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Workplace Relations Amendment (Transmission of Business) Bill 2001

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Workplace Relations Amendment (Transmission of Business) Bill 2001

Date Introduced: 4 April 2001

House: House of Representatives

Portfolio: Employment, Workplace Relations and Small Business

Commencement: The Act commences on a day to be fixed by proclamation, or 6 months from the Bill receiving Royal Assent.

Purpose

The purpose of the Bill is to prevent businesses potentially being bound under a variety of (federal) certified agreements (CAs) as a result of a business acquisition, or the acquisition of part of a business which may have its workforce already employed under one or more CA. The Bill does this by allowing a the 'new' employer to apply to the Australian Industrial Relations Commission (AIRC) to make a decision on the new employer's respondency to the CA applying to the acquired business. The application may be made either when a business contemplates an acquisition, or after the purchase. The provision gives the AIRC the discretion to bind the new employer to existing CA, or bind it to a specified extent, or not at all, in which case the existing CA is prevented from transmitting to the new employer.

Background

Legislative provisions are specified in the *Workplace Relations Act 1996* (Cwth) (WR Act) dealing with transmission of business. The provisions seek to ensure that when a business is sold the terms of employment for the business's employees are taken on by the new employer, so that essentially the employees suffer no loss of continuity of employment nor loss of conditions of employment.

These provisions are:

Sec.149(1)(d), re Awards

Sec.170MB(1)&(2) re Certified Agreements, and

Sec.170VS re Australian Workplace Agreements (AWAs).

These three categories reflect the three forms of industrial agreement now available under federal law. These are:

- **awards** made between employers and unions as a result of the resolution of an industrial dispute
- collective agreements called **certified agreements** made either with unions or with employees, and
- **AWAs** or individual employment contracts made between an employer and employees.

This Bill will amend sections 170MB(1), 170MB(2) and section 494 of the WR Act, ie in relation to the transmission of certified agreements. The transmission of certified agreements was specifically provided for under s.149(2) of the *Industrial Relations Act.* The WR Act repealed this provision introducing a new section 170MB dealing with the transmission of certified agreements.

Certified agreements transmitted under section 170MB(1) refer to those CAs made under Part V1B Division 3 of the WR Act ('Division 3' agreements). These agreements are made with unions pursuant to an industrial dispute or prospective dispute.

Section 170MB(2), deals with the transmission of 'Division 2' agreements (ie made under Part V1B, Division 2 of the WR Act) which are agreements between unions or employees and corporations (or the Commonwealth).

The Bill amends corresponding provisions dealing with the transmission of certified agreements under Part XV of the WR Act (sec.494). Part XV of the Act applies to employers and approximately 300 000 employees formerly governed by Victorian State awards which were abolished by the Kennett Government of Victoria.[1] This group is now regulated under particular provisions of the WR Act as a result of an agreement and legislation[2] between the Federal Government and the former Victorian Government. The effect of the provision concerning CAs is to allow a wider class of businesses, including non-incorporated businesses to make certified agreements.

Transmission of Business: legislative initiatives

Although this Bill deals with transmission provisions applicable to CAs, it is useful to review changes and proposed changes to the transmission provisions of CAs, awards and AWAs.

The Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999 (the MOJO Bill) introduced similar CA transmission provisions as contained in the present Bill, under Schedule 8 (Certified Agreements) and Schedule 15 (Matters referred by Victoria).

In relation to the transmission of awards, the Ministerial Discussion Paper *Transmission of Business and Workplace Relations Issues* (referred to here as the Ministerial Discussion Paper)[3] observed that the current sec.149(1)(d) (WR Act) provided some latitude to the AIRC to determine the award respondency of a new employer taking over a business. The current award transmission provision reads:

Section 149: Persons bound by awards

(1) 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 was 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;

The Ministerial Discussion Paper noted that the rewording of s.61 of the (former) *Conciliation and Arbitration Act 1904* into s.149(1) of the *Industrial Relations Act 1988* included giving the AIRC greater discretion on the transmission of awards through the addition of the introductory words: *Subject to any order of the Commission.*

As well, the re-wording made it clear that transmission of the award would occur in respect to the transmission of part of a business.[4] The discretion of the AIRC not to make an order binding a successor business to a plethora of federal awards was highlighted recently in the EDS (Systems) Pty Ltd case. In this case, the information technology specialist EDS had been awarded computing service contracts from a variety of large businesses, eg the Commonwealth Bank, the Australian Tax Office, many government agencies and other businesses. In some but not all cases, EDS employed the staff formerly performing this work.[5] EDS opposed applications seeking to bind it to the awards applying to the host companies. EDS did however agree to becoming a party to a safety net award designed for its business.

