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THE PROTECTION OF EMPLOYEE ENTITLEMENTS *
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This paper examines the interface between organisational change and the law regulating termination of employment.

The legal regime affecting these forms of organisational change include: contracts of employment; industrial instruments (awards, certified agreements, enterprise agreements and Australian Workplace Agreements ("AWAs"); statutes proscribing the termination of employment for certain reasons, including federal and state anti-discrimination laws, section 17OCK of the Workplace Relations Act 1996 (Cth), and state laws proscribing the termination of employment during periods of incapacity and parental leave; unfair dismissal laws; and, the arbitral powers of industrial tribunals.

Rather than attempt an exegesis of each of these areas of law, this paper highlights some of the more significant issues in this area of industrial relations regulation.

It is also important to note that taxation law, superannuation, annual holidays and long service leave laws are also significant issues affecting the treatment of employees in many situations of organisational change. This paper will, however, not deal with these matters.

**General Redundancy Standards**

From the early 1980s to the present, successive waves of economic change have prompted major reductions in the direct workforce of a majority of Australian firms. Australian unions and industrial tribunals responded to the acceleration in workforce reductions in the early 1980s by the establishment of a raft of industrial conventions designed to ameliorate the affect of retrenchment on employees. These responses were crystallised in 1984 with the decisions of the Australian Conciliation and Arbitration Commission in the Termination Change and Redundancy cases ("TCR cases")\(^1\)

The TCR cases established a code for the management of organisational change and redundancies by employers engaging more than 15 employees. These decision remain the source of many of the

source of many of the understandings found within contemporary Australian redundancy law and practice. The standard established by the TCR cases provides the following minimum entitlements:

1. Where an employer makes a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes, and their union or unions;

2. The employer shall discuss with the employees affected and their union or unions, inter alia, the introduction of the changes, the effect the changes are likely to have on employees, and shall give prompt consideration to matters raised by employees and/or their union or unions in relation to the changes. These discussions should commence as early as practicable after a definite decision has been made by the employer to make the changes;

3. For the purposes of these discussions the employer shall supply in writing to employees concerned, and their union or unions, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on employees, and any other matters likely to affect employees, provided that the employer is not required to disclose confidential information the disclosure of which would be inimical to the employer's interests;

4. Where an employer makes a definite decision that they no longer wish the job the employee has been doing to be done by anyone, and that decision may lead to termination of employment, the employer shall hold discussions with the employees directly affected and with their union and unions;

5. Those discussions are to take place as soon as practicable after the employer has made a definite decision to retrench a position, which may lead to the termination of employment. Those discussions should cover matters including the reasons for the proposed redundancies, the measures proposed to avoid or minimise the termination of employment and measures to mitigate the adverse effects of any terminations on the employees concerned;

6. Employers are to contact the Commonwealth Employment Service (now Centrelink) and provide in writing details of the reasons for the terminations, the number and categories of employees likely to be affected and the time when, or the period over which, the employer intends to carry out the terminations;

2 "Significant effects" were defined to include "termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect."
7. The employer is to give notice of termination to employees, the length of which depends on the employee's length of service and age.\(^4\)

8. Severance pay should be given to employees whose employment is terminated for reasons of redundancy. Minimum severance entitlements are based on the number of continuous years service the employee has had with the employer or the employers' predecessors in business;\(^5\)

9. Employees should be given paid leave of up to one day each week of their notice period for the purpose of seeking new employment;

10. The termination of employment by an employer shall not be harsh, unjust or unreasonable. If an employee claims that a termination of employment is harsh, unjust or unreasonable the employee's complaint should be settled by discussions between the employee, his or her representative and the employer and, failing settlement, the dispute should be referred to the Commission for conciliation.

These entitlements were subsequently included within the majority of federal awards, though variations from the standards were often encountered. Over time, State industrial tribunals also adopted these standards.

In 1994, the Industrial Relations Commission of New South Wales increased the minimum severance entitlements by adjusting the scale to the benefit of employees with greater seniority and persons over the age of 45 years.

More recently, federal award provisions regarding redundancy have been significantly reduced via the award simplification process. In particular, provisions regarding information sharing and consultation and prohibitions against harsh, unjust or unreasonable termination are no longer allowable award matters. To some extent, the provisions regarding harsh, unjust or unreasonable termination have been replaced by the provisions of Part VIA, Division 3 of the Workplace Relations Act 1996 (Cth).

**Consultation**

Consultation requirements in the federal system are now largely left to employers, employees and unions to establish within certified agreements.\(^6\) In the absence of suitable consultation arrangements in certified agreements, employees and unions can apply for orders under sections 170FA and 170GA of the *Workplace Relations Act 1996* (Cth). These provisions apply only to

\(^4\) This requirement is now enshrined by section 170CL of the *Workplace Relations Act 1996* (Cth).

\(^5\) The TCR severance scale depends on the employee's period of continuous service as follows: less than 1 year's continuous service, no severance pay; 1 year and up to the completion of 2 years continuous service, 4 weeks' pay; 2 years and up to the completion of 3 years continuous service, 6 week's pay; 3 years and up to the completion of 4 years continuous service, 7 weeks' pay; 4 years continuous service and over, 8 weeks' pay.

\(^6\) Of course, extensive consultation requirements remain within most awards of the Industrial Relations Commission of New South Wales.
instances where an employer decides to terminate the employment of fifteen or more employees. Accordingly, these provisions apply only to large scale redundancies and do not allow for the establishment of standards, of general application or otherwise, that establish an obligation on employers to consult with employees and their unions about other forms of organisational change which may have significant effects on employees. Securing and enforcing extensive consultative arrangements regarding workplace change through certified agreements should become of increasing importance to Australian unions.

While there has been a diminution in direct prescriptions regarding consultation, the provision of information and an opportunity to discuss proposed redundancies with employees and their unions remains a well established industrial convention. An employer's failure to follow this convention may become a basis for determining that the termination of employment was harsh, unjust or unreasonable, and provide an employee with grounds for making a successful unfair dismissal application.

The TCR convention of providing an opportunity for consultation during periods of change which may result in termination of employment, particularly in non-unionised or poorly-unionised workplaces, appears to have historically been honored more often in the breach. This is probably because employers tend to be suspicious of the adverse effects that early notice of redundancies will have on workplace efficiency. Also, the failure to observe these requirements may be due to the fact that the risk of a tribunal ordering the reinstatement of a retrenched employee appears to be very low, due to the understanding that it is impracticable to award reinstatement in such cases. While in rare cases employers have been ordered to reinstate or re-employ retrenched employees, there appear to be no recent unfair dismissal cases where an employer's failure to consult was considered by a tribunal to constitute grounds to both determine that the termination was unfair, and to remedy the unfairness by granting an order of re-employment.

More commonly, a failure to consult with employees about change will result in an award of compensation against the employer. An example of this occurred in the Simplot case. This case dealt with a decision by Simplot to outsource the engagement of electrical maintenance employees to a labour hire firm. Under the labour hire agreement between Simplot and the labour hire agency, Simplot terminated the employees' service and the employees were re-engaged by the labour hire firm.

The employer did not inform either the relevant unions or the employees likely to be affected about these proposals. There was no evidence that either the unions or the employees knew anything about the outsourcing until the terminations occurred. The evidence of the employees was that they were told that if they did not accept employment with the labour hire agent immediately, they would be treated as having abandoned their employment. Ryan JR expressed the view that the evidence was overwhelming in relation to the lack of consultation with the applicants and the union, and further, that this was undoubtedly a case in which consultation was required. Accordingly, the employees were awarded an amount of compensation of approximately $5,500 each, ostensibly for the employer's failure to consult.

Stones & Ors & CEPU v Simplot Australia Pty Ltd, Industrial Relations Court of Australia, Ryan JR, 30 June 1997.
The risk of a finding of unfair dismissal for failure to consult increases significantly in cases of downsizing where an employer chooses certain employees for retention in preference to other employees performing the same or similar tasks. In many such cases, an employer's decision to select a person for redundancy will involve an assessment by the employer of the competence or capacity of the employees. In such circumstances, there is a very strong presumption that the employer's failure to provide each employee with an opportunity to respond to the allegations of incompetence or incapacity upon which the employer has relied will be harsh, unjust or unreasonable. A similar risk arises where positions are restructured and the employer selects some persons for redundancy and offers new positions in the restructured organisation to other employees, without providing all employees with an opportunity to apply for the positions in the restructured organisation.

**Severance Entitlements**

In relation to severance entitlements in certified agreements, it is not uncommon to find fairly significant derivations from the TCR cases standards. This is particularly the case in relation to the requirement to make severance payments on termination due to redundancy. It is notable that the requirement to pay severance created by the TCR cases, and generally continued in simplified awards, is subject to several significant qualifications. First, in the case of award-based severance entitlements, an employer is able to make an application to the Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for an employee. Second, an employer can make an application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay. Third, where an employee's employment is transferred to an incoming employer or to a related company, no obligation to provide severance pay arises. Fourth, the requirement to pay severance excludes casuals and persons whose employment was terminated as part of the ordinary and customary turnover of labour, including those on fixed term contracts. Often the redundancy provisions of certified agreements do not expressly allow for these exclusions.

Arguably, where an entitlement to severance pay in a certified agreement or a contract has not adopted the standard exclusions in the TCR cases, employees can successfully claim severance payments on termination in circumstances where they would not be able to under awards: such as where the employer has obtained acceptable alternative employment for the employees; or the employees are to be re-engaged by a successor to the first employer's business or by a related company. This question does not appear to have been judicially tested. I would submit however that each case would need to be examined on its own by reference to the scope and proper construction of the certified agreement's redundancy provision and through an examination of the interrelationship between the agreement and the award. Similar issues also often arise where non-award employees have been given an entitlement to severance payments by contract; it is rare in my experience to find contractual severance entitlements drafted in a manner which contains the same exclusions as the TCR cases provided. Again, the drafting and interpretation of such clauses require great care.

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8 See particularly the decision of the Full Bench of the AIRC in Windsor Smith v Liu (1998) 44 AILR [3-858].
9 For example, see Bird v Florence Nightingale Rehabilitation Centre, AIRC, Gay C, 24 December 1998.
Accordingly, labour lawyers and industrial relations practitioners need to avoid relying on common understandings of the operation of redundancy provisions when advising employers about the application of severance arrangements in such circumstances.

Many certified agreements and unregistered industrial agreements provide for entitlements which are significantly in excess of the general award standards. A common standard is 3 weeks per year of service.

In many cases, employers adopt different standards for award employees and non-award employees. This approach is however fraught with risk, as a recent decision of the AIRC illustrates. In *Alkenmade & Ors v SERCO Gas Services (Vic) Pty Ltd* Holmes C held that four white collar workers, who received less redundancy pay than blue collar workers, were terminated in a manner that was harsh, unjust or unreasonable. The applicants, all white collar workers, were employees of the Gas and Fuel Corporation (GASCOR) for some time prior to 1996. In 1996, GASCOR contracted out maintenance work to SERCO and the applicants chose to take up employment with this company. The employees were informed at the time by SERCO that they would forego any entitlements to redundancy packages that GASCOR made available to its employees and would only be entitled to four weeks pay in the event of a redundancy. Due to a reallocation of boundaries between the two entities, the four applicants were made redundant in November 1997. They claimed that their termination was unfair for a number of reasons including the fact that severance payments made to them were significantly inferior to those provided to blue collar workers. In relation to the blue collar workers, GASCOR had instructed SERCO to pay two weeks for every year of service, including prior service ‘with GASCOR. Those payments had been funded in part by GASCOR. SERCO made a number of representations to GASCOR seeking additional funds to pay comparable benefits to white collar workers, but GASCOR refused such funding. During the proceedings, SERCO argued that there was no requirement for an employer, when making employees redundant, to provide or utilise the same formula for redundancy payments applied to other employees. Nonetheless, the Commission found that there was clearly a standard of two weeks for every year of service within the gas industry as this was the amount paid to some 100 blue collar workers who had also been made redundant. The fact that the applicants were not provided the same payment as blue collar workers meant that the applicants were not treated equitably or given a fair go all round.

"Unlawful" termination

Most disputes regarding redundancy are dealt with either by collective negotiation or by applications from retrenched employees, or their unions on their behalf, for remedies in relation to unfair dismissal. Nonetheless, the conduct of redundancies, particularly in relation to the selection of employees for termination, has increasingly become a minefield of interconnected legal issues beyond awards, agreements and unfair dismissal applications.

For instance, it is well established that the criterion used to determine whether an employee is dismissed or not may easily become tainted by a form of discrimination proscribed by state or federal anti-discriminations laws. This proposition was, of course, confirmed by the High Court as far back as 1989 in *Australian Iron and Steel Pty Limited v Banovic* in relation to the

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10 AIRC, Holmes C, 21 January 1999, Print R0909
unlawful discriminatory impact on women of the last-on, first-off rule. Similar arguments may also apply in relation to selection criteria which has an unlawfully differential impact on persons because of their age, pregnancy or disability.

In addition, caution must be exercised to ensure that the reason why a person was selected for redundancy was reason prohibited by section 170CK(2) of the Workplace Relations Act 1996 (Cth). Prohibited reasons for termination in section 170CK(2) include, but are not limited to, a person's temporary absence from work because of illness or injury, trade union membership or non-membership, a person's activities in the capacity of a representative of employees, or their absence from work during parental leave.

As illustrated in last year's maritime dispute, Part XA of the Workplace Relations Act 1996 (Cth), which protects freedom of association, has also become a basis for challenging employers' decisions to retrench.

Under section 298K of the Workplace Relations Act 1996 (Cth) an employer must not, for a "prohibited reason", dismiss, injure, alter the position of, or refuse to employ an employee. A breach of section 298K may result in a penalty of up to $10,000.00 in the case of a body corporate and up to $2,000.00 in other cases. A court can also issue an injunction to restrain a contravention. An employee dismissed because of involvement or potential involvement in protected action can be reinstated and compensated by a Court.

In Patrick Stevedores Operations No 2 Pty Ltd & Ors v Maritime Union of Australia & Ors, the High Court upheld a decision by North J of the Federal Court to impose an injunction against Patricks Stevedores and other parties which prevented Patricks Stevedores No 2 Pty Ltd terminating labour hire agreements. The Maritime Union of Australia successfully demonstrated a prima facie case that labour hire agreements between Patricks Stevedores and related corporations had been terminated in order to terminate the employment of MUA members.

Another application of this approach, and one which may have a far broader impact than the Patricks Stevedores case, relates to section 298L(I)(h). This section which provides that a prohibited reason for the purpose of section 298K is "because the employee... is entitled to the benefit of an industrial instrument." In Australian Services Union and Phillips v Greater Dandenong City Council and Anor, a case which is currently before the Federal Court, the Australian Services Union arguing that the Greater Dandenong City Council breached the Workplace Relations Act 1996 (Cth) in the course of outsourcing a portion of its operations. It appears that a bid was submitted by an in-house group of employees as well as another company whose employees are be covered by an award that provides lower hourly rates than the award that covered the Council's employees. The third party's bid was chosen, in part, because it came in at a lower price, presumably because of its lower labour costs. The in-house employees were to be dismissed on the basis of redundancy.

