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No. 163 2001–02

Workplace Relations Amendment (Transmission
of Business) Bill 2002

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Workplace Relations Amendment (Transmission of
Business) Bill 2002

Steve O'Neill
Economics, Commerce and Industrial Relations Group
6 June 2002

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Workplace Relations Amendment (Transmission of Business) Bill 2002

Date Introduced: 21 March 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: Clauses 1 to 3 will commence on Royal Assent. Schedule 1 will commence on a day to be fixed by Proclamation. However, if the Schedule has not commenced within six months after Royal Assent, the Schedules will commence on the first day following that six-month period.

Purpose

To amend the [Workplace Relations Act 1996](#) (WR Act) to allow the Australian Industrial Relations Commission (AIRC) to order that a new employer is not bound by an existing certified agreement which specifies the terms of employment for the employees of the acquired business; or, that the new employer is to be bound to a certain extent and/or for a certain time.

Background

Much of the background to this Bill has been covered in [Bills Digest 123 2000-2001](#) which reported on the Workplace Relations Amendment (Transmission of Business) Bill 2001 (the 2001 Transmission Bill). That Bill proposed to allow either a business seller or the purchaser, being a corporation or the Commonwealth, to apply to the AIRC for an order. Non-corporate entities such as partnerships cannot be bound by Division 2 certified agreements under Part V1B of the [Workplace Relations Act 1996](#). Any resulting order could specify that an applicable certified agreement would not apply following the sale of the business, or apply to a certain extent, or for a certain time. Such provisions are also contained within the current Bill.

Under the provisions of both Bills, the enterprise being acquired was one already bound by a certified agreement (and possibly an award as well) extant under the federal jurisdiction. However, the States also provide transmission provisions under their respective industrial

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laws and awards, thus a purchaser of a business may, in respect of different groups of employees, be bound to observe the terms and conditions of State awards/agreements.¹

It was noted in the previous Bills Digest that the current proposals addressing the transmission of certified agreements had appeared under Schedule 8 (and under Schedule 15 with respect to Victoria) of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999.

[Bills Digest 123 2000-2001](#) reviewed employer concern at the possibility of meeting the obligations of a variety of employment instruments, following a business acquisition. It was noted that this development in turn partly reflected the fragmentation of industrial bargaining, as the award system gave way to enterprise agreements and individual arrangements. Where an enterprise agreement is registered under the federal jurisdiction, it becomes a certified agreement (CA) and where an individual employment arrangement is formalised, it becomes an Australian Workplace Agreement (AWA). The concomitant development of relegating awards and orders of the AIRC to their current status of a safety net, has been the rise of the new employment instruments (CAs and AWAs) both of which outline actual terms of employment, and neither are amenable to direction or alteration by the AIRC. Unlike the situation applying to awards, employees who are to be covered by a CA must 'approve' it (usually by ballot) prior to its certification. The act of approving a CA in effect vests a notion of 'ownership' between the parties. Thus [section 170LY](#) of the WR Act provides that CAs continue until their nominal date of expiry which means it cannot be replaced by another CA until the first expires.

Sections [170MG](#), [170MH](#) and [170MHA](#) of the WR Act allow CAs to terminate before their expiry dates but only under specific circumstances including where employees and/or the relevant union have agreed to the instrument terminating, and the termination of the CA then be approved by the AIRC. Thus the prerequisite for a CA to terminate hinges on the consent of the parties, and for employees this may mean a ballot. CAs are instruments determined by the parties and not the AIRC, thus its discretion to alter or terminate these is strictly curtailed by the above provisions. However, all this means is that there is a process to terminate a CA which involves consent of employees, without arbitration by the AIRC. Such a process of terminating a CA was recently conducted to terminate a non-union agreement applying to [Phillips Medical Services](#), following a restructure of group companies.²

It is worth recalling that this lengthy process both to make an initial CA and then to terminate or vary it early has come about as a result of policy, i.e. to relegate other parties such as tribunals to a minor or at least lesser role in setting the employment conditions framework under agreements.

