In that matter, the CFMEU sought a declaration that Henry Walker Eltin was bound by the Ebenezer Mining Company Pty Limited Certified Agreement 1997 in relation to the operations of a coal handling preparation plant (the CHPP) at the Ebenezer Coal Mine. Ebenezer had entered into an agreement with HWE under which the latter operated the CHPP. Ebenezer terminated the employment of all employees who had been working in the CHPP and HWE offered them employment. The trial judge referred to the decision of the High Court in *PP Consultants* and also the Federal Court decision in *Stellar*. The judge found that the overall business of Ebenezer consisted of three aspects: the causing of coal to be extracted from the mine, the rendering of coal fit for sale and the selling of coal. The CHPP was found to relate to the second aspect of the business. The transferred activities were characterised in the hands of HWE as now being an aspect of HWE's total contacting business. It was said that Ebenezer now relied on HWE to operate the CHPP in the same way and to achieve the same results as were achieved when Ebenezer itself operated it.

The case was not appealed and so what we are left with is the trial judge's findings. There is something about the reasoning applied by the trial judge which has a slightly heterodox feel. According to the High Court in *PP Consultants*, the second part of the test is to characterise the transferred activities in the hands of the apparent successor. When the Federal Court did this in the *Stellar* case the result was that those activities (the running of call centres) were seen as part of a wider business consisting of the operation of call centres. Because the business of Telstra was more varied and therefore had a different legal characterisation, it was concluded that no transmission had occurred. In the *HWE* case, why was it not similarly found that the operation of the CHPP formed part of the business of HWE which was the business of contracting which was different from the business of Ebenezer (ie the getting of coal etc).

The main difficulty seemed to be that the High Court did not explain the hallmarks of the characterisation exercise. From the way in which the High Court itself characterised the businesses of St George Bank and PP Consultants it is relatively clear that what was intended was a fairly high level legal characterisation and not a characterisation which focused on the activities of employees. But there seemed to be a lot of "play" in the concept. It is rather like those trick drawings where one person looking at the picture sees an ornate candlestick and another person sees two silhouetted profiles facing each other.

[5] [2001] FCA 1009.

Type of Transaction

It is clear from the use of the compounding phrase "successor, transmittee or assignee" that the provision is intended to cover more than simply direct sales of business. But how far from that concept will the provision reach? The *PP Consultants, HWE* and *Stellar* cases were all examples of fairly clear-cut transactions under which certain rights and obligations would pass. In the recent *Gribbles Radiology* case,[6] the High Court had to wrestle with much more subtle circumstances.

The *Gribbles* case involved a radiography services business at a medical clinic, where a variety of medical services was provided. Radiographers were employed at the premises, enabling medical practitioners to send patients to the clinic for immediate imaging.

Due to profitability problems, over time a series of different operators carried on the radiography business under contracts with the clinic's manager. Despite the changes in the radiography service provider, the employees remained the same. Further, the changes of employer did not have a significant effect on the way radiography services were provided.

The original employer of the radiographers (MDIG) was named as a party to an award, which provided for severance pay on redundancy. The current employer, Gribbles Radiology, decided to terminate the employees' employment without including employees' service in previous employment at the clinic when calculating their severance pay.

Because Gribbles was not named as a party to the award, it could only be bound as a successor, transmittee or assignee of the radiography business, pursuant to the succession provisions in the *Workplace Relations Act.* Gribbles argued that it was not a successor to MDIG's business for the purposes of the Act because there was no direct transaction between it and MDIG.

The Federal Court considered whether Gribbles could be a successor, assignee or transmittee of any part of the business, even though there was no direct transaction between the previous employer and Gribbles. The only transaction involved in Gribbles taking over the business was its agreement with the clinic's manager.

The court decided that Gribbles was bound by the award. In coming to that decision, the court held that:

- the purpose of the transmission of business provisions in the *Workplace Relations Act* is to prevent the deprivation of the rights of employees under awards by substituting for the employer another employer not named in the award; and
- the transmission of business provisions should be construed broadly, not strictly.