11 (1989) 168 CLR 165
12 (1998) 153 ALR 643
13 Federal Court, V248 of 1999
The ASU has filed an application for an injunction to prevent the in-house employees from being dismissed. They claim that the tender was in breach of section 298K and 298L(I)(i) ill that the employees are being injured because they are entitled to benefits of an industrial instrument. A decision in relation to this application is excepted shortly.

A further illustration of this approach occurred in 1998 in Australasian Meat Industry Employees' Union & Ors v. Rashad Basha Aziz & Ors. In this case, Marshall J granted an injunction against a group of related companies, preventing them from terminating the employment of a group of workers who had claims for back-pay.

In May 1998 the union commenced proceedings against the ostensible employers of the employees for failure to pay wages. Less than two weeks after the court decision the employing companies were placed into voluntary administration. The administrator then sought to terminate the employees' employment on the grounds of the insolvency of the employers. The employees were denied severance and redundancy pay.

There was evidence that steps were taken to recruit the new employees to staff the abattoir. This gave rise to an application for interlocutory relief filed by the union and the dismissed employees. Marshall J found that the employers, and "[their] corporate emanations attempted to deprive the workers at the abattoir of their right to receive the quantum of payments due to them under the enterprise agreement by ensuring that the employing companies ... would not be in a financial position to pay the workers their correct entitlements."

In relation to the recruitment, Marshall J held that "it is not unreasonable to infer that a purpose for such recruitment is to replace the workforce terminated, as the evidence now stands, unlawfully and in particular in breach of section 298K(I)(b) and (c) of the Act on account of the prohibited reason referred to in section 298L(I)(h) of the Act."

An order was made that required the employers not to acquire from any person, other than the former employees, the services of meat-workers of the kind that were previously supplied to the abattoir by the applicants. In addition, Marshall J ordered that the respondents were not to dispose of their assets, other than in the normal course of business and that the employees were to be re-engaged on their prior conditions of employment.

**Concluding remarks**

This brief review of legal issues relating to redundancy typifies one of the great paradoxes of contemporary industrial relations in this country. That is, despite (or, perhaps because of) the efforts made by governments to streamline industrial regulation to facilitate efficiency and other alleged public policy imperatives, the complexity of laws regulating the relationship between employees and organisations appears to grow unabated. Whether the interests of employees, business and the community at large are better served by the current laws than they were by an award-based system of regulation typified by certainty and uniformity, remains an issue which must, however, be left to another forum.

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EMPLOYEE'S ENTITLEMENTS: THE TRANSFER OF OBLIGATIONS UNDER AWARDS AND AGREEMENTS FOR RESTRUCTURED ORGANISATIONS

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Introduction

Section 149(1)(d) of the Workplace Relations Act 1996 (Cth) ("the WR Act") is a section of fundamental importance to those employers and employees who fall within the ambit of federal industrial relations regulation. This section underpins the system of awards which regulate the terms and conditions of employees within the federal sphere by providing a mechanism through which awards continue to have effect notwithstanding the fact that an employer bound by the award transfers all or part of its business to an entity which was not initially bound by the award.

Section 149(1)(d) provides:

(1) Subject to an 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 industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer.

Section 149(1)(d) is specifically aimed at ensuring that awards\(^1\) remain binding on successors, assignees and transmitters. In addition, the WR Act also contains similar provisions with respect to the binding effect of certified agreements (s 170MB) and Australian Workplace Agreements ("AWAs") (s 170VS.)

Section 170MB provides:

(1) If:

(a) an employer is bound by a certified agreement; and

\(^1\) An award is defined in section 4 of the WR Act to mean:

an award or order that has been reduced to writing under subsection 143(1), but does not include an order made by the Commission in a proceeding under Subdivision B of Division 3 of Part VIA.
(b) the application for certification of the agreement stated that it was made under Division 3; and
(c) at a later time, a new employer becomes the successor, transmitee or assignee (whether immediate or not) of the whole or a part of the business concerned;

then, from the later time:

(d) the new employer is bound by the certified agreement, to the extent that it relates to the whole or a part of the business; and
(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 in this Part to the employer includes a reference to the previous employer, to the extent that the context relates to the whole or the part of the business.

(2) If:

(a) an employer is bound by a certified agreement; and
(b) the application for certification of the agreement stated that it was made under Division 2; and
(c) at a later time, a new employer that is a constitutional corporation or the Commonwealth becomes the successor, transmitee or assignee (whether immediate or not) of the whole or a part of the business concerned;
(d) then the new employer is bound by the certified agreement, to the extent that it relates to the whole or the part of the business; and

then, from the later time:

(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 in this Part 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.

(3) This section does not affect the rights and obligations of the previous employer that arose before the later time.

Section 170VS provides:

(1) If:

(a) an employee who is a party to an AWA becomes an employee of a new employer because the new employer is a successor to the whole or any part of the previous employer's business or undertaking; and
(b) at the succession at least one of the following applies:
(i) the new employer is a constitutional corporation;
(ii) the new employer is the Commonwealth;
(iii) the employee’s primary workplace is in a Territory;
(iv) the new employer is a waterside employer, the employee is a waterside worker and the employee’s employment is in connection with constitutional trade or commerce;
(v) the employee is a flight crew officer and the employee’s employment is in connection with constitutional trade or commerce;

then the new employer replace the previous employer as a party to the AWA from the succession time.

(2) The succession does not affect the rights and obligations of the previous employer that arose before the succession.

(3) In this section:

"successor" means a successor, transmittee or assignee.

For the purposes of this paper the primary focus will be on the interpretation and application of s 149(1)(d) however references will be made to ss 170MB and 170VS.

History

In order to properly understand why s 149(1)(d) and its predecessors have been so fundamental to the maintenance of the system of conciliation and arbitration in Australia it is necessary to retrace part of the history of the conciliation and arbitration process. One needs to go back in time approximately ninety years ago to 15 June 1909 when Mr Arthur Long, the Secretary of the Australian Boot Trade Employes Federation ("the Federation") served a log of claims on employers in various states of Australia. This log of claims made a number of demands in relation to the wages and terms and conditions of employees in the boot, shoe and slipper manufacturing industry and advised that if the demands were not accepted, the Federation would refer the matter to the (then) Commonwealth Court of Conciliation and Arbitration ("the Court") for the purposes of a hearing and determination.2

Unsurprisingly, the log of claims was rejected and, following arbitration, the Court made an award. Shortly thereafter, on 16 September 1910, the Federation applied to the Court pursuant to s 38 of the Commonwealth Conciliation and Arbitration Act 1904 (Cth) ("the

2 See in particular R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co. (1910) 11 CLR 1 at 4 - 5.
for the award to be declared a common rule award\(^4\) of the boot, shoe and slipper industry within New South Wales, Victoria, South Australia, Queensland and Tasmania.

The Federation's application led to a case being stated to the High Court (\textit{The Australian Boot Trade Employés Federation v Whybrow & Co and Others}\(^5\)) on the question of whether s 51(\textit{xxxv}) of the Constitution provided the Commonwealth Parliament with the power to legislate for the making of common rule awards. The Justices of the High Court\(^6\), although each publishing separate reasons for judgment, were unanimously of the view that s 38(f) of the \textit{C&A Act} was ultra vires and that s 51(\textit{xxxv}) of the Constitution did not provide the Commonwealth Parliament with a general power to regulate industry.

In the absence of a legislative response the \textit{Whybrow} decision had the potential to severely inhibit the Commonwealth Parliament's conciliation and arbitration system. If the Court could not make common rule awards which were binding on all employers and employees the beneficial and protective nature of the conciliation and arbitration system would have been rendered nugatory as employers could avoid the obligations imposed upon them by the award system by simply transferring their businesses to entities which were not a party to the initial industrial dispute.

In 1914 the Commonwealth Parliament sought to rectify this anomaly by inserting s 29(ba) into the \textit{C&A Act}. Section 29(ba) provided:

The award of the Court shall be binding on:

\[\text{(ba) in the case of employers, any successor, or any assignee or transmittestee of the business of a party bound by the award, including any corporation which has acquired or taken over the business of such a party.}\]

\(^3\) Section 38(f) of the \textit{Commonwealth Conciliation and Arbitration Act} 1904 (Cth) purported to authorise the Court:

\[\text{to declare by any award or order that any practice, regulation, rule, custom, term of agreement, condition of employment or dealing whatsoever determined by an award in relation to any industrial matter shall be a common rule of any industry in connection with which the dispute [ie. the dispute which gives rise to the award] arises.}\]

\(^4\) A common rule award is one which applies to all employers and employees engaged in the industries and/or occupations to which the award relates.

\(^5\) (1910) 11 CLR 311.
The scope of section 29(ba) was first tested in the High Court in *The Proprietors of the Daily News Limited v The Australian Journalists' Association*. In *Daily News* the High Court was evenly split over the proper interpretation of s 29(ba). Knox CJ, Gavan Duffy and Starke JJ held that the language of s 29(ba) implied the existence of an award in the first place, and a succession following upon the operation of the award. As such in the circumstances of *Daily News* a company which, before the making of an award had taken over the business of certain persons who, in respect of that business, were parties to proceedings in which the award was afterwards made and who became bound by it, was not itself bound by the award.

Justices Isaacs, Higgins and Rich dissented on the interpretation of s 29(ba) with Higgins J in particular holding that there was no basis in the words used for restricting the applicability of s 29(ba) to the case of an assignment which occurred after the making of the award. Notwithstanding this opinion as the High Court was evenly divided, the views expressed by Knox CJ prevailed to the effect that s 29(ba) was interpreted as not extending to a succession before an award was made.

Following the *Daily News* decision the High Court was again called upon to construe s 29(ba), however this time in the context of its inter-relationship with s 24(1) of the *C&A Act*. Section 24(1) provided:

If an agreement between all or any of the parties as to the whole or any part of the dispute is arrived at, a memorandum of its terms when so certified shall be filed in the office of the Registrar, and unless otherwise ordered the subject as may be directed by the Court shall, as between the parties to the agreement, have the same effect as, and be deemed to be, an award for all purposes.

In *Carter v E W Roach & J B Milton Proprietary Limited* the majority of the High Court held that s 24(1) did no more than provide that the terms of an agreement to which the section related were binding on the parties to it, to the same extent, and enforceable against them in the same way, as if those terms had been terms of an award instead of terms of an agreement. The majority went on to hold that s 29(ba) did not apply to such an industrial agreement

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6 Griffith CJ, Barton, O'Connor, Isaacs and Higgins JJ.
7 (1920) 27 CLR 532.
8 (1921) 29 CLR 515
(notwithstanding the fact that the s 24 specifically provided that industrial agreements were to "have the same effect as, and be deemed to be, an award for all purposes.")

The Daily News and Carter decisions pointed to a number of anomalies in the manner in which the C&A Act sought to ensure that the terms and conditions of industrial awards or agreements continued to be binding following the succession, assignment or transmission of a business. First, Daily News held that s 29(ba) did not apply to circumstances where a succession occurred before the award was made. Secondly, Carter held that s 29(ba) did not apply to industrial agreements (as opposed to awards per se). In 1921 the Commonwealth Parliament further amended the C&A Act in an attempt to address these deficiencies. In this respect s 24(1) was amended by adding the words "or any successors, or any assignee or transmee of the business of a party bound by the agreement, including any corporation which has acquired or taken over the business of such party" after the words "parties to the agreement". As such s 24(1) read:

If an agreement between all or any of the parties as to the whole or any part of the dispute is arrived at, a memorandum of its terms when so certified shall be filed in the office of the Registrar, and unless otherwise ordered the subject as may be directed by the Court shall, as between the parties to the agreement or any successors, or any assignee or transmee of the business of a party bound by the agreement, including any corporation which has acquired or taken over the business of such party, have the same effect as, and be deemed to be, an award for all purposes. (emphasis added)

Furthermore the words "of a party to a dispute" were inserted into s 29(ba) so that it provided:

The award of the Court shall be binding on:

... (ba) in the case of employers, any successor, or any assignee or transmee of the business of a party to a dispute bound by the award, including any corporation which has acquired or taken over the business of such a party. (emphasis added)

Within two years of these amendments being made a constitutional challenge was brought to test the validity of s 24(1). In George Hudson Limited v The Australian Timber Workers' Union\(^\text{10}\) the appellant argued, inter alia, that the above mentioned amendment to s 24(1) of the

\(^\text{10}\) (1923) 32 CLR 413.
was beyond the power conferred on the Commonwealth Parliament by ss 51(xxxv) and (xxxix) of the Constitution in that it purported to impose a liability on persons who were not a party to the dispute or the agreement. Furthermore, it was argued that if the Commonwealth Parliament was attempting to bind persons, not because they were parties to a dispute, but because they were engaged in an industry, then that attempt was beyond the Commonwealth Parliament’s powers and was not incidental to the power conferred by s 51(xxxv).

The High Court rejected these arguments and held that s 24(1) as amended was within the power of the Commonwealth Parliament by virtue of ss 51(xxxv) and 51(xxxix). However it is important to note that the High Court reached this conclusion on at least two differing bases, which Punch and Irving have termed “the traditional view” and the “Isaac’s view”.

The traditional view suggests that s 24(1) and, by analogy s 29(ba), are constitutionally valid because they represent an exercise of the Commonwealth Parliament’s incidental powers under ss 51(xxxv) and 51(xxxix) of the Constitution. In the absence of such a section “the whole fabric of the constitutional power may be, and in actual practice must be, utterly ineffective and useless”. In this respect Higgins J in *George Hudson* held:

Now, under the scheme which Parliament had adopted for conciliation and arbitration, the primary duty of the President of the Court is to secure agreement between the disputing parties; and not only to make a compulsory award when an agreement cannot be secured ... But nothing would be so likely as to prevent agreement as the knowledge, on the part of the unions, that the employer could get rid at any time of his obligations under it by assigning his business - even by assigning it to a new company having the same shareholders holding shares in the same proportions as in the former company. It is only by some such provision as the present that the agreement - or the award - can be made effective. In my opinion the provision that assignees of the business shall be bound is “incidental” to the power to make laws for conciliation and arbitration; just as a provision that executors of a party to the dispute should be bound would be “incidental” to that power.  