The current award transmission in the WR Act remains in its earlier form. The transmission provisions of the MOJO Bill aimed to provide a similar latitude to the AIRC in respect of the transmission of CAs.

In relation to AWAs, the MOJO Bill also proposed changes to transmission by repealing the current AWA transmission provision (s.170VS) in Schedule 9 of that Bill. Under a proposed subclause 170VDD of the MOJO Bill, the Employment Advocate would be able to make orders that an AWA transmitted, or had limited or no binding effect on a successor, transmittee or assignee of the business or part of the business. In other words, a similar power to that being conferred to the AIRC by this Bill in respect of CAs. The MOJO Bill has not been passed by the Senate.

The need for an award transmission provision

The Ministerial Discussion Paper reported on the background to the federal provisions concerning transmission. It noted that in 1914 the first statutory provision dealing with transmission [s.29(ba)] was inserted into the Conciliation and Arbitration Act (the C&A Act).

This was after the High Court in *Whybrow No.3* had declared invalid a provision [s.38(f)] of the C&A Act which sought to make awards of the Commonwealth Conciliation and Arbitration Court 'common rule awards'.[6] Such awards relate to callings or occupations, not the identity of the employer's business.

The High Court found that federal common rule awards were beyond constitutional power [s.51 (35)] of the Australian Constitution[7] (other than in the Territories). Despite the finding, the offending provision remained in the federal legislation for twenty or more years after.[8]

However it was quickly understood as a result of *Whybrow*, that under a system which required individual employers to be nominated as respondents in the award, award obligations could be avoided simply by a change of business name. As Justice Higgins (second President of the Commonwealth Court of Conciliation and Arbitration) later put it:

> …men are not so likely to submit to peaceful methods of settling disputes, by agreement (conciliation) or awards (arbitration) if they feel that those with whom they dispute can evade the obligations imposed by transferring their businesses to their sons, or by assigning it to a company having a new name and the same shareholders.[9]

The legislative provisions (ss24 and 29 of the C&A Act) transmitting the award to a new employer were found to be incidental to the exercise of the conciliation and arbitration power and thus valid.[10]

Common rule awards have been a feature of the State industrial jurisdictions but transmission provisions still can be found within State legislation, for example in the Queensland *Industrial Relations Act 1999* [ss.68, 69 and s.124 (1)(e) & (f)] and NSW *Long Service Leave Act 1955* [s.4(11)(C)].

Transmission and outsourcing

It is no understatement to regard transmission of business issues as the current *cause celebre* of labour issues. It is the prime ingredient of a *compote* comprising:

- compulsory competitive tendering and outsourcing of core functions
- cutting business costs by avoiding awards and agreements
- the use of non-union labour often employed under non-union Division 2 collective agreements, Australian Workplace Agreements or informal arrangements, and
- violation of the anti-discrimination provisions (and the benefits of union membership) found in the WR Act's Freedom of Association (FOA) provisions (Part XA).

The transmission of business issue has become prominent because of union contests to outsourcing exercises in the Federal Court in a number of high profile cases involving the following parties:

- Community and Public Sector Union (CPSU), Telstra Corporation and Stellar Call Centres
- CPSU, the former Department of Employment, Education, Training and Youth Affairs and the successor to the Commonwealth Employment Service, Employment National
- Finance Sector Union, St George Bank and PP Consultants, and
- Australian Services Union and Dandenong Home Care Services (Glad P/L, trading as Silver Circle)

Some decisions, at least the initial decisions, of the Federal Court in these matters gave the former Workplace Relations Minister, the Hon. Peter Reith MP cause for concern as indicated in his introduction to the Ministerial Discussion Paper:

> … the Federal Court's approach has moved away from the issue of whether there has been a succession, assignment or transmission of a business or part of a business, to a position where a transmission of business will be held to have occurred where there is a 'substantial identity' between the activities performed by the 'transmittor' and 'transmittee' businesses. Further, the recent cases suggest that outsourcing of non-core elements of a business will attract the operation of the transmission of business provisions. [11]

Only where a transmission of a business has occurred, will the award/agreement transmit as well (ie to the new owner). It is helpful to point out that the High Court in *ATOF*[12] developed the substantial identity test of business activities in 1990 to ascertain whether in fact a transmission had occurred. The Minister also noted that the provisions dealing with transmission:

> had not kept up with the complexities of the modern business environment, nor had they kept up with the shift from industry to enterprise level bargaining.[13]

Some might argue that the current federal workplace legislation has helped to add to the complexity by introducing the stream of individual employment contracts AWAs, on top of a variety of streams for certified agreements as well as the old award system. Recent figures shed light on the groups of instruments now available under the WR Act, and the numbers covered within each:

- 160 349 AWAs as at 1 April 2001[14]
- 10 183 federal collective agreements current at 31 December 2000, covering an estimated 1.4m. employees, and[15]
- 2 297 federal awards covering directly or indirectly about 3.0 million employees.[16]

At the time of the Ministerial Discussion Paper's publication, the High Court had reserved its decision in the *PP Consultants* appeal.[17] The Minister foreshadowed transmission of business amendments in the Discussion Paper but noted that the 'desirability or timing' of any such amendments could be affected by the decision of the High Court in the *PP Consultants* case.