[6] *Gribbles Radiology v HSUA* [2005] HCA 9.

The similarity between the two businesses justified the conclusion that Gribbles Pathology was a successor and bound by the industrial arrangements applicable at the workplace. This was in spite of the fact there was no transaction between the two employers, such as a sale agreement. Gribbles appealed and the Full Federal Court rejected the appeal and unanimously confirmed that Gribbles was a successor to the previous business and was bound by the award.

Gribbles appealed to the High Court. Gleeson CJ, Hayne, Callinan and Heydon JJ (Kirby J dissenting) allowed the appeal and held that Gribbles was not a successor to the business of MDIG. The fact that a new employer carries on a virtually identical business to its predecessor is not sufficient to constitute a succession of business. In order to be MDIG's successor, Gribbles would need to enjoy a part of the tangible or intangible assets that MDIG used in the pursuit of its business activities. The expression "business…of an employer" in s 149(1)(d) of the *Workplace Relations Act* expresses a compound conception of the particular business of the former employer. In many cases, this will be provided by some transaction between two employers. However, it can exist without a transaction. If the new employer uses assets of the previous employer, this may constitute a succession to the business of the previous employer.

The result in *Gribbles* seems to accord with common sense, however, as is sometimes the case there are aspects of the reasoning which may well cause confusion in later cases. The High Court attached significance to the fact that Gribbles was not enjoying any part of the tangible or intangible assets that had been used by the predecessor business (MDIG). Intangible assets, like the expression "goodwill" can cover a range of ideas. It is not beyond the realms of coherence to suggest that having the use of trained radiographers who by virtue of their past experience with MDIG have sound relationships with patients, constitutes an intangible asset. It has also been consistently emphasised in cases dealing with transmission of business principles that the absence of a transfer of goodwill is not, of itself, an indication that no transmission of business has occurred.

In *Australasian Meat Industry Employee's Union v Australian Select Meat Products Pty Ltd & Anor*,[7] the Commission had to determine whether St George Meats had succeeded to a part of the business of Australian Select Meat. Australian Select Meat had gone broke. A receiver was appointed who broke up the assets and sold them to a variety of third parties. St George Meats obtained some equipment as well as the residual term of a 50-year lease over abattoir premises. It was argued that this did not amount to a transmission because St George Meats did not take over any part of the business of Australian Select Meat. It had simply picked up some assets at what amounted to an auction conducted by a receiver. Particular emphasis was placed in argument on whether or not any goodwill had passed. The Commission ruled that this was irrelevant. It was enough that St George Meats was carrying out the same activities from the same premises.

[7] Print K7460.

Admittedly, this case is different because there was some clear nexus between the parties – even if the receiver functioned as intermediary in the sale. Perhaps what accounts for the intuitively "correct" feel of the result in *Gribbles* is that it is hard to understand why a transmission should be found in circumstances where the parties are unaware of each other. Otherwise what is to prevent a transmission occurring every time there is a change in service providers? So, let us assume that Westfield decides to change the company that cleans several of its shopping centres and to award the contract to another company – why should this facilitate a transmission of business between the two cleaning companies.

REDUNDANCY AND TRANSMISSIONS OF BUSINESS

Background

An entire AMPLA paper could safely be devoted to fixing up the misconceptions which surround the concept of redundancy and the entitlements that flow from redundancy. Such a thing is obviously beyond the scope of this paper, but in order to understand the intersection between redundancy and transmission of business some essential elements of background need to be sketched in.

Firstly, there is, in no meaningful legal sense, a general right to redundancy pay which exists for all employees. Employees will have the right only to the extent that some legally enforceable instrument (eg a contract of employment, award, Australian Workplace Agreement or Certified Agreement) provides that right. That said, a termination of employment in circumstances of redundancy which is not accompanied by compensation is at risk of being found "unfair" in terms of the various statutory remedies that exist at Federal and State levels. And so, employers who are lucky enough not to be bound by any contract or other document which gives employees a right to severance pay still need to proceed cautiously.