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11 Isaacs, Higgins and Starke JJ (Knox CJ and Gavan Duffy dissenting).
13 *George Hudson*, above, n 10, at 438.
14 *Id*, at 450 - 451. See also Starke J at 455:

The constitutional power is not so weak, in my opinion, that it is limited to the settlement of an industrial disturbance between the actual participators therein. If so limited, the power would be practically ineffective: in industrial disturbances are to be settled or prevented, then the power must extended to the ever changing body of persons within the area of such disturbances.
On the other hand, the Isaacs view holds that ss 24(1) and 29(ba) were constitutionally valid because they bound those who were in fact parties to an industrial dispute. To this extent Isaacs J, following a discussion of the importance of the C&A Act in the promotion of the welfare of the nation, held:

In the present instance Parliament has thought it expedient, in order to prevent injustice or even a defeat of the scheme of industrial peace intended by the statute, to enact that the employees rights shall not be disturbed by the mere fact that the owner of the business happens to be another individual. ... In my opinion it was not ultra vires of Parliament to enact that the new company should be bound by the obligations of the business. If it was not, neither can new employees in a business, though members of the same organization, be bound or benefited by an award; and the whole fabric of the constitutional power may be, and in actual practice must be, utterly ineffective and useless.\footnote{15}

Isaacs J went on to hold:

The very nature of an “industrial dispute,” as distinguished from an individual dispute, is to obtain new industrial conditions, not merely for the specific individuals then working for the specific individuals then employing them, and not for the moment only, but for the class of employees from the class of employers limited by the ambit of disturbance or dislocation of public services which has arisen if the demand were not acceded to and observed for a period really indefinite. The concept looks entirely beyond the individuals who are actually fighting the battle. It is a battle by the claimants, not for themselves alone and not as against the respondents alone, but by the claimants so far as they represent their class, against the respondents so far as they represent their class. “Successors” in the employer’s business are in exactly the same position as “successors” in Yzquierdo’s Case [(1902) AC 524 at 530].\footnote{16}

The Isaacs view suggests that a successor is made a party to the dispute and a party bound by the award.\footnote{17} Furthermore, it seeks to overcome the constitutional barrier created by Whybrow by holding that ss 24(1) and 29(ba) do not in reality add new parties to the dispute, although they may do so superficially, but even so this superficial extension does not contravene Whybrow. In this respect Isaacs J held:

It is true that it was held that an award can only be made as between the formal disputants; and this is right because they necessarily delimit the area of the dispute, and therefore an enactment which assumed to give power to make an award as to persons outside the area, that is, as between persons other than the formal disputants, was invalid, because inherently inconsistent with arbitration. But while the award can only be made as between formal disputants, it no more follows that the subject matter of their dispute is limited to them

\footnote{15 Id, at 438.}{\footnote{16 Id, at 441.}{\footnote{17 Punch and Irving, above, n 12, p 80,044.}}}
personally than it follows that a contract is necessarily limited at common law to the persons actually entering into the contract. The judgment of Lord Halsbury L.C. in Don Jose Ramos Yzquierdo y Castaneda v Clydebank Engineering and Shipbuilding Co. [(1902) AC 524 at 530] is instructive as to this, with respect to "successors".\(^{18}\)

Having been found to be constitutionally valid there was from the 1920's to 1988 a period in which there was little judicial scrutiny of the above mentioned provisions. Whilst there were a number of minor amendments made to these provisions\(^{19}\) they remained largely unaltered until the repeal of the *C&A Act* and its replacement by the *Industrial Relations Act 1988* (Cth) ("the IR Act").

**The IR Act**

The enactment of the *IR Act* brought with it a number of significant reforms to federal industrial laws. For present purposes the most important of these reforms was the re-drafting of what had become s 61(d) of the *C&A Act*. The old s 61(d) became s 149(1)(d) of the *IR Act*, the terms of which provided:

(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 an industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer.

The re-formulated s 149(1)(d) was different from its predecessor provisions in four material respect, the effect of which has been conveniently summarised by Creighton:

- None of the previous transmission provisions were stated to be subject to order of the Commission.
- The reference to successors, assignees or transmitters "whether immediate or not" was intended to remove doubts as to whether the former provision applied to successors to successors - the new wording meant that if Alpha was a party to an industrial dispute, and transferred its business to Beta, then an award in settlement of that dispute would

\(^{18}\) *George Hudson*, above, n 10, at 439.

\(^{19}\) In 1947 s 29(ba) was renumbered as s 50(d) of the *C&A Act*. In 1956 it was then renumbered s 61(d) of the *C&A Act*. 
become binding upon Beta as a transferee of Alpha’s business. It would also be binding upon Gamma if Beta subsequently transferred the business to Gamma.

- It was now clear that transmission of part of a business would suffice to make any relevant award which was binding upon an transmitter binding upon the transmitee of part of a business.

- The words “or of a party bound by the award” in the former provision were deleted. This meant that awards no longer transmitted where the transmitter was bound by an award but was not a party to the dispute in settlement of which the award was made...

When the WR Act was enacted the provisions of s 149(1)(d) of the IR Act were fully incorporated into the new legislation.

Construing s 149(1)(d)

Before one can begin to analyse the constituent elements of s 149(1)(d) it must be appreciated that the section, being part of a beneficial legislative regime, is to be given a meaning which provides for the fullest relief which a fair meaning of its language will allow. As such, in interpreting s 149(1)(d) courts have favoured an approach to construction such that that employers do not “avoid the settled rights of employees.” In this respect Higgins J has held:

The meaning should be accepted which furthers a main object of the provision, the meaning which prevents evasion of any obligation which may be created by the award.

“Subject to an order of the Commission”

As noted above, these prefatory words were included into s 149(1)(d) for the first time in the IR Act and have the effect of providing an opportunity for a party to seek an order from the Australian Industrial Relations Commission (“the Commission”) that, notwithstanding the fact that there has been a succession, transmission or assignment of a business or part thereof,

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21 As to the beneficial mode of construing legislation see Bull v Attorney General (NSW) (1913) 17 CLR 370 at 384 per Isaacs J.
22 See in particular George Hudson, above, n 10, at 435 - 436.
23 Daily News, above, n 7, at 545. See also ACTEW Corporation Ltd v Media, Arts and Entertainment Alliance (unreported, Industrial Relations Court of Australia, Matter No AI 1004 of 1997, 7 August 1997) where Moore J held (at 7) “in my opinion whether there has been a succession, transmission or assignment of a business should not be approached on some narrow basis”, and Finance Sector Union of Australia v PP Consultants Pty Ltd (unreported, Federal Court of Australia, NG 994 of 1998, 12 May 1999, Mathews J at 8).
24 Interestingly s 170MB in relation to certified agreements and s 170VS in relation to AWAs do not have the same qualification.
the underlying award provisions should not become binding on the successor, assignee or transmittee.

In my opinion such an order would more likely than not be sought in circumstances where it could be shown that the underlying award was only intended to apply to the specific circumstances of the transmittor’s business either because of particular economic or other specific circumstances. In such a case it is suggested that there would be a positive onus on the successor, assignee or transmittee to show that it is inappropriate for the award to bind it upon transmission. Furthermore, given the inherently protective nature of s 149(1)(d) it is difficult to conceive of a circumstance in which the Commission would, in the absence of the consent of the parties bound by the award, be prepared to grant such an order if the resultant effect was that the terms and conditions of employment of the employees the subject of the award were adversely affected.

To date I am not aware of a circumstances in which a party has successfully sought such relief from the Commission. However, a recent decision of the Federal Court in *Health Services Union of Australia v North Eastern Health Care Network and Another*25 has indicated that even in circumstances where an award is tailored to meet the circumstances of a particular employer, this does not of itself provide a basis for finding that the award should not be applied to a successor, assignee or transmittee of that employer.

The decision in *HSUA* is of considerable import and for that reason it is worth briefly setting out its factual background. In 1994 the Victorian Government sought expressions of interest to take over from the Department of Health and Community Services the delivery of mental health services in specified regions. At the time that these expressions of interest were sought members of the applicant union were employed by the State of Victoria to provide mental health services. The terms and conditions of employment of these employees were governed by two awards, the *Health and Community Services (Nursing, Health Care and Associated Groups) Interim Award 1994*, and the *Victorian Health and Community Services (Psychiatric, Disability and Alcohol and Drug Services) Award 1995*. In March and July 1995 proclamations were made under s 94(2) of the *Mental Health Act 1986* (Vic) that the first and second respondents were approved psychiatric units and as such the units began to receive

patients who had previously been treated under the auspices of the Department of Health and Community Services.

The questions which arose for determination in HSUA were, inter alia:

1. whether the provision of mental health services by the State of Victoria constituted “part of a business” of the State within the meaning of s 149(1)(d) of the WR Act;

2. whether the activities of a State consisting in the employment of persons and the provision of services to the public ceased to be a “business” because these activities were not generally conducted for profit;

3. whether there had been a transmission of the business of the State of Victoria to each of the respondents within the meaning of s 149(1)(d);

4. whether there was anything associated with the making of the 1994 and the 1995 awards which would indicate that the Commission had intended to exclude the operation of s 149(1)(d); and

5. what is connoted by the term “business”.

In summary Marshall J answered the first and third of these questions in the affirmative and answered the second and fourth in the negative. There was also some discussion of the fifth question, but that will be the subject of comment in a later part of this paper.

With respect to the question 4 it was submitted by the respondents that the Commission had ordered that the 1994 Award was not one which transmitted. Counsel for the respondents argued that the 1994 Award was intended to apply only to the State of Victoria and that it was “an award peculiar and unique to the Victorian Public Service.”

This argument was expressly rejected by Marshall J who held:

I do not consider that an award tailored to meet the circumstances of employment of employees by a particular employer cannot apply to another employer upon the transmission of part of the business of the first employer to the second. I do not accept that in the making of an employer specific award the Commission should be considered to have made an order
ousting the effect of s 149(1)(d) of the Act. It will not often be known with any certainty when an award is made whether an employer bound by it will transmit part of its business to another entity. If the other entity finds the previous award unsuitable to its business, it is open to it to apply to the Commission to have the award varied or set aside insofar as it applies to it. If it was the intention of the Commission in making the 1994 Award it would have been an easy task for it to provide that s 149(1)(d) of the Act did not apply by adding a provision which had that effect. No such clause found its way into the 1994 Award.

I find that, in making the 1994 Award on 15 August 1994, the Commission did not intent to oust the operation of s 149(1)(d) of the Act.26

Marshall J went on to hold, for largely similar reasons to those identified in the above mentioned quote, that the Commission did not order that s 149(1)(d) of the WR Act had no application to the 1995 Award.27

Requirements for a succession, assignment or transmission

(a) The requirement of privity

It has been suggested that the mere fact that an employer is carrying on the same type of business, in the same premises, and perhaps under the same name, as the person whose successor he or she is alleged to be, does not establish a successorship.28 In this respect there is a requirement that there be some definite legal nexus or privity between the transmittor and the transmittee. An early illustration of this proposition is to be found in the decision of Bansgrove v Ward and Syred.29

In Bansgrove the plaintiff was an employee of the defendants. Prior to commencing employment with the defendants the plaintiff had been an employee of Messrs Bernard and Leo Grogan. The Grogans carried on the business of a continuous picture theatre known as Australian Picture Palace and in so doing were respondents to a federal award. In late September 1930 the Grogans ceased acting in the business and a few days later the defendants took up and continued the same business in the Australian Picture Palace.

26 Id, at 58.
27 Id, at 59 - 60.
29 (1931) AR (NSW) 272.
At first instance the Chief Industrial Magistrate found that the defendants were successors to the business of the Grogans, however on appeal a Full Bench of the New South Wales Industrial Commission ("the State Commission") held that there had been no succession, relying on the uncontroverted evidence of one of the defendants to the effect that "I had no dealings with Mr Grogan". In reaching this conclusion the Full Bench held that in order for there to be a successorship:

there must be some definite legal nexus or privity between a respondent to the Federal award who is the predecessor, and a successor who then, by virtue of the Commonwealth statute, becomes bound by the award. The existence of that nexus or privity must be evidenced either by direct proof of a transaction or by facts from which the conclusion may be drawn from some transference of a right to the business from the predecessor to the successor.\(^\text{30}\)

The Bansgrove decision is significant in that suggests that in the absence of privity there can be no transmission of the business (and the underlying award entitlements). A case which further illustrates this proposition is Meat and Allied Trades Federation of Australia v Australasian Meat Industry Employees Union.\(^\text{31}\) The Meat and Allied Trades case raised the question of whether there could be a transmission in circumstances where the original entity was wound up and consequently ceased trading for a period of time. In or about 25 July 1989 a company known as Australian Select Meat Products Pty Ltd ("the Company") was placed in the hands of a Receiver and Manager. By 21 November 1989, an abattoir which was operated by the Company was closed and all employees (excepting office and security staff) had their employment terminated. Thereafter no further operations were conducted at the abattoir and the Company was wound up by order of the Supreme Court on 19 February 1990. In mid March 1991, the Company (in liquidation) was purchased by Dedix Pty Ltd ("Dedix") and shortly thereafter the abattoir re-commenced operations under the management of an entity known as St George Meat Pty Ltd.

The Commission held that there had not been a transmission of business in the sense referred to in s 149(1)(d):

... acceptance of the proposition that there must be an ongoing concern before a business is caught by s 149(1)(d) is not a necessary precondition to a determination of this matter. What is necessary is that there be a substantial identity of the business of the employer party to the dispute and the business of the employer sought to be bound by the Award through the

\(^{30}\) Id. at 277.

\(^{31}\) (1995) 58 IR 90.
operation of s 149(1)(d). In *Hillman* (at 270) the Court generally accepted that there was no reason to doubt the identity of the business where: “It was carried on in the same place, by the same staff, doing substantially the same work”.

Similarly, evidence that a business was passed as an ongoing concern from one proprietor to another will often be the best means of establishing the identity of the business in the hands of the recipient with that carried out by the former employer party to an industrial dispute. But the identity of one business with another is not established merely by the fact that the business of the later employer is conducted at the same place, even if that employer must use that place for a similar range of work.

It is sufficient for a determination on the facts of this case that from at least 19 February 1990 no business involving St George Abattoir was being conducted by Australian Select Meat Products Pty Ltd. Nor could any such business be conducted in the absence of a decision by the liquidator to recommence trading in liquidation. No such decision was taken. The winding-up order of 19 February 1990 may be taken to have terminated any outstanding contracts of employment and to have discharged all employees. The evidence discloses that all trading activity and employment ceased for a period of at least 12 months from the date of the winding-up order. The subsequent sale of the assets of the abattoir was not associated with a sale or transfer of matters or interests which would indicate that there was a succession to a business, as distinct from a succession to the ownership of the necessary means whereby a business could be carried on. Thus no employment was transferred, and no existing or prospective commercial activity of the kind normally associated with a business was transferred.

In our view there was not a sufficiently substantial identity between the business conducted by Australian Select Meat Products Pty Ltd and that latter conducted by Dedix Pty Ltd for it to be held that the latter is a successor to the business of the former. The fact that Dedix later conducted the same kind of business, at the site acquired from the wound up company, is not by itself sufficient to establish Dedix as the successor of the business of the company that was the employer party to the dispute.32

(b) Determining whether there has been a succession, assignment or transmission

Aside from the requirement of privity there are at least two schools of thought as to the approach to apply in determining whether there has been a succession, assignment or transmission. I shall refer to the first of these schools of thought as the narrow approach, and the second as the broad approach.

(i) The narrow approach

The narrow approach is premised on the assumption that no transmission is deemed to have taken place in circumstances where the transmittee cannot be said to be carrying on the

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32 *ibid*, at 96.
business formerly carried on by the transmittor. An example of a decision which adopts the narrow approach is to be found in Shaw v United Felt Hats Proprietary Limited.\(^{33}\)

The Shaw decision concerned a situation where the respondent took over the hat manufacturing business of two companies ("D Co." and "F Co."), both of which were bound by a federal award. The rates for the finishing of hats at D Co. was higher than that for F Co.\(^{34}\) The appellant was employed by D Co. where he was paid at the higher rate of 5s. per dozen finished hats, and following the take over remained in the employ of the respondent at D Co. until such time as the premises of D Co. were closed down. The appellant was subsequently employed by the respondent at the premises of F Co, where the lower rate of pay was applicable. The appellant claimed he was entitled to be paid at the higher rate of pay.