The High Court has since made its decision on *PP Consultants.* It found that there had been no transfer of the business of banking from St George Bank to the Byron Bay (NSW) pharmacy (PP Consultants) which took over some functions and staff of the bank's operation (located next door to the pharmacy). The High Court distinguished between government and private sector transmissions. However in respect of private sector transmissions, the unanimous judgment determined the following code to ascertain what was and was not transmission:

> As a general rule, the question whether a non-government employer who has taken over the commercial activities of another non-government employer has succeeded to the business or part of the business of that other employer will require the identification or characterisation of the business or the relevant part of the business of the first employer, as a first step. The second step is the identification of the character of the transferred business activities in the hands of the new employer. The final step is to compare the two. If, in substance, they bear the same character, then it will usually be the case that the new employer has succeeded to the business or part of the business of the previous employer.[18]

The Full Federal Court in *Stellar*[19] has followed the High Court's reasoning in *PP Consultants* and has found that the Stellar Call Centre business was not a successor of Telstra. Therefore Telstra awards and agreements will not transmit or apply to Stellar call centres. Overturning the initial finding concerning the similarity of work being performed, and that Telstra's work thus had been transmitted, the Full Federal Court determined to the contrary. It was not enough to rely on the fact that the businesses or the employees will perform similar functions, the character of the business must also be taken into account.

The Federal Court took the view that even if there existed a complete identity between the duties and working conditions of employees of a transmittor and a transmittee, transmission does not occur unless the activities performed by the new employer are in substance identical in character with the business, or a distinct part of a business, of the old employer.

It is perhaps also pertinent to point out that the Full Federal Court has recently found against the conduct of an outsourcing exercise in which a statutory obligation required local councils to competitively tender for services formerly provided by council employees. In this instance, the Greater Dandenong City Council (Vic) accepted a tender for the provision of home care services based on lower employment benefits than those provided for in the previous award/agreement for in-house employees.[20] The State legislative requirement obliging local councils to competitively tender their services reflects the obligations imposed on State governments by National Competition Policy (NCP).[21] However the Victorian legislation[22] did not require a council to accept the lowest bid. The Court found the same people to be doing the same work as the successful tenderer re-employed a number of redundant in-house employees. It found that the exercise had denied these employees the benefit of their award/agreement entitlements and thus violated the Freedom of Association provisions of the WR Act (Part XA).[23]

Unions had believed that transmission provisions of the WR Act (specifically s.149 and s.170MB) would underpin NCP processes and ensure that the full benefits of NCP through innovation, better use of capital, lower prices through competition etc, would not be delivered through labour condition reductions. However, in his analysis of Australia's *golden age* of productivity growth over the 1990s, Professor John Quiggin has reviewed productivity figures to show that to the (minimal) extent there has been such an age, it has been derived almost exclusively through labour productivity[24], or what some might call an increased rate of labour exploitation. In other words, the ability to undercut awards and agreements through outsourcing and contracting-out (and often the threat of these) has been important to macro economic objectives and to some considerable extent outsourcing has been underpinned by National Competition Policy, as evident in the *Silver Circle* case.

Concerns for such outcomes were evident in a (1999) submission by the Australian Services Union to the Senate Committee investigating the consequences of competition policy:

> Competition will not be based on the reduction of wages and working conditions of employees and that legislation be amended to ensure that employment conditions are transferred from public to private sector employees in contracting out situations as occurs in Europe ... In Australia, there has been uncertainty about whether or not we have a similar entitlement here, until very recently. I say that because the provisions of the Workplace Relations Act 1996, particularly sections 149 and 170MB, on which the national competition policy sought to rely, provide for a successor organisation to a business or part of a business to take on, in effect, the award and certified agreement that used to apply in the business before the service was transferred.[25]