Ministerial Discussion Paper

It was also noted in [Bills Digest 123 2000-2001](#) that under the former Minister for Employment, Workplace Relations and Small Business, the Hon. Peter Reith, a Ministerial Discussion Paper [Transmission of Business and Workplace Relations Issues](#) was

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commissioned to review concerns about the transmission of business issue. The paper addressed issues such as what commercial transaction constituted a transmission of business. This is important. Unless a business 'transmits', a relevant federal award, CA or AWA will not subsequently transmit. Does, for example, the contracting out of a firm's information technology function constitute a transmission of business? The report proposed some indications which legal authorities might refer to when determining a transmission of a business. Another part of the report dealt with options for countering possible obligations under a number of industrial instruments following such a transaction.

The Ministerial Discussion Paper had observed that the current [subsection 149\(1\)\(d\)](#) (WR Act) provides some latitude to the AIRC to bind or not bind new employers to awards. This had occurred due to an amendment to the transmission provisions in moving from the *Conciliation and Arbitration Act 1904* to the *Industrial Relations Act 1988*. The amendment introduced the qualification into section 149: *Subject to any order of the Commission*. Otherwise, the award provisions on transmission have an 80 year history as noted in [Bills Digest 123 2000-2001](#).

Importantly, certified agreements were regarded as awards under the *Industrial Relations Act 1988*, thus the transmission provisions applying to awards also applied to certified agreements under section 149 of the IR Act.³ This is no longer the case under the WR Act, as [section 170MB](#) of the WR Act now governs the transmission of certified agreements. Also the award provisions were worded broadly applying to transmitters, successors and assignees, and, later, to the transmission of a part of a business. These provisions assumed in the case of a transmission of business that the relevant award or agreement also transmitted, but the provisions allowed the AIRC to determine the resendency of a new employer taking over a business. It was also noted in [Bills Digest 123 2000-2001](#) that where two awards 'collided' following a transmission, the superior terms were to apply. Subsequently, a modernised single award might have been made with the relevant unions and the previous instruments could be set aside. By contrast, the Ministerial Discussion Paper's preferred option to resolve the perceived dilemma over CA transmission, gave the AIRC a discretion to veto an existing CA binding a new employer:

The ability of the Commission to make orders affecting certified agreements is not in keeping with the primacy given to agreement making under the WR Act. However, a power in the Commission to curtail the imposition of a transmitted certified agreement to a new employer is arguably more consistent with the objects of the WR Act.⁴

Senate Committee Report on the 2001 Transmission Bill

The Workplace Relations Amendment (Transmission of Business) Bill 2001 was referred to a Senate Committee for review and report on 5 April 2001. The Senate Employment, Workplace Relations, Small Business and Education Legislation Committee reported on the 2001 Transmission Bill [with the Workplace Relations (Registered Organisations) Bill 2001] on 18 June 2001. This report⁵ and the submissions to the Senate Committee provide

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valuable insight to positions of respective parties as to whether CAs should transmit when a business is sold or indeed where part of a business is outsourced. The positions of various parties are reviewed below.

Unions

Union concerns with the previous attempts to reform the transmission provisions have centred on the potential for a seller to offer a prospective employer a 'package' of lower cost operations through the elimination of current terms of employment. Thus the Australian Rail Tram and Bus Union (RBTU) put it to the Senate Employment Committee that:

If outgoing employers have entered into a lengthy binding agreement with their workforce they should not have the option to effectively dump that agreement in order to get a better price for the sale of their business.⁶

The RBTU also commented on the potential under the 2001 Transmission Bill for those in a workforce to have their AWAs transmit following a business sale, while CAs applying to the bulk of the same workforce potentially would not.⁷

The Australian Council of Trade Unions (ACTU) submitted that:

The problems of transmission of business, including in relation to contractors and related corporations, as well as the ability of the transmittor to require employees to sign AWAs in order to retain their jobs, do not need to be exacerbated.

Weakening an already inadequate transmission of business provision will further encourage the types of contracting out and corporate restructuring which we have seen can have such an unfair effect on employees ...

Legal controversies have centred around whether or not a transmission of industrial instruments occurs in cases where part of a business, whether government or privately owned, is transferred through sale, assignment or contract to another entity, such as through privatisation, or outsourcing and contracting out ...