The High Court rejected the appellant’s contention that s 29(ba) of the C&A Act operated to entitle the appellant to continue to be paid at the higher rate. Higgins J held:

> The criterion is the business; and it appears to me that, unless there is evidence establishing that the business upon which the appellant is employed is the old Denton business [D Co.], it must be assumed that the place is the criterion of the business; and, as he is not working at the Denton Mills but is working at the Fairfield Mills [F Co.], he must be paid at the Fairfield rate. I only say that that is the prima facie test, and I wish to guard myself against deciding that the Denton business could not, under certain circumstances, be proved to have been transferred bodily, without qualification or exception, to Fairfield. But there is no proof of that at all. The result is, in my opinion, that the appeal should be dismissed, and the order nisi discharged.\(^{35}\)

Because of the limited construction which it gave to the operation of s 29(ba) of the C&A Act the Shaw decision has been subject to criticism. In particular Creighton has argued:

> [T]he effect of this decision was that all of the business would have had to be transferred lock stock and barrel to the new location for there to have been a transmission for [the] purposes of the Act. This conclusion is not impelled either by logic or legislation. The respondent had bought both the Denton and Fairfield businesses, and clearly continued to carry on the business of manufacturing hats. It had decided to rationalise the businesses. The fact that it elected to do so by transferring part of the plant, and some of the workforce, to Fairfield did not alter the fact that on a commonsense view it was the successor to the Denton business, and that it continued to carry on that business.\(^{36}\)

\(^{33}\) (1927) 39 CLR 533

\(^{34}\) 5s. per dozen as compared to 4s. 4 4/5d. per dozen

\(^{35}\) Shaw, above, n 33, at 536 - 537.

\(^{36}\) Creighton, above, n 20, at 175.
Given that s 149(1)(d) now expressly refers to the transmission of part of a business it has been suggested that Shaw would now be decided differently. In addition it is questionable whether Shaw can be regarded as good authority in light of the judgment of the High Court in re Australian Industrial Relations Commission and others; Ex parte Australian Transport Officers Federation and others where the High Court held:

The R.T.A. and the P.S.A. submit that a substantial identity between the business formerly carried on by the C.M.T and the business now carried on by the R.T.A must be shown to exist in order to constitute the R.T.A as a successor of the business of the C.M.T. We do not agree that Shaw v United Felt Hats Pty. Ltd [(1927) 39 CLR 533] supports such an absolute proposition. That decision, which related to s. 29(ba) of the Commonwealth Conciliation and Arbitration Act as it then stood, turned on its own facts. The respondent’s notion of substantial identity invites a comparison between the nature of the business as it was formerly carried on and the nature of the business now carried on by the new entity with a view to ascertaining an identity between the two. According to the natural reading of the language of the successor clause, the inquiry should be directed to ascertaining whether the business or the activities formerly carried on by the … [transmitter] are still carried on by the … [transmittee], notwithstanding that the … [transmittee] also carries on one or more other substantial activities… Accordingly, … the ultimate issue is whether there is a substantial identity between the old activities and those now carried on by the … [transmittee] which correspond with the old activities. (emphasis added)

In ATOF the High Court adopted a broad approach to the question of successorship by determining that the primary focus of any inquiry into successorship is the question of whether there is a substantial identity between the activities carried on by the transmittee and those formerly carried on by the transmitter. Whilst it is conceded that the question which

37 Ibid.
39 Id, at 229 - 230.
40 In applying this test see in particular the decision of Marshall J in HSUA, above, n 25, at 57:
   It is beyond dispute that there was a substantial identity between the old activities carried on by the State in the provision of adult mental health services for the Central East area immediately prior to 18 April 1995 and the provision of those services by PANCH on 18 April 1995.

Immediately prior to 18 April 1995 persons requiring adult inpatient mental health services from the Central East catchment area were cared for at North Ward 5 at NEMPS. On 18 April 1995 those patients and the large bulk of the staff who provided those services from that day were transferred to Upton House. I accept the evidence of Ms Sainsbery and Mr Lucas that, after 18 April 1995, the Department no longer provided any services out of NEMPS in relation to adult mental health services for the Central East catchment area and that those services were provided by PANCH and, from August 1995, by North Eastern. As well as the transfer of employees, equipment, assets and medical records
fell to be determined in *ATOF* concerned the construction of a successor provision in the eligibility rules of a trade union, and not the specific terms of s 149(1)(d), it is my opinion that the approach adopted by the High Court in *ATOF* is one which readily lends itself to the proper interpretation of s 149(1)(d). In this respect it is to be noted that in *Australian Federation of Air Pilots v Skywest Airlines Pty Ltd* Marshall J held:

Mr Parry submitted that the Court should pay little regard to the decision in *ATOF* because it concerned the interpretation of an eligibility rule. I reject this submission. It is well established that eligibility rules should ordinarily be construed generously. See for example, *Re Anti-Cancer Council; Ex parte State Public Service Federation* (1992) 175 CLR 442, 448. However, there is no indication in *ATOF* that the Court approached the meaning of the relevant rule in any special way because it was considering an eligibility rule. I agree, with respect, with the views of the Full Bench of the Australian Industrial Relations Commission ("the Commission") in *Meat and Allied Trades Federation of Australia v Australasian Meat Industry Employees Union* (1995) 58 IR 90 at where at 94 the Full Bench said of *ATOF*:-

"... The Court in that instance was free to place a liberal construction on the relevant union rules. However the Court's reasoning would appear to be no less applicable to construction of the corresponding terms of that Act, which were alluded to in the same pages of the decision." 41

A further example of where a tribunal has construed a successor provision in a broad manner is the decision of Dunphy J in *The Theatre Managers Award, 1953.* 42 In this case Dunphy J was called upon to determine whether s 50(d) of the C&IA Act operated in circumstances where a company ("the licensor") entered into a licence agreement with 3 entrepreneurs ("the licensees") to produce certain plays. The licensees had the right to use the licensor's theatre premises and took over control of the licensor's staff. Dunphy J held that the licensees became bound by the applicable federal award as an "assignee or transmittee of the business of a party bound by the award" in circumstances where one of the licensees was a party to the federal award. His Honour held:

It seems to me that the provisions of section 50 paragraph (d) of the Act are wide enough to apply to this particular matter and that the Licensee becomes bound by the Federal award as "an assignee or transmittee of the business of a party bound by the award. ... Once a person becomes bound by an award and continues to remain in the industry any sharing of his business with a stranger carries with it the award coverage.

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41 Unreported, Industrial Relations Court of Australia, Matter No VI 3649 of 1995; affirmed on appeal (1996) 69 IR 362. See also *HSUA*, above, n 25, at 61.

42 (1953) 77 CAR 291.
The terms “assignee” and “transmittee” as used in paragraph (d) of section 50 do not appear to have restricted meanings, otherwise the phrase “including any corporation which has acquired or taken over the business of such a party” at the end of the paragraph would hardly be necessary. I would have imagined that an assignment, in the strict sense, would have applied, without express mention, to a business taken over or acquired by a corporation. (emphasis added)

(c) Succession

The word “successor” is not defined in the WR Act. In the Macquarie Dictionary successor is defined as follows:

1. One who or that which succeeds or follows. 2. One who succeeds another in an office, position, or the like.

It has been suggested that there are three (non essential) factors which serve as useful indicia of whether there has been a succession. First, the staff, or at least some of the staff, of the predecessor are “transferred” to the successor. Second, the goodwill of the predecessor is transferred to the successor. In this respect it is noted that goodwill has been regarded as being a primary, but not a crucial aspect or criteria in the determination of whether a transmission has occurred. Third, in addition to the requirement of privity, a number of cases suggest that for there to be a succession or transmission it needs to be shown that:

the effect of the transaction was to put the transferee in possession of the going concern, the activities of which he could carry on without interruption.

This means that the equipment (and sometimes the premise) used to produce the product of the predecessor will, in addition to the stock in trade, be transferred to the successor.

43 Id. at 295.
45 Punch and Irving, above, n 12, at 80,046-80,047.
46 ATOF, above, n 38, HSUA, above, n 25, FSU, above, n 23.
47 McDonough v Readford (1980) AR(NSW) 969. On this point Punch and Irving (above, n 12, at 80,046) have commented: The fact that goodwill has not been specifically assigned will not prevent the Court, which should look at the substance of these matters rather than their particular form, concluding that effectively goodwill has been assigned (Marcus v Balnave 1973 AILR ¶175; Mackara v Therm-O-Lite 1978 AILR ¶300).
48 Kennir Limited v Frizzell [1968] 1 All ER 414 at 418; Lloyd v Brassey (1969) 1 All ER 388; Woodhouse and Another v Peter Brotherhood Ltd [1972] 3 All ER 91.
49 Punch and Irving, above, n 12, at 80,047.
Business

What constitutes a “business” for the purposes of s 149(1)(d) is a question which is attended with particular difficulty. In ATOF the High Court held:\(^{50}\)

Of all words, the word ‘business’ is notorious for taking its colour and its content from its surroundings. ... Its meaning depends upon its context.

Whilst the above mentioned statement points to the difficulties associated with attempting to define the constituent elements of a business, it unfortunately offers little guidance as to what limitations are to be imposed on the definition of a business. In this respect there have been a number of expositions as to what constitutes a business. On the one hand Marshall J in HSUA held that “business” is a word of wide import\(^{51}\) and that the:

\[\text{activities of a State constituted by the employment of persons and the provision of services to the public do not cease to be a “business” merely because they are not generally conducted for profit.}\]  \(^{52}\) (emphasis added).

Marshall J’s decision in HSUA suggests that the element of profit making is not a necessary constituent part of a business for the purposes of s 149(1)(d). As such his Honour found that the provision of mental health services in the relevant area by the State did constitute “part of the business” within the meaning of s 149(1)(d).\(^{53}\) In this respect it is also relevant to note that the definition of “business” contained in Part 2 clause 1(2)(a) of the Dictionary to the Evidence Act 1995 (Cth) includes a reference to a business which is not engaged in or carried on for profit.\(^{54}\)

\(^{50}\) ATOF, above, n 38, at 226.
\(^{51}\) HSUA, above n 25, at 55.
\(^{52}\) Ibid.
\(^{53}\) Id, at 55 -56.
\(^{54}\) The definition of a business of the purposes of the Evidence Act is:

1.(1) A reference in this Act to a business includes a reference to the following:

(a) a profession, calling, occupation, trade or undertaking;

(b) an activity engaged in or carried on by the Crown in any of its capacities;

(c) an activity engaged in or carried on by a government of a foreign country;

(d) an activity engaged in or carried on by a person holding office or exercising power under or because of the Constitution, an Australian law or a law of a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power (otherwise than in a private capacity);

(e) the proceedings of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament;
On the other hand, in *Hope v The Council of the City of Bathurst*[^55] Mason J (with whom the other members of the High Court agreed) held, in construing the word “business” (in the context of s 188(1) of the *Local Government Act 1919* (NSW)):

I accept, then, that “business” in the sub-section has the ordinary or popular meaning which it would be given in the expression “carrying on the business of grazing”. It denotes grazing activities of a going concern, that is, *activities engaged in for the purposes of profit on a continuous and repetitive basis.*[^56] (emphasis added)

For present purposes it is also worth referring to the decision in *State Authorities Superannuation Board v Commissioner of Taxation*[^57] where Davies J, in discussing the word business, held:

A “business”, as that term is used in the definition of “excluded debit”, is a trade or commercial enterprise as a going concern. See the *Shorter Oxford English Dictionary* meaning 18 and 19. I cannot conceive of an activity in the nature of a business in the relevant sense in which the business transactions are not predominantly consensual or in which the business relationships are not predominantly contractual. An activity lacking this feature would not be in essence a trading or commercial activity.

A business must have organisation. It usually has capital, plant, employees and consumables. It must derive income and it must trade with or deal with another person or persons. In *Re Duty on Estate of Incorporated Council of Law Reporting* ([1888] 22 QBD 279) at 293 - 294, Lord Coleridge CJ made these remarks as to a business:

> “But putting aside the question whether they carry on a trade, how can it be denied that the Council carry on a business? They are incorporated; they have a secretary; they employ editors, reporters, and printers; they print books; they sell those books; they do all that is ordinarily done in carrying on the business of a bookseller. It is said that though they make profit, they cannot, by the terms of their memorandum of association, put that profit into their own pockets. Be it so; they are carrying on a business in which, by the terms of its constitution, they are prevented from making a profit to their own benefit. One can suppose the case of co-operative stores founded upon the principle that no profit shall be made by the members. They buy and sell, and if any profit is  

[^56]: Id, at 8 - 9.
[^57]: (1990) 21 FCR 535.
made, their articles of association compel them to dispose of it in this or that way, but prevent the members putting any money into their own pockets. They would also probably employ secretaries, and other persons engaged in their warehouses and in buying and selling goods all over the country. Could it possibly be denied that such an association of persons were not [sic] carrying on a business?"

... It is, of course, fundamental to a business and to an activity in the nature of a business that there be a derivation of income of a revenue nature. 58

(d) part of

As noted above when s 149(1)(d) was inserted into the IR Act one of the importance inclusions was the express reference to the succession, assignment or transmission to or of the business or "part of" the business. This amendment had the effect of making it clear that for s 149(1)(d) to have effect it was not necessary that the whole business had to be transmitted, all that had to be transmitted was a "part of" the business.

The question which therefore arises is what is constituted by a "part of" a business. In Hayman and Ors v Neil 59 a Full Bench of the State Commission held that the words "any part thereof" in s 4(11)(c) of the Long Service Leave Act 1955 (NSW), as related to a "business", referred to a part which could itself be regarded as a business. The Full Bench held:

There would be a transmission of a part of a business if an employer conducting a business involving both the manufacture of clothing and the sale of cloth, sold to another that part of his business concerned with the sale of cloth, but there would not be a transmission of part of the business if the employer merely sold part of the machinery used in the manufacturing business (See, to the same effect Barrow v Masonic Catering Co-operative Society Limited [(1957) AR(NSW) 736 at 738) or the whole or part of the stock of cloth used in the cloth selling part of his business. 60

The above mentioned extract from Hayman was cited with approval by the State Commission in Manley v Gazal Clothing Co. Pty Ltd 61 where a Full Bench went on to hold:

58 Id, at 548.
59 (1960) 59 AR(NSW) 363.
60 Id, at 368.
61 (1973) AR(NSW) 547.
... Parliament included the words "or any part thereof" to guard against the risk that the word "business" on its own might be construed as meaning the whole of a business. 62

Whilst it is acknowledged that the decisions in Hayman and Manley arose in a different statutory context (the Long Service Leave Act 1955 (NSW)) it is my opinion that they nevertheless provide guidance as to how one should construe the works "part of the business" for the purposes of s 149(1)(d).