The significant cases on outsourcing and transmission cited earlier make these (1999) assumptions about the potential of s.149 and s.170MB to deal with outsourcing or 'contracting-out' appear somewhat optimistic. It can be posited that after *Stellar,* the current federal transmission provisions may not be sufficiently prescriptive to deal with the more sophisticated forms of business restructure often underpinning wholesale outsourcing. A transmission of public sector awards was upheld by the Federal Court in the case of the outsourcing of employment services from the CES to Employment National but there must be doubts whether it has value as precedent in light of the stricter transmission tests under *Stellar*.[26] The legal issues in the *Silver Circle* case were slightly different, focusing more on the tendering process, the refusal of in-house staff to lower their conditions to match a lower bid as well as the freedom of association issue.[27]

Questions about the relevance of the transmission provisions will also arise concerning divestiture of corporate assets to related parties which then supply a service to the principal, under contract. This arrangement was evident in the Patrick Stevedore dispute with the Maritime Union of Australia and recently was a feature of the Steel Tank and Pipe group of companies receivership.[28]

Finally, it is useful to ask after a simple business acquisition where two awards collide as a result of transmission, which is to cover the employees? In his decision on *North Western Health Care Centres* Justice Marshall determined that:

> The situation where two awards govern the terms and condition of employment of certain employees, whilst relatively unusual, is not an unknown one. In those circumstances, the employer is obliged to accord to its employees the better conditions in respect of matters dealt with in the awards, thus obeying all its obligations.
>
> It is not the function of this Court to determine which award is more appropriate.[29]

The 'priority system' concerning the order under which successive CAs apply to a single enterprise is stipulated in s.170LY of the WR Act. This means that the CA whose expiry date has not passed continues to apply (unless there is agreement to terminate it) and thus an inferior CA in terms of its wages and conditions may continue to apply for at least part of the 'new' workforce after a transmission of business.

As a remedy for such a potential problem, the Federal Court hearing the PP Consultants appeal (ie prior to it proceeding to the High Court), suggested a solution. Where there had been a merger of different operations with a potential mixture of the activities of individual employees, it might be appropriate for the parties to negotiate a new regulatory regime. This might take the form of a certified agreement covering the whole of the new employer's activities or Australian Workplace Agreements, or for the Commission to bring about such a regime by arbitration.[30] This Bill may facilitate such an objective.

Main Provisions

The proviso "subject to any order of the Commission" is inserted into subsection 170MB(1)(d) (of the WR Act) by **Item 1** of the Bill.

"Subject to any order of the Commission," is inserted and into subsection 170MB(1)(f) by **Item 2**;

A similarly worded proviso is inserted into section in subsection 170MB(2)(d) **(Item 3)** and into subsection 170MB(2)(f) **(Item 4)**

The following provision is inserted by **Item 5** after subsection 170MB(2):

(2A) The Commission may make an order for the purposes of this section that a new employer who is the successor, transmittee or assignee (whether immediate or not) of the whole or part of a business referred to in paragraph (1)(c) or (2)(c):

is not bound by the certified agreement; or

is bound by the certified agreement, but only to the extent specified in the order.

The order must specify the day from which the order takes effect. That day must not be before the day on which the order is made.

(2B) The Commission may make an order under this section on application by the employer bound by the agreement.

(2C) Before making an order under this section, the Commission must give the persons bound by the certified agreement an opportunity to make submissions.

(2D) However, an organisation that is bound by a certified agreement made in accordance with section 170LK may only make a submission if the organisation has at least one member:

whose employment is subject to the agreement; and

whose industrial interests the organisation is entitled to represent in relation to work that is subject to the agreement; and

who requested the organisation to make a submission.

Item 6 inserts similarly worded subclauses to those stipulated in Item 5 in respect of certified agreements made under Part XV of the WR Act; Matters referred by Victoria. The reason for a distinct set of provisions dealing with certified agreements in Victoria is that they do not fall under the same Constitutional restraints as Division 2 and Division 3 agreements made Part V1B of the WR Act; ie they may be made between non-corporate bodies such as a partnership and its employees or a union.

Concluding Comments

This Bill makes minor amendments to the Workplace Relations Act in respect of the transmission of certified agreements by allowing the AIRC to make orders concerning the transmission (if any) of an existing certified agreement to a new business owner. The effect of the provision will be to make non-automatic the transmission of an existing CA to a new business owner.

The restrictions imposed by the Bill on unions making submissions to the AIRC concerning the transmission of Division 2 agreements [see proposed s.170MB(2D) of the WR Act] reflect similar restrictions imposed on unions participating in the making of Division 2 agreements (ie those agreements with employees under s.170LK, but where an employee requests to be represented a union, see s.170LK(4)). There may be questions as to whether the wording of the provisions of the Bill gives primacy to the employer in initiating an application.