In the event that a transmitted certified agreement is not appropriate to the needs of the workplace, or is in conflict with an already existing agreement, it is open to the parties to agree to vary the agreement or apply to the Commission for it to be terminated.⁸

The employers' view

The Australian Chamber of Commerce and Industry (ACCI) made reference to the submissions of its members on problems caused by there being no AIRC authority to terminate an extant CA in a purchased business, for example:

A business is looking at acquiring or merging or expanding their business to acquire a similar operation and the business that they are looking at acquiring has a certified

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agreement. As the law currently stands the acquiring employer cannot seek to modify that current agreement while it is nominally in force, and the acquiring business is looking at a new certified agreement but it cannot take any steps in its proposed agreement to deal with staff of the business under the earlier certified agreement, because the priority system provides that a prior made and non-expired certified agreement is not affected by a later made certified agreement. In practical terms the new business cannot integrate the businesses because they cannot vary the terms of the existing agreement, except to have a valid majority of people under the agreement agree to cancel it.

The point is that if a new agreement could be developed it would have to pass the no disadvantage test of the two awards but it would be a global test in respect of both work groups, eg. one of the agreements might provide for better leave provisions and another different hours for work, which could be integrated and still in a global sense not leave the workforce worse off and be approved by a valid majority, but this course cannot be followed currently. We are simply asking for a procedure to enable the Australian Industrial Relations Commission to look at all these issues.

The Bill is a moderate Bill. It is not a radical or extreme response to the problems arising from the existing transmission of business provisions. It deserves to be examined on its merits.⁹

Views of political parties

ALP

The ALP opposed the 2001 Transmission Bill as it appeared to facilitate the lessening of employee entitlements through corporate restructuring. The previous Shadow Minister for Industrial Relations, the Hon. Arch Bevis MP, stated:

Potentially this could enable unscrupulous employers to short-change workers through corporate restructures or contrived sales to shelf companies. All an employer would have to do was set up a shelf company, apply for an order that the enterprise agreement not transfer and then sell the company to the shelf company. At this point, workers could have all their terms and conditions stripped away.¹⁰

The minority report of ALP Senators included in the Senate Employment, Workplace Relations, Small Business and Education Committee's report: *Consideration of Provisions: Workplace Relations Amendment (Transmission of Business) Bill 2001 and the Workplace Relations (Registered Organisations) Bill 2001*, made the following conclusion:

Labor senators are convinced, by the weight of evidence, and their own knowledge and experience of the effects of the *Workplace Relations Act*, that the Transmission of Business Bill is conceptually flawed by serious policy omissions in the parent Act. While the amendments to section 170MD may be seen as 'technical' in the way they address an obvious anomaly, the solution which is proposed only highlights more

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fundamental deficiencies in the Workplace Relations Act. For this reason the bill cannot be supported in its current form.¹¹

Australian Democrats

Representing the Australian Democrats, Senator Murray drew a different conclusion, one which considered the need for the AIRC to have the discretion to resolve industrial relations questions:

The Australian Democrats have a long tradition of supporting the AIRC having an independent discretion to determine industrial relations matters on their merits. Discretion of course is never open-ended, but it has long been our view that wherever possible such discretion is a better guarantor of fairness and flexibility. However we do recognise that discretion can lead to uncertainty and cost until such time as orders have been made.

It seems self-evident to me that the AIRC should have discretion in respect of transmission of employee conditions in business acquisitions, particularly when more than one certified agreement affects 'old', 'transferred' and 'new' employees in a business. The AIRC needs to determine which agreement should prevail. Provided that is, the AIRC continue to recognise that the intention behind transmission of business provisions is, in the interests of fairness, to provide a protective mechanism for employees. They must do this while taking into account a need to provide new or reformed businesses with necessary operational flexibility.¹²

The Government's view and policy commitment

As noted, this Bill is represents the third attempt to reform certified agreement transmission provisions since 1999. A possible review of the provision was touched on in the Coalition's 2001 workplace relations policy, *Choice and Reward in a Changing Workplace* in the reference:

In a third term we will:

Simplify the legal rules that regulate employment rights and obligations upon the transmission of businesses from one employer to another.¹³

The Liberal Party's 49th Federal Council endorsed four terms for the House of Representatives (13 April 2002).¹⁴ While it is still early days in respect of this proposal as it requires amendment to the Australian Constitution, the tempo of the Government has been raised. Clearly the issue of the successful passage of workplace relations legislation, and in particular the 'small business exemption' from unfair dismissal laws, has been central to these calls for reform. But it must be kept in mind that the Senate did not reject the 2001 Transmission Bill. Indeed that Bill had not passed the House of Representatives at the time the November 2001 federal election was called.