An interesting example of the application of the above mentioned principles is to be found in Crosilla v Challenge Property Services. 63 Crosilla concerned a purported transmission of a part of a business in circumstances where the proprietor of an Adelaide motel, which had previously used its own staff (including the appellant) to clean its premises contracted out certain cleaning services to the respondent. The appellant’s employment with the motel was terminated and she immediately commenced employment with the respondent in circumstances where she performed essentially the same cleaning work at the motel as she had previously done when employed by the motel.

In a decision which took a strict view of what constitutes a business or a part of a business Russell J held that cleaning services in a motel do not form part of the business of a motel. To this extent Russell J held:

The business of Town House is that of a fully licensed motel operator. It receives guests or patrons, who resort there, and for reward, provides them with accommodation, meals and refreshments. The business of the respondent, on the other hand, is that of a cleaning contractor. It provides its customers with a cleaning service in their buildings, or in other premises, for reward.

Both before and after the cleaning contract was entered into, both Town House and the respondent continued to run their own businesses. The only difference, in the case of Town House, was that instead of running its business as a motel proprietor by employing servants to perform the necessary cleaning work, it reorganised the method of running its business by engaging an independent contractor to perform the cleaning work: in the case of the respondent, it was still running its business as a cleaning contractor. The only difference in the respondent’s business, after it won the Town House contract, was that it had one more customer and, for that purpose, it engaged additional servants, some of whom had previously been employed by Town House.

62 Id., at 551.
63 (1982) 2 IR 448.
... In order to constitute a transmission of business, or part of the business, it must be shown that the business itself, or a severable part of the business itself, has been transferred to the transmittee. It is not sufficient merely to show that, as a result of the contract entered into with the contractor, the contractor had been given a license to enter the principal's premises to perform certain functions, which are ancillary to the running of the business, by the principal. And that is, in my opinion, all that has been shown here. (emphasis added)

Succession, transmission or assignment of “the business or part of the business” - where to now?

Whilst it is of little comfort for those people confronted with or required to advise on the breadth of the words “the business or part of the business” for the purposes of s 149(1)(d), the current state of the law is far from settled.

For the most part judicial attempts at providing guidance as to the meaning of these words have only served to pose more questions than they have answered, as is clear from the High Court’s finding in ATOF that the word business is “notorious for taking its colour and content from its surroundings”, and Marshall J’s statement in HSUA that the word business “is a word of wide import.” Added to these decisions is Crosilla in which Russell J held that notwithstanding the fact that the Town Hotel had previously employed cleaners to clean and service motel rooms at its premises the provision of such cleaning services did not constitute a part of its business.

In the absence of a definitive statement as to the scope of s 149(1)(d) one is left in the unsatisfactory position of having to attempt to formulate propositions of law from the “surprising dearth of cases which directly relate to s 149(1)(d).” To this extent a recent decision of the Federal Court in Finance Sector Union of Australia v PP Consultants Pty Ltd is of considerable importance.

The facts of FSU are as follows. In the period 1989 to 1997 Mrs M was employed as a bank officer at the Byron Bay branch of the St George Bank (“the Bank”). The terms and conditions of Mrs M’s employment were governed by the St George Bank Employees Award. On 12 September 1997 the Bank closed its office and at the same time entered into an

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64 Id, at 456 - 457.
65 FSU, above, n 23, at 10
66 FSU, above, n 23.
agreement ("the Bragency Agreement") with the respondent to conduct a bank branch from
the respondent's pharmacy premises. For this purpose the respondent employed two of the
bank's previous employees, one of whom was Mrs M.

Mrs M's evidence was that the work she performed with the respondent was precisely the
same as that she had previously performed for the Bank. Furthermore she wore the same
Bank uniform, used the same Bank equipment and was paid the same wages.

Pursuant to the Bragency Agreement the respondent was required, amongst other things, to
collect deposits for and on behalf of the Bank, open deposit accounts for Bank customers and
monitor the operation of the Bank's ATM machine.

No monies were paid by either party on the completion of the Bragency Agreement, however
it was agreed that the Bank would pay the respondent monthly remuneration which would be
calculated according to "performance orientated" components.

Pursuant to clause 9 of the Bragency Agreement all fittings and equipment supplied and
installed at the respondent's premises (including computer terminals, a cash safe, filing
cabinets, ATM and other equipment) remained the property of the Bank.

The Bragency Agreement also provided in clause 7 that the relationship between the Bank
and the respondent was acknowledged to be one of agency and to be strictly personal to the
parties. Furthermore, the Bragency Agreement was terminable on one month's notice.

The questions which arose for consideration in this case were:

1. Were the activities conducted by the respondent in its pharmacy premises part of the
   business of the Bank; and

2. If yes, did the respondent conduct those activities as a successor, assignee or
   transmee from the bank?

In addressing the first of these questions the judgment of Mathews J focussed on a proprietary
based analysis of the constituent elements of a business and whether what the respondent
received from the Bank was a “going concern”. In this respect her Honour referred to the decision in *Kenmir Ltd v Frizzell and Ors* where the court held:

... In deciding whether a transaction amounted to a transfer of a business regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption. Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not chose to avail himself of all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete...  

In applying the above mentioned test Mathews J held:

[O]n no interpretation of the transaction between the bank and the respondent could it be said that the latter acquired any part of the bank’s business as a going concern. The bank clearly retained that for itself. Nor was the respondent entitled, under the bragency agreement, to conduct the bank’s activities without interruption. The agreement was terminable by either party upon one month’s notice.  

Mathews J next turned to the question of how one is to determine whether a person is conducting a part of a predecessor’s business. In addressing this question her Honour held, without further elaboration, that the *ATOF* and *HSUA* decisions did not suggest that the existence of a substantial identity between the activities carried on by the successor entity was, in and of itself, a sufficient basis to establish a succession under s 149(1)(d). In so limiting the applicability of the substantial identity test Mathews J again sought to focus attention on what I have described as being a proprietary based analysis of a business. To this extent Mathews J held:

As Mr Dixon [for the respondent] points out, the respondent has no direct interest in any of the transactions conducted from its premises. The profit from these transactions is retained by the bank, which makes a monthly payment to the respondent based on the number of transactions completed. The respondent has no discretion as to how the bank business is to be transacted. It cannot, for example, determine the interest rate upon which loans are to be granted. It is bound by the terms of the bragency agreement to conduct the whole of the

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*Kenmir*, above n 48, at 418.  
*FSU*, above, n 23, at 12.  
*Id*, at 14.
bank's business in accordance with the bank's direction. In effect, the respondent has become the intermediary for transactions between the Byron Bay community and the bank, thus enabling the bank to continue its operations in that area. Can it then be said that the respondent is conducting part of the bank's business? In my opinion the answer must be in the negative. Certainly it could not be said that the part of the bank's business conducted by the respondent itself constitutes a business (Hayman). Nor has the respondent acquired a going concern which it can conduct without interruption (Kenmir).

To this I would add a further element, namely that in order to conduct a business a person must be able to exert at least some control over its activities. The respondent has, as already mentioned, virtually no control at all over the bank's activities conducted from the pharmacy premises.70

On the question of whether there had been a succession Mathews J concluded that even if the respondent was conducting part of the business of the Bank, it was not doing so by way of succession, assignment or transmission from the Bank with her Honour holding:

The respondent under the bragency agreement acquired nothing from the bank except the entitlement to conduct certain banking activities for which it was to receive a monthly fee. The arrangement was terminable on one month's notice. No goodwill passed hands. Nor would one expect it so under such an agreement. As the court observed in Kenmir, an assignment of goodwill is strong evidence of a transfer of a business, but the absence of such an assignment is not conclusive "... if the transferee has effectively deprived himself of the power to compete. (Kenmir, p 418). The court continued (p 418): "[t]he absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before."

Every one of these elements is absent in this case. The bank has expressly preserved its power to compete (if “compete” is the right word, for in reality the bank would be competing with itself). Certainly the respondent obtained a lease of the premises previously occupied by the bank, but this was not achieved through any arrangement with the bank itself. No equipment was acquired from the bank: under the bragency agreement all fitting and equipment which were supplied and installed at the respondent's premises remained the property of the bank and were to be delivered up to the bank upon termination of the agreement.

However broadly the concept of succession, assignment or transmission under s 149(1)(d) is to be construed it cannot, in my view, encompass the arrangement between the bank and the respondent in this case. The respondent acquired no business in its own right. It gained the entitlement to transact the bank's business from its premises, but it did not gain and interest in the bank's activities. Mr Dixon raised the question of whether an agent can ever be the successor of a business under s 149(1)(d). It is unnecessary to answer this question here, but I find it difficult to envisage that parties who are negotiating at arm's length and who create an agency at will, could ever fall within this provision. Be that as it may, in the particular

70 Ibid.
circumstances of this case I am satisfied that there has been no succession of the bank’s business so as to attract the operation of s 149(1)(d).\textsuperscript{71}

With the greatest of respect to Mathews J it is my opinion that the \textit{FSU} decision is flawed in that, without explanation, it fails to give proper weight to the substantial identity test applied in \textit{ATOF} and \textit{HSUA}; that is whether there was substantial identity between the old activities of the Bank and those carried on by the respondent (which correspond with the old activities of the Bank). In lieu thereof \textit{FSU} focuses attention on the more tangible indicia of a business, such as:

1. whether what the respondent received was a “going concern”;

2. whether monetary consideration was involved in the establishment of the Bragency agreement between the Bank and the respondent;

3. whether goodwill changed hands; and

4. whether the respondent acquired equipment from the Bank.

In my view, whilst the above mentioned factors are relevant constituent elements by which a person can test whether there has been an succession, assignment or transmission of a business or part of a business they should be regarded as additional to, and not exclusive of, the primary focus of any inquiry. This primary focus must consider whether there is a substantial identity between the old activities and those now carried on by the successor, assignee or transmittee. In my opinion the supplanting of the substantial identity test with the narrower proprietary based test runs the risk of effectively ignoring the fact that remedial provisions such as s 149(1)(d) should be construed in a manner which provides for the fullest relief which a fair meaning of the language of the section will allow and which prevents evasion of any obligation which may be created by the award.\textsuperscript{72}

\section*{Conclusions}

\textsuperscript{71} \textit{Id}, at 15 - 16.

\textsuperscript{72} \textit{Daily News}, above, n 7, at 545. See also \textit{ACTEW}, above, n 23, at 7, and \textit{FSU}, above, n 23 at 8.
The jurisprudence surrounding s 149(1)(d) and its predecessors is, if for nothing else, notable for its inability to offer substantive guidance to practitioners as to the meaning of the key words which constitute this section. Given the fundamental importance of this provision (and the provisions relating to the succession, transmission or assignment of certified agreements and AWAs) it is surprising that they has not been the subject of more litigation over the years. As one writer has suggested, the absence of litigation surrounding s 149(1)(d) may in itself be proof positive that the section has achieved its purpose of ensuring that awards continue to bind successors, assignees or transmitters.73

From an analysis of the legislative history and case law surrounding s 149(1)(d) and its predecessors it is suggested that one can distil the following general propositions:

1. In construing s 149(1)(d) one should be guided by the principle that, being a remedial section, s 149(1)(d) will be beneficially construed by courts such that employers do not “avoid the settled rights of the employees”.74

2. Since the enactment of the IR Act it has been open to a party to approach the Commission to seek an order that an award does not bind them as a successor, assignee or transmitee for the purposes of s 149(1)(d). However the mere fact that an award was tailored to meet the circumstances of a particular employer does not of itself provide a basis for finding that the award should not be applied to a successor, assignee or transmitee of that employer.75

3. For there to be a succession, transmission or assignment there needs to be some definite legal nexus or privity between the transmittor and the transmittee. The existence of that nexus or privity must be evidenced either by direct proof of a transaction or by facts from which the conclusion may be drawn of some transference of right to the business from the predecessor to the successor.76 If there is found to be a break in the chain of transmission then there will not be a transmission in the relevant sense. Examples of where such a break in transmission will arise are where

73 Creighton, above, n 20, at 180.
74 See in particular George Hudson, above, n 10, at 435 - 436; Daily News, above, n 7, at 545
75 HSU, above, n 25.
76 Bansgrove, above 29, at 277.
the business has been closed down for a period of time\textsuperscript{77} or where there is no connection between the transmittor and the alleged transmittee.\textsuperscript{78}

4. The better view would seem to be that the primary focus of any inquiry into successorship is the question of whether there is a substantial identity between the activities carried on by the successor, assignee or transmittee and those formerly carried on by the previous entity.\textsuperscript{79} However in light of \textit{FSU} it is debatable where the existence of a substantial identity is, in and of itself, sufficient to establish a succession for the purposes of s 149(1)(d).

5. There is no definitive definition of what constitutes a business for the purposes of s 149(1)(d). It is clear that the word is one of wide import\textsuperscript{80} and that it will take its colour and its content from its surroundings.\textsuperscript{81}

6. The derivation of profit is not a pre-requisite for the establishment of a business for the purposes of s 149(1)(d).\textsuperscript{82} Other factors which one should take into consideration when seeking to determine whether for the purposes of s 149(1)(d) a business exists are:

a) whether the successor took possession of a “going concern, the activities of which he could carry on without interruption”\textsuperscript{83}, and

b) whether the successor is able to exert at least some degree of control over the activities of the business.\textsuperscript{84}

7. In determining what constitutes “part of the business” one must establish what the intrinsic elements of the business are. Matters which are ancillary to the operation of

\textsuperscript{77} \textit{Meat and Allied Trades}, above, n 30.
\textsuperscript{78} \textit{Bansgrove}, above, n 29.
\textsuperscript{79} \textit{ATOF}, above, n 38, and \textit{HSUA}, above, n 25.
\textsuperscript{80} \textit{HSUA}, above, n 24.
\textsuperscript{81} \textit{ATOF}, above, n 38.
\textsuperscript{82} \textit{HSUA}, above, n 25.
\textsuperscript{83} \textit{FSU}, above, n 23.
\textsuperscript{84} \textit{Ibid.}
the business do not constitute the business, nor to they constitute a part of the business. 85

8. The assignment of goodwill, whilst not being a conclusive factor, is evidence which strongly points towards the existence of a transmission of business.

9. It is questionable whether parties who are negotiating at arm's length and who create an agency at will would fall within the scope of s 149(1)(d).

Whilst it is suggested that the above mentioned propositions offer some guidance as to how one should construe s 149(1)(d) there is still a significant grey area surrounding the question of the applicability s 149(1)(d) (and the related provisions concerning certified agreements and AWAs) to organisations which embark on a program of restructuring which involves the outsourcing of certain functions. Whether such an outsourcing will entail the succession, transmission or assignment of award obligations will be very much dependent on the facts and circumstances of the particular case. In this respect it may be of assistance to focus attention on the nature of the functions which have been outsourced and whether those functions are inherent to the business or whether they are to be regarded as being ancillary or peripheral, however it is my view that the test which more readily accords with the purpose of s 149(1)(d) is the substantial identity test.

Given the current trend towards the outsourcing of business functions it is my opinion that this matter would benefit from a legislative clarification of the scope of s 149(1)(d).