Secondly, whether or not an employer who is obliged to give severance pay (because of the terms of a contract or other instrument) may be excused from doing so if the employee is given the chance to take up alternative or comparable employment somewhere else will depend upon what the specific terms of the contract or other instrument happen to say. That said, in the area of unfair dismissal it now seems to be widely accepted that it is not unfair for an employer to refrain from giving severance pay to an employee who has the opportunity to take up ongoing employment on no less favourable terms.

Thirdly, redundancy as an outcome necessitating compensation was "invented" in a series of decisions of a Full Bench of the former Conciliation and Arbitration Commission which resulted in the creation of a standard clause for insertion in all Federal awards. In arriving at the form of the model clause, the Full Bench said that they did not consider that employees should have entitlement to severance pay

in cases of succession, assignment or transmission of a business. The Full Bench decided to introduce a proviso in the standard award clause, which proviso was to be modelled on cognate provision in the Metal Industry Long Service Leave Award. The proviso which was introduced stated that where there was a succession transmission or assignment of a business the employee's employment would be deemed continuous. This was the form of words used in the Metal Industry Long Service Leave Award. Because the clause did not really draw attention to itself (by failing to use words clearly indicating an exemption) people came to forget about it over time. Certainly it attracted much less attention than the other provision introduced by the Full Bench which enables an employer to seek an exemption from the Commission in circumstances where an offer of adequate alternative employment is obtained. The Full Bench created this exemption not in order to address situations of transmission of business but a situation where by some process the employer was able to dig up employment opportunities elsewhere.

In 2004 the Australian Industrial Relations Commission (AIRC) issued a revamped standard redundancy clause for insertion into Federal awards. The AIRC took the opportunity to smarten up the transmission of business exemptions so that it clearly denotes the job it is intended to do. But it must be remembered that this is a provision that goes only in awards and that awards can be "trumped" by the inconsistent provisions of a certified agreement. If a certified agreement deals with redundancy in a way which appears to cover the field, then it will override the award (including the beneficial exemption provisions which the award may contain). And it is now that we can make sense of the *Amcor* case.

Amcor[8]

This case arose out of the demerger of Amcor Limited and PaperlinX Limited in April 2000. As part of the transaction, some 800 terminated Amcor employees were offered employment with Paper Australia Pty Ltd (part of the PaperlinX Group) on terms and conditions identical to those they enjoyed with Amcor.

Amcor's certified agreement contained a clause which stated that should a position become redundant and an employee subsequently retrenched, the employee would be entitled to generous redundancy payments. The redundancy clause did not include a provision that redundancy payments were not to be made on transmission of the business. So immediately there arose an issue as to whether the exemption provision in the underlying award could have any effect given that there was an enterprise agreement dealing with redundancy. This issue was put beyond doubt because the certified agreement contained a clause which said that the award was entirely excluded.

The Construction, Forestry, Mining and Energy Union (CFMEU) brought proceedings in the Federal Court and alleged a breach of the redundancy clause in the certified agreement, relying on the fact that Amcor did not make redundancy

[8] *Amcor Ltd v CFMEU* [2005] HCA 10.

payments to the employees who were offered alternative, identical employment with Paper Australia.

CFMEU argued that the employees who were given notice that their employment with Amcor was terminated had their respective positions made redundant within the meaning of the redundancy clause in the certified agreement, and so became entitled to severance payments. Amcor argued that there had been no redundancy and retrenchment because, among other things, the employees had suffered no loss. Redundancy payments are compensatory in nature and are not properly due where there is no loss to compensate. Moreover, no position had become redundant – to the contrary, the positions were transmitted and continued, unchanged.

Justice Finkelstein said that in this particular case the obligation to make the payments depended on the employees' positions having become redundant and the employees having been retrenched. Justice Finkelstein held that:

- "becoming redundant" meant that an employee was no longer required by their employer because the employer no longer had a need for the work that employee was performing; and
- an employee has been made redundant if their employment is terminated because the employer has sold the business in which the employee was working.