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Main Provisions

Item 1 repeals and replaces subparagraph 45(3)(a). The item allows an organisation or person bound by an award or an order to make an application for an appeal against an order or award made by a member of the AIRC, with the exception of the eligibility of applicants qualified by subparagraphs 45(3)(aa) and 45(3)(ab).

Item 2 inserts new subparagraph 45(3)(ab). The item amends subsection 45(3) of the WR Act, which sets out who can appeal AIRC decisions to a Full Bench of the Commission. An organisation or person who participates in AIRC proceedings about whether the AIRC should make an order that a certified agreement does not apply following a transmission of business, or applies either to a limited extent or for a limited period, would be able to appeal against a subsequent order. If the AIRC refused to make an order, the organisation or person could appeal against the decision.

Item 10 inserts a new section 170MBA at the end of Division 6 of Part VIB. **Proposed section 170MBA** would allow the AIRC to order that a certified agreement which would ordinarily transmit to a new employer under section 170MB has no binding effect on the new employer, or only binds to a limited extent or for a limited period.

Proposed subsection 170MBA(1) defines the terminology used in proposed section 170MBA:

- The *outgoing employer* is the employer bound by a certified agreement who will transmit, or has transmitted, the whole or a part of their business to another employer
- The *incoming employer* is the employer who, at a later time, becomes or is likely to become the successor, transmittee or assignee of the outgoing employer's business
- The *business concerned* is the whole or that part of the business that is transmitted by the outgoing employer to the incoming employer, and
- The *transfer time* is the time when the business or part of the business transmits from the outgoing employer to the incoming employer.

Proposed subsection 170MBA(2) would give the AIRC power to make an order as to whether, or to what extent, an incoming employer is bound by a certified agreement.

Proposed subsection 170MBA(3) allows the AIRC to make an order under subclause 170MBA(2) specifying is that an agreement binds an incoming employer, but only for a specified period of time, but without limiting subclause 170MBA(2).

Proposed subsection 170MBA(4) allows an application for an order under subclause (2) to be made at any time – before, at, or after transmission.

Proposed subsection 170MBA(5) provides that before transmission, an application for an order under subclause 170MBA(2) may be made only by the outgoing employer.

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Proposed subsection 170MBA(6) provides that where an application is made at or after the transfer time, it may be made by a number of people, including:

- the incoming employer; or
- an employee of the incoming employer whose employment is subject to the certified agreement in question; or
- a registered organisation (for instance, a union) that is bound by the certified agreement and is entitled to represent the industrial interests of employees of the incoming employer, whose employment is subject to the agreement, in relation to work that is subject to the agreement.

Proposed subsection 170MBA(7) confirms that an organisation, which has agreed to be bound by an employee agreement made under section 170LK of the WR Act, may only apply for an order under subclause 170MBA(2) if the organisation has at least one member:

- who is an employee of the incoming employer and whose employment is subject to the certified agreement
- 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 apply for an order under subclause 170MBA(2).

Proposed subsection 170MBA(8) would require the applicant to take reasonable steps to give notice of the application to those people who are entitled to make submissions.

Proposed subsections 170MBA(9) to (13) set out who may make submissions. Where AIRC hearings regarding an application for an order under subclause 170MBA(2) occur before transmission, **proposed subsection 170MBA(10)** specifies that, in addition to the applicant, the following people and organisations must be given an opportunity to make submissions:

- employees of the outgoing employer, who are employed in the business that is likely to transmit to the incoming employer, and whose employment is subject to the agreement
- the incoming employer
- employees of the incoming employer whose employment may become subject to the agreement if the agreement transmits, and
- an organisation that is bound by the agreement and entitled to represent the industrial interests of the employees of the outgoing or incoming employer (whose employment is or may become subject to the agreement) in relation to work that is subject to the agreement.

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Where AIRC hearings regarding an application for an order under subclause 170MBA(2) occur at or after transmission of business, **proposed subsection 170MBA(12)** specifies that, in addition to the applicant, the following must be given an opportunity to make submissions:

- the incoming employer
- an employee of the incoming employer, whose employment is subject to the agreement, and
- an organisation that is bound by the agreement and entitled to represent the industrial interests of employees of the incoming employer whose employment is subject to the agreement, in relation to work that is subject to the agreement.

Item 11 repeals and replaces subsection 494(3). New subsection 494(3) provides that section 170MB applies so that a certified agreement made under Division 2 of Part VIB will transmit with a business or part of a business to a Victorian employer (whether or not this employer is a corporation).