85 In my opinion there is a danger associated with placing too heavy a reliance on this principle as it can lead to ill-defined attempts to establish what are regarded as being the essential parts of a business and what are otherwise ancillary. In FSU Mathews J held (at 14) that the decision in Crosilla was "patently correct". Notwithstanding this fact I would question how it could be said that the provision of cleaning services to a motel is to be regarded as being ancillary to the business of a motel. Surely the provision of a clean and serviced room is fundamental to such a business.
INTRODUCTION.

The provisions of the *Occupational Health & Safety Act 1983 (NSW)* (the OHS Act) clearly apply to protect contractors and agency workers in the same way that they protect employees. What is less clear, is the nature and extent of the duties owed by organisations that either hire, or hire out, labour and how these duties may overlap with the duties owed by others in control of a workplace. Organisations that engage the labour of a contractor or agency worker need to be aware of the concurrent nature of the duties imposed under the OHS Act. They also need to be aware of the different types of risk that face a contractor/agency worker. A common failure of organisations that use contractors/agency workers is the failure to provide sufficient training, instruction and supervision of the work to be performed. Often this arises out of the mistaken belief that the obligation to provide the training, instruction and supervision lies with others, usually, the person or company providing the labour. In reverse, many labour hire companies have held the belief that the responsibility for safety rests with those who have direct control over a work site. While most organisations have a grasp of the nature of the duties of care owed to an employee under the safety legislation, there still appears to be some considerable confusion about the nature of the duties owed to contractors/agency workers.

In part, this confusion can be attributed to the focus given to the employee/employer relationship in industrial law and the somewhat artificial distinctions often used to describe that relationship. Industrial law focuses on the nature and characterisation of the contractual relationship between the parties (i.e. is the relationship that of an employee, or contractor, or something else) and the obligations and entitlements that flow from that relationship. Over time the courts have developed a number of “tests” and/or “indicia” to facilitate the characterisation of an employment relationship. The “tests” have varied over time in an attempt to accommodate changes in the workforce structure. Some organisations have used the “tests” developed by the courts to re-structure themselves to gain some perceived advantage in not having an employer/employee relationship in that structure. In my view some organisations mistakenly believe that there is also some advantage gained by way of reduced responsibility, or even no responsibility, for the safety of contractors/agency workers by the mere fact that those persons are not employees of the organisation and/or are out of the control of the organisation. I say mistaken, because in the area of occupational health and safety, both the Act and the decisions of the courts show that in determining the duties owed the focus is on the work performed rather than on the nature of the contractual relationship between the parties. With safety breaches the courts have taken a broad approach to determine the nature and scope of the duties of care owed to contractors and/or agency workers under the Act. The courts will consider the totality of the relationship between the parties and any necessary legal elements of the offence. But it is clear that the courts will focus on the concurrent nature of the duties of care to determine those responsible for the organisation and control of the work performed and the risks that flow from that work. The courts have paid particular attention to the risks created when contractors/agency workers are required to work.
at a location that is unfamiliar to the worker. The fact that an organisation may not have direct
control of a workplace will not necessarily found a defence to any breach of the OHS Act.
The direction taken by the courts is best illustrated by looking at some specific decisions
involving contractors and/or agency workers. From these cases it is clear that organisations
are mistaken if they hold the view that their responsibilities for safety under the Act can be
reduced, if not avoided altogether, by the use of contractors or agency workers. Indeed it may
be the case that more steps have to be taken by an organisation to ensure that their duties of
care are properly discharged because of the greater risks that may exist to contractors/agency
workers.

2. CASE STUDIES

It is difficult to provide a general list of the OHS obligations of an organisation towards
contractors and/or agency workers because the nature and scope of the obligations will to a
large extent depend on the specific type of work to be carried out;
the circumstances of the place where the work is to be performed; the qualifications and
experience of the persons performing the work; and other relevant factual considerations.
Nonetheless, by examining the case studies below it is apparent that the duties owed can be
broadly grouped to include such things as induction; training; supervision; instruction;
inspection of plant and/or workplace; monitoring; and appropriate prior delineation of
responsibility for supervision.

CASE STUDY NO 1

INSPECTOR ANKUCIC V DRAKE PERSONNEL LIMITED T/AS DRAKE
INDUSTRIAL
(Hungerford J. Industrial Relations Commission - 25 November 1997) - Duties to
agency worker.

INSPECTOR ANKUCIC V WARMAN INTERNATIONAL LIMITED
(Marks J. Industrial Relations Commission - 27 March 1997 – Duties to agency
worker.

The prosecutions arose out of an injury to an employee of Drake Personnel Limited t/as Drake
Industrial at premises occupied by a company known as Warman International Ltd. The
injured worker had been hired out to Warman’s by Drake Industrial and had worked at the site
for about 19 days until the accident occurred. The worker was injured while cleaning a
cabinet mounted circular docking saw. The docking saw took approximately 75 seconds to
run down after it was switched off. The worker switched the saw off and opened the door of
the cabinet to clean out built up sawdust unaware of the slow run down time of the saw, when
his right hand came into contact with the saw blade causing severe lacerations to his thumb
and index finger. The worker was inexperienced in the operation of the saw having operated it
only several times prior to the accident. He had received no formal training or instruction
from Drake Industrial or Warman’s in the operation of the saw, but had been briefly shown its
operation by an employee of Warman’s when he commenced at work at the factory, and told
to be careful. There was no warning signage on or about the saw indicating the run down
time.
The injured worker had commenced work with Drake Industrial in May 1995 while on a working holiday from the United Kingdom. Prior to commencing work he completed a work experience card. He indicated that he had 7 years experience as a warehouse man and that he held a forklift license. The work he performed with the company since 1995 was packing stores and forklift driving duties. Prior to commencing work at Warman’s the worker was not asked specifically whether he had previously operated woodworking machinery or powersaws. He was shown a safety video by Drake Industrial showing general workplace safety in a factory/warehouse environment. The video did not specifically detail safe working requirements for docking saw operation. Prior to commencing work at Warman’s the worker was not told that he would be required to make crates at the site. Nor was he advised that he would be required to operate woodworking machines or a docking saw. Once the worker commenced work at the site Drake Industrial made no enquiry as to the precise duties he was to perform; or what machinery the worker was to use; or what training he would receive in the use of the woodworking machines and docking saw. Certainly prior to the accident the worker did not receive any training from Drake Industrial in the use of such machines.

At the time of the accident Drake Industrial had no system in place for assessing the adequacy of any training and supervision provided by Warman’s. Nor did the company have a means in place whereby it could assess the safety of plant provided to the worker on hire or the adequacy of the system of work used. Importantly, Drake Industrial did not have in place a means of informing Warman’s of the specific skills and qualifications of the hired worker and what training would be required for the work to be performed. In addition the company failed to advise its employees of the true nature of the work to be performed.

The company was charged with four breaches of the OHS Act. Three of the charges related to the failures that occurred prior to the commencement of work ie. a failure to train, instruct and inform the worker about the safe use of docking saws. The fourth charge arose on the day of the accident for a failure to provide the worker with a safe system of work. The company pleaded guilty to all of the charges and received a penalty of $25,000. Related charges were taken against Warman’s for a failure to adequately enclose the cutting blade of the docking saw; a failure to ensure only trained persons cleaned the saw; a failure to provide such information, training and supervision as necessary to ensure the safety of persons using the saw; a failure to provide signage and written directions for the use and cleaning of the machine; and other specified charges relating to the docking saw. A plea of guilty was entered and Warman’s were fined $125,000, which was reduced on appeal to $45,000.

The decision of Hungerford J. sets out the following principles:

- When an employer hires an employee to a third party the employer has a special responsibility to ensure the health, safety and welfare of the worker for no reason other than that the workplace is removed from the employer’s direct control and management and is often foreign to the worker.
- It is no answer to plead reliance on the third party to ensure safety at the workplace.
- The level of penalty imposed should act as an encouragement to similar businesses to take appropriate steps to ensure safety when labour hire is used at a workplace.
CASE STUDY NO 2
WORKCOVER AUTHORITY OF NSW V SUTHERLAND SHIRE COUNCIL
(G. Miller Chief Industrial Magistrate - 18 January 1999 – duties to contractors)

Sutherland Shire Council pleaded guilty to a charge arising from an incident in December 1995 when a WorkCover inspector observed a recycling truck owned by a contractor to the Council being operated with three of the four offside/runners standing either on the cabin running boards or steps attached to the side of the vehicle rather than the rear riding steps. The contract workers were employed by a company known as CBD Enviro Services Pty Ltd. That company as part of its contract had agreed to comply with the safety legislation. Representatives of the Council were instructed to report back if they saw anything of concern with the operation of CBD. In November 1995 an accident occurred and it came to the Council’s attention. Directions were given to the director of CBD to make sure no one was riding on the back of the truck. In addition the Council wrote to the company advising it of the importance of observing the safety legislation and the need for CBD to formalise its instructions to the workers as well as sending written instructions to each driver. No such written material was provided by CBD. A staff member of the Council drew up a pro forma document for the CBD workers to sign to indicate that they had received instructions on safe work practice. In early December 1995 both CBD and the Council were issued with Improvement and prohibition Notices relating to the work practices of the staff of CBD. The Council sent a further letter to CBD requesting that their staff be given instructions that complied with the terms of the Notices. The Council also expected that CBD would closely monitor the work practices of its staff. However, after the issue of the letter the WorkCover inspector observed that the unsafe practice of riding on the side of the vehicle was still being used by CBD staff. A prosecution was commenced against the Council and CBD. The council was fined $10,000 and CBD fined $6,000.

In his judgment the Chief Industrial Magistrate said:

- Under the safety legislation the health and safety of people must be the paramount objective in all the operations of an organisation.
- Contractors and their employees must be treated in regard to OHS requirements as if they were Council employees.
- Council has an obligation to eliminate safety hazards and to communicate and enforce safety to every person who enters a work situation.
- In particular formal risk and hazard investigations should be carried out with all contractors involved. This should be done prior to the grant of any tender.
- Councils should require from prospective contractors an indication of induction procedures, OHS systems, safety meetings arrangements and the system of work to be followed.
- It is not sufficient to rely on a contractor to comply with the safety legislation.
CASE STUDY NO 3

WORKCOVER AUTHORITY V BORAL MONTORO PTY LTD

(Peterson J. Industrial Relations Commission - 8 September 1998 - Responsibility for safety of contractors.)

Boral Montoro Pty Ltd was a company that supplied and fixed roof tiles. The fixing of the tiles in this case was not carried out by employees of Boral but by sub-contractors. The subcontractor was a small company of which the principle director was a roof tiler who employed other tilers and apprentices. In November 1995 Boral was contracted to supply and fix tiles at a domestic residential site that was under construction by A.V. Jennings. On the 23 and 24 November 1995 a WorkCover inspector visited the site and observed that the roof being tiled had a pitch of 33 degrees and that the roof was partly covered with glazed tiles that were particularly slippery. The highest point of the roof from which a person could fall was approximately 6.5 m. No scaffolding or fall restraint system was in place while the roof was being tiled. No accident occurred whilst the work was being carried out. Prosecutions were commenced against both Boral and A.V. Jennings for breaches of the safety legislation for allowing the work to be performed in an unsafe manner. A.V. Jennings entered a plea of guilty and was fined. Boral defended the charge on the grounds that A.V. Jennings was the builder in charge of the site and as such had overall responsibility under the safety legislation for the work being performed. In addition Boral was entitled to rely on the experience and expertise of the tiler contracted to do the work. A further defence raised by Boral was that it was not reasonably practicable for it to provide a fall arrest system for use by the contractor tiler. In respect of the responsibility of the builder to ensure the work was done safely Boral pointed to the provisions of the contract between it and A.V. Jennings.

The evidence given at the hearing of the A.V. Jennings matter revealed that Jennings had asked for a quote from Boral off the building plan. On acceptance of the quote an order was placed. Boral sent out a representative to inspect the site and assess who amongst the tiling contractors used by Boral would be best to carry out the work.

In terms of safety Boral relied on the expertise of the tiler engaged and the control of A.V Jennings. The same evidence was allowed in at the Boral hearing. It should also be noted that there was a long standing practice in the fixing of domestic roofs that the price for fixing would be set by the supplier of the tiles as part of the overall contract to supply. It should also be noted at the time of the prosecution there was no Code of Practice in place that governed domestic premises. Further, scaffolding was not used as a matter of common practice. Boral were found guilty and fined $12,500. His Honour Justice Peterson found that:

- A contractual obligation to a third party cannot be regarded as an effective means of avoiding a statutory obligation to ensure safety. Nor is a contract an obstacle to the practicality of ensuring safety or having control over the relevant work.
- In this case the failure to provide a fall arrest system was not the result of any impracticability, or lack of control, but the result of the industry’s traditional approach.
CASE STUDY NO 4

WORKCOVER AUTHORITY OF NSW V INDUSTRY STAFFING PTY LTD t/as ACTION WORKFORCE.

( Hungerford J. Industrial Relations Commission – 8 February 1999 – Duties to hired labour.)

Industry Staffing Pty Ltd t/as Action Workforce was engaged in the business of hiring labour to other companies. An employee was provided to Warman International Limited who was contracted to maintain pumps at the Malabar Sewerage Treatment Works by Sydney Water. In December 1996 the worker was directed by Warman’s to clean a pugmill conveyor system. This task was not part of the job specification when Action Workforce agreed to provide the labour to Warman’s. While the work was being carried out by the use of a ladder the worker lost balance and fell 6 metres. He sustained a fractured leg and multiple arm fractures. Apart from being shown how to use the ladder to access the area to be cleaned the worker received no instruction or training from Warman’s as to a safe system of work. In particular, the worker was not instructed as to how to tie off the ladder safely or be manned before ascending. At no time did Warman’s disclose to Action Workforce that the worker was to undergo safety induction provided by Sydney Water. The injured worker had attended the site on approximately 10 occasions over a 12 month period. Both Warman’s and Action Workforce were prosecuted.

Hungerford J. re-affirmed the principles set out in his earlier decision of Drake Industrial and noted again that it was not a defence under the OHS Act to point to reliance on the client to provide a safe system of work. Even if the client has committed a breach of the OHS Act that does not lessen the serious nature of the offences of the employer. The company at the time of the accident did not have in place appropriate policies to cover the safety of employees hired to others at work sites not directly under the control of the employer.
CASE STUDY NO 5
WORKCOVER AUTHORITY OF NSW V SWIFT PLACEMENTS PTY LTD - APPEAL
(Marks J. Industrial Relations Commission – 26 March 1999 – Lack of control will not be sufficient to escape liability.)

Swift Placements Pty Ltd conducted an industrial labour hire business and personnel agency. A worker was hired to Warman International Limited a manufacturer and supplier of slurry pumps. In early January 1996 the hired worker was cleaning a sand-mixing machine at the foundry area when his right hand came into contact with moving blades within the machine. The worker suffered amputation injuries to the middle and ring fingers of his hand and severe lacerations to the index finger. At the time of the accident the machine was not switched off or isolated. When the worker first started at Warman’s he was operating a grinding machine. He was later transferred to the foundry section to perform general labouring duties. The injured worker had been in the foundry section for one week when the accident occurred. Up to the day of the accident the worker had been assisting an employee of Warman’s. On the day of the accident the employee of Warman’s was absent and the worker was asked to carry out the cleaning.