According to Justice Finkelstein, the fact that the employer has been able to arrange for the new owner to engage the employee on identical terms and with full preservation of accrued entitlements is irrelevant. His Honour said that being "retrenched" meant being dismissed. He found that the former Amcor employees were made redundant and retrenched within the meaning of the Amcor certified agreement. Therefore, Amcor was obliged to pay the transferred employees redundancy entitlements.

His Honour recognised that the result might be seen by some as unfair and contrary to common sense, given that continuous employment was generated on similar terms. However, the absence of an express provision relieving the employer from its redundancy payment obligations on the sale of a business, left the court with no power to intervene.

Amcor appealed unsuccessfully to the Full Federal Court and was then granted leave to appeal to the High Court.

The High Court unanimously (7-0) allowed the appeal. The court held that the positions had not become redundant as a result of the demerger. The positions referred to in the agreement ("should a position become redundant…") are positions in a business rather than positions with a particular employer.

According to Gleeson CJ and McHugh J, "[t]here is nothing inherent in the idea of redundancy that justifies an expectation either that redundancy payments will or that they will not become payable in the event of a reconstruction, merger or

takeover. Similarly, there is nothing inherent in the nature of a corporate reconstruction that justifies an expectation either of continuity of a legal entity, or of succession, or of discontinuity. Thus, depending upon the legal regime under which it takes place, a merger between two companies might or might not put an end to the merging entities." To determine the effect of any particular reconstruction, it will be necessary to examine the language of the particular agreement in its industrial and legislative context as well as the nature of the particular reorganisation.

According to Kirby J, it was relevant but not decisive that the employees in this case suffered no disadvantage consequent upon the change in employer.

Amcor can be seen to be something of an extreme case in that the underlying award was expressly excluded by the enterprise agreement but it should not be assumed that tribunals will be in a hurry to read awards and enterprise agreements in a complementary way on the topic of redundancy. Recently the New South Wales Industrial Relations Commission had to consider whether the exemption provision in the redundancy clause of a State Award survived the existence of an enterprise agreement. The enterprise agreement had a redundancy clause which tolerated no exemption. In that case[9] the Commission held that the enterprise agreement covered the field and so the award provision had no role to play.

CONCLUSION

The preceding analysis of the cases will, I hope, have demonstrated the following:

- there is still a substantial degree of unpredictability as to whether a particular transaction between two businesses will result in the second business being bound by the awards and enterprise agreements of the first business;
- it is still the case that two business who have not entered into any explicit transaction can nevertheless be found to be part of a transmission of business and so the second party can become bound by an industrial instrument almost unknowingly; and
- an employer's obligation to give severance pay to employees under a certified agreement may or may not be constrained by the exemption provisions of an underlying award. The difference will often depend upon whether the persons drafting the certified agreement were legally skilled enough to recognise whether the certified agreement "covered the field".

All of these three conclusions lead to the same thing: the necessity to involve lawyers in what may become a detailed and finely balanced assessment of competing legal criteria. My own view is that it is undesirable for transactions in the economy to be dependent upon the resolution of such finely balanced criteria.

[9] *Unilever Australia Ltd v The AWU* [2005] NSWIRComm 2.

In the *Amcor* case the aggregate value of severance pay entitlements was estimated to be nearly $100 million. All of that rested upon some decisions (being a handful out of several hundred decisions that had to be made throughout the course of a complex transaction) about the meaning of the word "redundancy". The matter was looked at by a total of 12 judges, seven of whom saw it one way and five of whom saw it completely differently.

It seems to me that this is an area where legislative reform is required. That legislative reform can also do away with the absurdity of having to use the outdated "offer and acceptance" mechanism when businesses are sold, spun off or restructured. In the United Kingdom the Transmission of Undertaking Protection of Employment (TUPE) laws codify the rights of employees in such situations. Among other things they do away with the need for the artificial exercise of writing to employees offering them what will largely be the same job in the same place performed for a different entity.

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