Finally, the need for this amendment shows up the complexities associated with enterprise bargaining as bargaining becomes further fragmented and decentralised as well as the impracticality of removing 'third parties' such as the AIRC from employment relations.

Endnotes

1 *Independent Report of the Victorian Industrial Relations Taskforce,* August 2000 http://www.vic.gov.au/irtaskforce/Full%20Report%20of%20the%20Industrial%20Relations%20Taskforce.pdf, p.10.

2 For a comprehensive review of the referral of industrial laws passed by the Commonwealth and the Victorian Government in 1996/97, see Bills Digest 66 1996-97, *Workplace Relations and Other Legislation Amendment Bill (No.2) 1996.*

3 The Hon Peter Reith MP, *Transmission of Business and Workplace Relations Issues,* Ministerial Discussion Paper, September 2000.

4 B Creighton, "Transmission of All or Part of a Business: A Neglected Issue in Australian Industrial and Employment Law (1998) 26 *Australian Business Law Review*.

5 AIRC, *Print T3529* s.149 application by EDS Systems Pty Ltd. 21November 2000.

6 *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow and Co.* (1910) 11 CLR 311.

7 *Commonwealth of Australia Constitution Act 1900.*

8 W.B. Creighton, W.J. Ford and R.J. Mitchell, *Labour Law*, 2nd edition, (The Law Book Company, 1993) p.596.

9 *George Hudson Ltd v. Australian Timber Workers Union* (1923) 32 CLR 413.

10 Ibid. Provisions addressing transmission were also inserted into s.24 of the *Conciliation and Arbitration Act 1904* in 1921.

11 The Hon Peter Reith MP, Foreword to *Transmission of Business and Workplace Relations Issues*, Ministerial Discussion Paper, September 2000, p.iii.

12 High Court of Australia *Re Australian Industrial Relations Commission & Others; Ex parte Australian Transport Officers Federation & Others* (1990) 171 CLR 216.

13 Cited in endnote 11, p.iii.

14 http://www.oea.gov.au/WhatsNew/WhatsStats.html.

15 Workplace Relations Amendment (Transmission of Business) Bill 2001, *Explanatory Memorandum.*

16 See data on awards in the AIRC's website: http://www.airc.gov.au/my_html/award_simplificat_n.html. The 1999-2000 Joint Governments' Submission to the Safety Net Wage Case estimated 2.4 million under federal agreements representing 80 per cent of the number of federal award employees (p. 2-14. The recent ABS *Employee Earnings and Hours* survey (Cat.6306, 27/3/01) did not report on the extent of federal award coverage.

17 The appeal was over the decision of the Full Federal Court (FCA 1251) in *Finance Sector Union of Australia v PP Consultants*, 10 September 1999.

18 High Court of Australia (HCA 59), *Finance Sector Union v PP Consultants*, 16 November 2000.

19 Federal Court of Australia (FCA 106) *Stellar Call Centres Pty Ltd v CEPU*, 21 February 2001.

20 Federal Court of Australia (FCA 1231) *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council*, 4 September 2000.

21 For an explanation of the intertwining Federal and State agreements and laws implementing National Competition Policy, refer to the report of the Senate Select Committee of the 39th Parliament of Australia on the Socio-Economic Consequences of the National Competition Policy, *Competition Policy: Friend or Foe (Economic Surplus, Social Deficit?)* 12 August 1999.

22 *Local Government Act 1989* (Vic)

23 Federal Court of Australia (FCA 349) *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union*, 4 April 2001.

24 John Quiggin 'Golden age myth exposed', *The Australian Financial Review*, 15 February 2001. There he argues that since 1989 annual labour productivity growth has been 2.6%, while annual capital productivity growth has been –0.8%.

25 See Evidence to Select Committee on Socio-Economic Consequences of the National Competition Policy by Mr Timothy Lee (ASU), 16 July 1999, p.562.

26 Federal Court of Australia (FCA 452) *Employment National Ltd v CPSU*, 11 April 2000.

27 See footnote 19.

28 For a review of some of the legal issues with the 1998 waterfront dispute, see Ron McCallum's 'A Priority of Rights: Freedom of Association and the Waterfront Dispute', *Australian Bulletin of Labour*, v.24, no.3 1998. See 'Union demands employer pays', *The Age* 22 November 2000, re the collapse of STP group of companies. The report suggests that were up to 50 companies involved with STP.

29 Federal Court of Australia (1084 FCA) *Health Services Union of Australia v North Eastern Health Care Network; Health Services Union of Australia v Western Health Care Network* (22 October 1997).

30 CCH *Australian Industrial Law Reports*, ¶4-149.