Swift’s were charged with breaches of the OHS Act for failing to supervise the worker, alleged to be its employee, to ensure that he received information, instruction and training from Warman’s; failing to instruct the worker not to undertake the cleaning of any machine until trained how to do so safely by Warman’s; and a failure to provide a system of work that was without risks to health. The company defended the charges. The following evidence emerged from the hearing.

The injured worker joined Swift’s after answering an advertisement. He was interviewed and offered casual employment. At the time the offer was made the worker signed a contract that set out the terms of engagement. Two and a half weeks after the interview the worker was placed at Warman’s. Whilst at Warman’s the worker was given directions as to what work was to be performed, what equipment should be used, and who he was to report to for work and supervision by that company. Warman’s also provided on-the-job training and instruction in a number of areas. After the accident the worker filled out a workers compensation claim and Swift’s completed an employer’s report of injury form.

Evidence of the director of Swift’s revealed that the company regarded the responsibility for the safety of the worker to reside with Warman’s. Marks J. quoted in his judgment a statement made to the prosecutor by the director on this point. The company provided its clients “with the staff according to what they want, its up to them to provide suitable and safe equipment and we cannot impinge on there (sic) territory. We provide the person they provide the equipment that is safe to use, it’s the responsibility of the client to provide safe equipment in a safe environment and ...(the worker)....should have an awareness of the responsibilities of a fettler.”

The defence raised by Swift’s was that the company was not the employer of the injured worker. The company submitted that the offer of casual employment was not evidence of any contractual arrangement between the worker and Swift’s for the work performed at Warman’s. Further, the degree of control and direction available to
Swift's over the work of the injured worker was so minimal that it could not be said that the company was an employer. The prosecution submitted that there was an employment relationship in existence as the company paid the wages of the worker; deducted tax; paid for annual leave; paid workers compensation premiums; and paid superannuation.

Marks J. held that Swift's was the employer of the injured worker. The offer of work at Warman's and the acceptance of that offer showed an intent by the parties to enter into a legally binding contract of employment. His Honour also held that it would be inconsistent with the evidence to suggest that the worker was employed by Warman's and that would be a contradiction of the contractual agreement between Warman's and Swift's. Nevertheless, the evidence was that substantial direction and control of the work devolved upon Warman personnel. Marks J. noted at p.32 of the judgment that "...the circumstances created by the use of labour hire organisations as a recent manifestation of the manner of deployment of labour do not comfortably fit within orthodox concepts of control developed by the courts over many years to deal with what were then contemporary orthodox employment relationships or variations on them." His Honour noted that the only feature missing from the terms and conditions of the casual offer of employment was detailed direction and control of the worker, but that this control and direction did not necessarily have to devolve on the defendant personally to found an employment relationship. As a result, the company was found to be in breach of its obligations to ensure the safety of its employee.

This case illustrates how the courts will look at new and evolving work structures to characterise work relationships and determine what rights and obligations flow from those relationships.

**DUTY OF CARE PROVISIONS**

The duties imposed on persons and organisations in control of the work performed by contractors/agency workers by the provisions of sections 15; 16; 17; 18; 19; and 50 of the OHS Act require the following:

- There must be responsibility for the creation and control of risk at the workplace;
- The action taken to control the risk should be proportional to the risk involved;
- The obligations under the OHS Act are concurrent. The fact that one organisation may have control over a workplace will not necessarily remove responsibility from any other party. The level and degree of responsibility for safety will vary as will the steps that are necessary to discharge the OHS duties of care;
- The duty to ensure safety involves both preventative and remedial steps to be taken;
- The scope and allocation of delegated duties under the OHS Act must be realistic and meaningful.

The difficulties encountered in the legal determination of whether a relationship is one of employee/contractor/agency worker is somewhat ameliorated by the cross-over provisions found in S.15(4) and 16(3) of the OHS Act. Section 15(4) states: "If in proceedings against a person for an offence against this section the court is not satisfied that the person contravened this section but is satisfied that the act or omission concerned constituted a contravention of s.16(1), the court may convict the person of an offence against that section."
The provision of S.16(3) repeats the same words but substitutes a contravention under S.15(1). The effect of these two provisions is to diminish the characterisation of the relationship between the parties as a primary determinate or element of a safety offence allowing the courts to focus on the acts or omissions that created the alleged offence.

CONCLUSION

From the case studies referred to it is clear that in the area of occupational health and safety the obligations of organisations to contractors/agency workers are not diminished by reason of the characterisation of the contractual arrangements, nor by the degree of control available over the work performed. Indeed the cases referred to suggest that there may be even greater steps needed to be taken by organisations to effectively discharge their obligations under the OHS Act towards contractors/agency workers given that the work is frequently carried out at premises outside their control.

Where more than one organisation is responsible for workplace safety all of the duty holders should ensure that there is a clear understanding of the different duties owed, by whom, and how those duties are to be discharged.
Introduction: Issues in Context

The Sydney Morning Herald put the matter aptly in its editorial of 7 July 1999, when it said the entitlements of workers "need not and should not be smashed to pieces in the carnage." [of company insolvency] and that the dilemma was "a scandal that must quickly be addressed".

The June 1999 closure of the Oakdale coalmine near Camden, NSW, where $6.3 million is outstanding in employee entitlements, is just the latest example and reinforces the need for measures to secure the payment of employee entitlements.

There was the earlier closure of the CSA Copper Mine at Cobar in 1998, where after much time and heartache employees were eventually paid out most of the approximately $10.5 million owing in accumulated employee entitlements. There has also been the closure of Gilberton Abattoir at Grafton involving $3 million in unpaid employee entitlements, and the Woodlawn copper, lead and zinc mine at Goulburn, where an estimated $6 million was due to employees. 157 hospital workers at Rockhampton and Yeppoon lost $1.4 million, and thousands of Sizzler Restaurant employees lost $2 million worth of entitlements.

The 1998 waterfront dispute highlighted the need for measures to prevent the manipulation of company structures or the closure of businesses, where that leads to the avoidance of legal entitlements.

A leading English authority has put the position succinctly in his standard text on corporate insolvency law:

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* A paper given to the Australian Centre for Industrial Relations Research and Training Conference "Re-thinking Collective and Individual Rights at Work: A Reflection and Outlook" 16th July 1999, Sydney, Australia.
"There can be no doubt that employees do deserve special protection. Very often their wages or salaries are their sole source of income. The loss of employment can thus have a devastating effect on them and their families, an effect exacerbated by non-payment of their entitlements by their employer. The relationship between employee and employer is a continuing relationship requiring mutual trust and confidence, and it is a relationship in which the employee is very clearly subordinate. Moreover, without the work of the employees the employer's business would not function and creditors would not get paid." 86

It is a fact of commercial life that not all businesses succeed. This is often the case despite the best efforts of company directors and management. But even where no-one is at fault, there is force in the proposition that employees deserve special protection in relation to their earned entitlements.

It is important that the response to this problem be a national one.

It must be recognised that this is not a matter for industrial law alone. Amendment of the Corporations Law is a necessary part of any package of reforms aimed at resolving these issues.

In recognition of the need for a national framework for company law, legislative amendment of the Corporations Law aimed at protecting employee interests requires the agreement of all Australian jurisdictions. Under the Heads of Agreements on Future Corporate Regulation, the States have undertaken not to legislate on matters which might affect corporations without the approval of the Ministerial Council for Companies and Securities.87

Better securing the rights of employees requires corporate and industrial legislative reform at the federal level. This paper puts forward a range of specific reforms for consideration:

That company directors could be held personally liable where, for example, a director has not acted with due diligence to make provision for the payment of entitlements.


87 The Corporations Law is State law, being the Corporations Law set out in s.82 of the Corporations Act 1989 (C'th) and applied as State law by the Corporations (New South Wales) Act 1990 (see s.7). In order for a later New South Wales Act to effectively amend the Corporations Law, that later Act must expressly so provide as required by s.5(2). The Corporations Agreement, at cl.513, provides that a State will not introduce a Bill that would repeal or amend a national scheme law unless before its introduction the Ministerial Council has been consulted about it and has approved it.
Related entities within a corporate group may be held liable for unpaid employee entitlements.

An anti-avoidance provision could be inserted into the Workplace Relations Act to invalidate a contract or arrangement whose purpose or effect is to avoid legal obligations to pay employees their industrial entitlements.

Measures could be introduced to require employers to make provision for employee entitlements as they accrue, to avoid the possibility that there will be nothing left for workers to claim against.

Finally, the establishment of a federal wage earner protection fund of entitlement insurance will be considered.

A Federal Proposal for the Corporations Law

Two options for the amendment of the Corporations Law were identified by the Federal Treasurer in April 1999, and raised at the Ministerial Council for Corporations. Both options are designed to assist in the protection of employee entitlements. These options are as follows:

(a) creating a civil or criminal penalty, specifically designed to prevent the misuse of company structures by directors to avoid payment of employee entitlements; and

(b) strengthening the related party and insolvent trading provisions in the Law, so that directors would be in breach of the existing insolvent trading provisions if they gave a financial benefit to a related party or entered into a commercial transaction, which caused the company to become insolvent.

NSW has written to the Federal Treasurer and indicated a number of deficiencies with these proposals. Proposal (a) does not assist the recovery of unpaid money. Such a provision would primarily have a deterrent role. Proposal (b) does not focus specifically on the protection of employee entitlements. Rather, proposal (b) aims to tighten insolvency law in a way which would assist all creditors.

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Proposal (a) would go some way towards protecting employee entitlements. However it should be complemented with an anti-avoidance provision which would permit a court to unravel the proscribed artificial structures and arrangements. Proposal (b) may have little effect. It will only assist creditors in those situations where asset stripping or unlawful depletion of a company’s assets has taken place and those assets cannot be traced. Even in those cases, it may be that existing provisions - if enforced - already deal with such circumstances.

Until more details are available, it will not be possible to determine whether the proposal improves the existing position of creditors.

The priority for policy makers at this stage should be to find ways to achieve recovery of entitlements for employees, rather than simply to penalise unscrupulous directors.

**Insolvency and the Position of the Employee as an Unsecured Creditor**

An insolvent corporation is one which is unable to pay all its debts as and when they become due and payable. The unpaid employee is, almost always, an unsecured creditor.

Due to amendments in 1993, the priority of the Commissioner of Taxation over employee creditors seeking payment of their entitlements has been abolished. After the costs of the administrator (the costs of winding-up), employee entitlements rank first among unsecured creditors. Due to application of the *pari passu* principle, there is equal sharing of available assets between creditors of the same class. This means that employees, who are given a priority status as a class of unsecured creditors are, after the costs of winding-up, ranked next as the class of creditors amongst whom available funds are distributed. Secured creditors, however, have priority over all unsecured creditors. This scheme of priority has been well summarised as having “been erected in a legal vacuum, without regard to the possibility that

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89 s. 95A Corporations Law


91 Darvas, op cit, at 105-108. The Harmer Report (1988) recommended that the principle of equal sharing among creditors of the same class continue. Employees have a limited preference over other creditors in relation to floating charges, see s. 443 in relation to a receivership, and s. 556 in relation to liquidation. See Lipton, P & Herzberg, A, Understanding Company Law, LBC, 1998, at 711 and chapter 24.
no money will be left in the corporate pot once secured creditors or the liquidators are satisfied." ⁹²

Some have proposed affording employee creditors priority over secured creditors ⁹³.

The International Labour Office uses the term “super-privilege” or “absolute priority” to describe this type of arrangement. A report to the 1991 International Labor Conference by the International Labor Office identifies a number of countries that have adopted such a system, “...mainly French and Spanish speaking countries, whose labour legislation is modelled on Mexican and French law. ⁹⁴ Generally only part of the outstanding entitlement is protected by the super-privilege - for example only the previous year’s wages may be protected ⁹⁵.

Caution should be exercised before considering this type of approach. The application of secured creditor arrangements is fundamental to commercial lending arrangements. The impact of such a scheme on the lending practices of banks and other creditors would be a relevant consideration.

How effective those laws have been in practice in securing payment of employee entitlements would also be useful to know. Such issues are beyond the scope of this paper.

Deeds of Company Arrangement and changes to the priority of employee claims

The use of voluntary administration and deeds of company arrangement procedures (Part 5.3A of the Corporations Law) is of critical importance to the issues under examination. ⁹⁶ Voluntary administration represents a procedure for administering a company’s affairs when faced with insolvency. However, from the perspective of employees, there are aspects of the voluntary administration provisions which have special significance. At least one of the policy justifications for the voluntary administration procedures is to preserve employment

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⁹⁵ ibid.

⁹⁶ These provisions came into effect on 23 June 1993. The introduction of Part 5.3A into the Corporations Law was based on the recommendations of the Australian Law Reform Commission’s General Insolvency Inquiry ("the Harmer Report"), see p 17 of ASC Research Paper 98/01.
prospects. The main aim is to give companies some time in which, and a mechanism whereby, they can restructure their affairs with a view to saving the company’s business. Part 5.3A was introduced as a much simplified procedure for dealing with a company’s affairs when faced with insolvency.

The Corporations Law allows prescribed provisions that would otherwise be incorporated in all deeds of company arrangement to be varied or excluded (s.444A(5)). In order to accurately assess the effect that such a procedure has on employees’ entitlements, it is necessary to determine how frequently deeds of company arrangement depart from the priorities contemplated by s.556 of the Corporations Law. This information is not collected. The Australian Securities Commission (as the ASIC then was) undertook a study in relation to the various claims and complaints concerning the operation of Part 5.3A in practice. This resulted in a 1998 ASC Research Paper, A Study of Voluntary Administrations in New South Wales which stated that:

“the practice of making such changes can be to the disadvantage of creditors particularly in the areas of changing the ranking for employees in the order of priorities...” (Emphasis added)

As the law currently stands, whether or not an employee’s priority under s. 556 is sacrificed is not determined solely by the employee, but instead by all creditors.

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98 ASC Research Paper 98/01, A Study of Voluntary Administrations in New South Wales, 1998, Australian Securities Commission. Part 5.3A was introduced as a much simplified procedure for dealing with a company’s affairs when faced with insolvency. It was in part a replacement procedure for official management (which did not operate satisfactorily) and also to overcome the delay and costs associated with schemes of arrangement, p 18.

99 Id, p 11. The report also referred to evidence of substantial non-compliance with the requirements for voluntary administrators to notify the ASC of suspected breaches of the Corporations Law.