New subsection 494(4) would allow the Commission to make orders about the extent to which a successor, assignee or transmittee employer within Victoria is bound by a transmitting certified agreement.

Concluding Comments

By affording rights to the outgoing employer to make an application to the AIRC about the extent to which a current CA will bind a future purchaser of the business, suspicions similar to those expressed by the Australian Rail Bus and Tram Industry Union are likely to be aroused that the outcome will do more to facilitate a business sale rather than successfully determining employment conditions.

It has been noted that certified agreements or enterprise agreements have been associated with the idea of removing third parties from the process of making agreements. Awards by contrast have been seen to be the product of third party involvement, notably the involvement of the AIRC. Yet the Bill proposes to reinstate AIRC involvement to resolve an enterprise issue. It has also been noted that business concerns with transmission issues have been heightened because of the fragmentation of bargaining, thus increasing the possibility that separate enterprises have their workforces employed under separate arrangements. It would therefore seem to be one option to return to the award system and allow awards express actual rates of pay. Awards are by now far fewer in number compared to CAs, the procedures for transmitting awards to new businesses, or creating new awards and/or setting aside old awards are well established and within power. The issue boils down to one of certified agreements being the property of the parties bound.

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A second option might review the proposed right of the outgoing employer to make an application about a current CA binding a future employer. It may be wise however, to have provisions warning a purchaser of the current employment arrangements applying with the sale. Providing particular rights of the outgoing employer to have a CA not bind a future employer is not available under the award transmission provisions ([subparagraph 149\(1\)\(d\) <http://scaleplus.law.gov.au/html/pasteact/0/70/0/PA002080.htm>](http://scaleplus.law.gov.au/html/pasteact/0/70/0/PA002080.htm) WR Act). Also, any solution on the amalgamation of CAs and one acceptable to all parties is likely to require something like a no disadvantage test to be incorporated to apply to the provisions of colliding CAs. Under such a scenario, the AIRC's role may revert to one of arbitrating over actual conditions of employment. The Bill does not contemplate such a role (let alone a return to the award system). Note that under the Bill, an incoming employer will acquire the right to make an application with effect that a CA not apply to a purchased business, even in circumstances where the incoming employer is not bound by any existing formal or registered industrial instrument.

Endnotes

- 1 See for example *Industrial Relations Act 1996* (NSW), s.12 and Part 8, *Industrial Rzelations Act 1999* (Qld), s.124, s.167, s.214 and *Industrial Relations Act 1984* (Tas) s.61N.
- 2 Australian Industrial Relations Commission, *PR916083*, 28 March 2002.
- 3 *Industrial Relations Act 1988* subsection 149(2).
- 4 The Hon. Peter Reith, Ministerial Discussion Paper, *Transmission of business and workplace relations issues*, September 2000, par. 167.
- 5 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of Provisions: Workplace Relations Amendment (Transmission of Business) Bill 2001; Workplace Relations (Registered Organisations) Bill 2001*.
- 6 Submission to Senate Employment, Workplace Relations, Small Business and Education Inquiry into the Workplace Relations Amendment (Transmission of Business) Bill 2001 and the Workplace Relations (Registered Organisations) Bill 2001 by the Australian Rail, Tram and Bus Industry Union .
- 7 *ibid.*
- 8 Submission to Senate Employment, Workplace Relations, Small Business and Education Inquiry into the Workplace Relations Amendment (Transmission of Business) Bill 2001 and the Workplace Relations (Registered Organisations) Bill 2001 on behalf of the ACTU.
- 9 ACCI Submission to Senate Employment, Workplace Relations, Small Business and Education Inquiry into the Workplace Relations Amendment (Transmission of Business) Bill 2001 and the Workplace Relations (Registered Organisations) Bill 2001.
- 10 Quoted in 'Federal Government acts on transmission of business' *CCH Australian Industrial Law News*, April 2001.

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- 11 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of Provisions: Workplace Relations Amendment (Transmission of Business) Bill 2001; Workplace Relations (Registered Organisations) Bill 2001* p. 34.
- 12 *ibid.*, p.35.
- 13 Liberal Party of Australia: *Choice and Reward in a Changing Workplace*, October 2001.
- 14 Interview with Malcolm Turnbull, Treasurer of the Liberal Party of Australia, ABC TV, *Insiders*, 14 April 2002.

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