In a number of the cases reviewed by the ASC in its research paper, the prescribed provisions were amended in relation to the priorities specified in s.556 of the Corporations Law, which had the effect of denying the priority normally accorded to claims by employees. Two of the main advantages of this process are that it enables an appointment to be made virtually immediately and that the company is able to proceed directly into liquidation from administration, if circumstances warrant. With the introduction of Part 5.3A there is evidence of a substantial decline in the number of court windings up and provisional liquidations (p18). Concern about amendment to employee priority is heightened by the fact that discrimination between creditors has been held to be justifiable in a decision of the Full Court of the Federal Court. This decision indicated that a deed of company arrangement that, in the context of part of a business being closed but the continuation of the profitable part, discrimination in favour of creditors who were likely to have a continuing relationship with the company was not necessarily unfair: Lam Soon Australia Pty Ltd (Administrator Appointed) v Molit (No 55) Pty Ltd (1996) 14 ACLC 1,737 at 1,748-9. In a situation where employee creditors were employed by the part of the business that closed, the application of this principle would be to the detriment of employee interests.
Depending on the facts of a particular case, it might conceivably be in the interests of employee-creditors to receive a reduced sum in order that the employer’s business may continue as a going concern and continue employing staff. It could even be in the interests of employee-creditors for certain other creditors (such as an essential supplier with monopolistic power) to receive priority ahead of the employees if that meant the difference between the business surviving and ceasing to trade.

However, the application of these provisions to employee entitlements is a concern. In particular, there is the issue of whether or not an employee who has outstanding entitlements is in a position to make an informed decision at a creditors’ meeting. Difficulties confronting employees might be exacerbated where employees have little understanding of commercial issues and rely upon their employer’s advice on such issues. This was adverted to by Young J in the Supreme Court of New South Wales in *Khoury v Zambena Pty Ltd* 100 In that case there was evidence that a manager called a meeting of employees and said:

> “There is going to be a meeting in the city this afternoon. All of you who are owed money... can go to the meeting, but I don’t want you to as there is too much work here. However, I am going and I can represent you at the meeting.” 101

The employees then signed forms authorising the manager to represent them at a meeting at which, in fact, their rights were substantially altered. His Honour said:

> “any suggestion... that the manager represented employees who did not really know what was going on and voted in their stead in favour of the deed must be looked at very seriously. The evidence in this case is would make me think that in fact [one of the employees] ... was entitled to vote, but the circumstances whereby her vote and probably also those of non-English speaking workers at the factory were in fact usurped by the manager is something which led to the situation that one could not guarantee that had the workers known what was going on, they would have agreed to the scheme at all. However, at the meeting their votes were in favour of the scheme.” 102 (Emphasis added)

In addition, under section 440D (1) of the *Corporations Law*, during the administration of a company, a proceeding in a court against the company or in relation to any of its property

100 *Khoury v Zambena Pty Ltd* (1997) 15 ACLC 620.

101 Id, p.623

102 Id, p.626.
cannot commence or be proceeded with, except with the administrator’s written consent or with the leave of the Court. The effect of this section is to significantly encroach on the ability of workers to enforce their rights in industrial tribunals. An interpretation adopted by the NSW Supreme Court represents a further limitation on the ability of workers to obtain their proper entitlements when a company is under administration.\footnote{Brian Rochford Ltd (Administrator Appointed) v Textile Clothing & Footwear Union of NSW (1998) 85 IR 332. See also Foxcraft v The Ink Group Pty Ltd (1994) 15 ACSR 203, as discussed in Darvas, op cit, p 111.}

Accordingly a submission has been put to the Federal Minister for Financial Services, urging consideration a regulation under section 440D (2) to prescribe proceedings in the Industrial Relations Commission of NSW to ensure that industrial proceedings are not stymied. The foregoing raises a number of significant policy issues:

(I) whether it should be open to creditors to exclude an employee’s priority under a deed;

(ii) if so, whether such exclusion should be determined by the employee-creditors only;

(iii) whether, under the present law, employee-creditors are able to make a fully informed decision at creditors’ meetings, free from any managerial pressure; and

(iv) whether (and this is related to (iii) above) it should be a requirement that an employee’s union, in order to advise their members, be provided with the information to which employee creditors are entitled.

In order to assess accurately the effect of the Part 5.3A on employee entitlements (voluntary administration and deeds of company arrangement procedures), information should be provided to determine how frequently deeds of company arrangement change the priority of employee entitlements as specified in s. 556 of the Corporations Law.

**Option of Director Liability where a Corporation Fails to pay Employee Entitlements**

No matter what priority might be given to employee rights on insolvency, the fact remains that there may not be enough money in the company to satisfy their claim.
One measure to address this would be to hold directors personally liable in cases where they have not made proper provision for, and paid, employees’ wages due and owing. Directors are already personally liable under some statutes and I accept the argument that the corporate veil should be pierceable on this important issue in limited circumstances.

An exception could be made where a director can satisfy the court that the director:

* was not in a position to influence the conduct of the corporation in relation to making provision for wages and other entitlements due and owing, or
* the director, being in such a position, used all due diligence to make provision for wages and other entitlements due and owing.

The test of making proper provision for wages due and owing could be satisfied where the corporation has provided for the payment of wages due and owing by way of a trust fund, a wage guarantee fund, or has otherwise taken out appropriate and adequate insurance where such a mechanism is successful in quarantining and paying employee wages due and owing. It would not be sufficient to merely deposit money in an account, as it would be exposed to claims by other creditors. The effect of such a provision may be to provide an incentive to company directors to arrange adequate insurance or take other action to ensure the security and payment of entitlements.

There are existing provisions that have some relevance to the issue of director liability:—

- Under part 5.7B of the Corporations Law, the director of a company may, in certain circumstances, be personally liable to creditors for corporate debts where the director has allowed the company to incur debts while insolvent, although the primary right to sue the directors for insolvent trading is vested in the liquidator.
- Section 400 of the Industrial Relations Act 1996 makes the directors of corporations liable to a penalty, in certain circumstances, where the corporation itself is legally in breach of industrial legislation.
- under s.50 of the Occupational Health and Safety Act 1983, where a corporation contravenes any provision of that Act, each director of the corporation shall be deemed to have contravened the same provision unless he can satisfy the court that the director:
  - was not in a position to influence the conduct of the corporation in relation to its contravention of the section, or
  - the director, being in such a position, used all due diligence to prevent the contravention by the corporation.

Similar NSW provisions are s.10 Environmental Offences and Penalties Act 1989 and s. 22 of the Employment Protection Act.

Contrast Section 561 of the Corporations Law.
There is already such legislation operating in Queensland. *Under the Workplace Relations Act 1997 (Qld)*, section 452 provides that if a corporation commits an offence under the sections relating to the failure to pay wages, the executive officers of the corporation are also taken to have committed the offence and are liable to any order for the payment of wages that a magistrate may make. This provision can be invoked when a company is liquidated or placed in receivership provided there is no evidence to indicate that the executive officer exercised reasonable diligence to ensure compliance with the Act or was not in a position to influence the conduct of the corporation in relation to the offence. Indications are that these provisions have proved effective.\(^{106}\) It does not seem that this provision has had an adverse impact on directors or the operation of corporations in Queensland.

Canada also has directors’ liability legislation of the kind contemplated here. One Canadian legal text - and this is relevant to the Australian position - has described the position as follows:

“In many such cases the small asset base will not make it worthwhile for the creditors or the corporate employer itself to commence ... proceedings. Consequently, a hollow corporate shell will remain, against which creditors’ claims are seldom recoverable.

To overcome this unsatisfactory effect upon employee creditors, most Canadian jurisdictions have established a legislative framework which enables employees to pierce the corporate veil and pursue their claims against the officers and/or directors of the corporate employer.” \(^{107}\)

Redundancy payments are in a special position as no entitlement accrues unless there is termination in certain circumstances and as there is inherent uncertainty as to whether there will ever be an entitlement (the employee may resign or the employment never lead to retrenchment). The key issue is: could the directors reasonably be expected to have quantified and made provision for redundancy payments (under the relevant instrument) during the life of the company? For example, at Oakdale, a large part of the outstanding entitlements was redundancy and severance - under the relevant award, there was an entitlement of three weeks’ pay for each year of service.\(^{108}\)

\(^{106}\) These provisions have been carried over under s. 673 of the *Industrial Relations Act 1999 (Qld)*.


\(^{108}\) Coal Mining Industry (Production and Engineering) Consolidated Award 1997, clauses 16.3 and 16.4
The Protection of Employee Entitlements *

Introduction: Issues in Context

The Sydney Morning Herald put the matter aptly in its editorial of 7 July 1999, when it said the entitlements of workers “need not and should not be smashed to pieces in the carnage.” [of company insolvency] and that the dilemma was “a scandal that must quickly be addressed”.

The June 1999 closure of the Oakdale coalmine near Camden, NSW, where $6.3 million is outstanding in employee entitlements, is just the latest example and reinforces the need for measures to secure the payment of employee entitlements.

There was the earlier closure of the CSA Copper Mine at Cobar in 1998, where after much time and heartache employees were eventually paid out most of the approximately $10.5 million owing in accumulated employee entitlements. There has also been the closure of Gilberton Abattoir at Grafton involving $3 million in unpaid employee entitlements, and the Woodlawn copper, lead and zinc mine at Goulburn, where an estimated $6 million was due to employees. 157 hospital workers at Rockhampton and Yeppoon lost $1.4 million, and thousands of Sizzler Restaurant employees lost $2 million worth of entitlements.

The 1998 waterfront dispute highlighted the need for measures to prevent the manipulation of company structures or the closure of businesses, where that leads to the avoidance of legal entitlements.

A leading English authority has put the position succinctly in his standard text on corporate insolvency law:

* A paper given to the Australian Centre for Industrial Relations Research and Training Conference “Re-thinking Collective and Individual Rights at Work: A Reflection and Outlook” 16th July 1999, Sydney, Australia.
The Need for an Anti-Avoidance provision in the Workplace Relations Act

Appropriate legislation is necessary to prevent corporate restructuring conduct which leaves employees without their entitlements. This need was highlighted recently in the Patrick case. Despite that case, artificial corporate restructuring of the type alleged in *MU A v Patrick* may, depending on the circumstances, still be permitted by current corporations law.

The proposal to introduce an anti-avoidance provision into the Workplace Relations Act would address the problem of artificial corporate structures being adopted to avoid employee rights and entitlements. It would allow a Court to declare void any contract or arrangement, the purpose or effect of which is to avoid the payment of employee entitlements, and seek to have a deterrent effect against corporate structures being so used.

In *Qantas Airways Limited v Christie* (1998) 72 ALJR 634, McHugh J considered the possible scope for employers to avoid s 170DF(1) of the *Industrial Relations Act 1988* (now known as the *Workplace Relations Act 1996*). McHugh J said nothing in s 170DF(1), for example, prevents the employer from defining the tasks of the qualifications for a particular position or requires in a particular way so as to avoid their obligations. If by reason of a particular delineation of the requirements of a particular position, age is an inherent requirement of that particular position, the employer commits no breach of the relevant section if he terminates the employment for reasons of age. Conceptually, this type of conduct is the same as corporate actions to avoid the payment of employee entitlements, such as the transfer of employment to a related company that has insufficient assets to pay entitlements, or stripping the existing employer company of sufficient funds to pay entitlements.

McHugh J noted that there is nothing in the Act equivalent to Pt IVA of the *Income Tax Assessment Act 1936* (Cth), so as to invalidate a contract or arrangement whose purpose or effect is to avoid the operation of s 170DF(1).

McHugh J’s comments highlight the serious possibility that provisions of the *Workplace Relations Act* - and not merely the unfair dismissal provisions - can be avoided by a contract or arrangement whose purpose or effect is to avoid the operation of the Act. At the same time, however, the very means of preventing such avoidance is adverted to by McHugh J, namely the introduction of a provision equivalent to Pt IVA into the *Workplace Relations Act*.\(^\text{110}\)

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\(^{109}\) *Patrick Stevesoers Operations No 2 Pty Ltd and Others v Maritime Union of Australia 79 IT 339*

\(^{110}\)
Part IVA of the *Income Tax Assessment Act* demonstrates that the federal legislature in other contexts has experience in dealing with artificial mechanisms for avoiding the scope of relevant legislation.

The decision of Marshall J in *Australasian Meat Industry Employees' Union v Aziz*,111 was one of the first decisions to apply the principles enunciated in the *Patrick* case. In *AMIEU v Aziz*, Marshall J made a number of interlocutory orders arising from the apprehended restructure of the employer's group of companies. The case does disclose a willingness on the part of the Court to grant an interim mandatory Mareva injunction in order to protect the integrity of the Court’s orders. In *AMIEU v Aziz*, Marshall J noted:

"Based on the evidence currently before the Court, I have no confidence that any order the Court makes will not be attempted to be defeated by some arrangement made by the Aziz family and/or associated corporate group to attempt to reshuffle their corporate and family finances so as to avoid any adverse consequences for them as a result of the applicants seeking to enforce their legal rights".112

This passage reinforces the need for an anti-avoidance provision.

**Related Company Liability for Outstanding Employee Entitlements**

There is much to be said for the objectives of the *Employment Security Bill 1998* (Cth), a private member’s bill, to extend “employer” liabilities for entitlements to related companies by seeking to amend the *Corporations Law* to enable an application to be made to a competent Court for a related corporation to pay the debts of an insolvent company. Again, this approach is not a panacea, but is an important component in the package of reforms proposed.

The Companies and Securities Advisory Committee’s Discussion Paper (December 1998) canvassed Court-ordered contribution orders, and noted that the Australian Law Reform Commission *Insolvency Report* (the Harmer Report) of 1988 recommended that a court should have a specific power to make a contribution order where a group’s affairs have been intermingled. The Harmer Report recommended that a court could make an order affecting

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112 Id, at 15.
any company related to the company in liquidation (not just a holding, or ultimate holding, company), taking into account the level of intermingling of the affairs of the companies including:

- the extent to which and the conduct of the related company took part in the management of the company in liquidation;

- the conduct of the related company towards the creditors of the company in liquidation (for instance, the extent to which the corporate group has dealt with creditors as a single economic unit);

- the extent to which the circumstances giving rise to the liquidation are attributable to the actions of the related company, and;

- the extent to which creditors of any of the companies in liquidation might be advantaged or disadvantaged by the making of a pooling order.\(^{113}\)

The Companies & Securities Advisory Committee advanced an additional criterion in its 1998 Discussion Paper:

- the extent to which the insolvent company has, at any time, engaged in one or more transactions that have resulted in the value of the insolvent company’s assets being reduced.

This is a relevant consideration in relation to the protection of employee entitlements.

Consideration should be given to providing an employee, group of employees, or a registered industrial employee organisation, with the ability to apply to the Federal Court for an order that a related body corporate pay the outstanding entitlements due to employees of the employer company. In addition to the factors mentioned in the Harmer Report, special consideration should be given to the position of employee entitlements by instituting a requirement that the Court take into account the following matters in determining orders:

- whether the related body corporate operated at arm’s length;

\(^{113}\) Companies & Securities Advisory Committee, Corporate Groups - Discussion Paper, December 1998, pp 133-134, and pp 128-130 as to pooling orders.
whether the related body corporate as a creditor had voted at a creditor meeting that other creditors be paid in preference to employee creditors (as can be done by deed of arrangement);\textsuperscript{114}

and any other matters the Court sees as relevant.

Where an employee, group of employees, or a registered industrial employee organisation were to make an application for directors of a corporation to be jointly and severally liable on insolvency for payment to former employees of their wages and entitlements due and owing, and there is also an application for a related body corporate to pay the employee entitlements of the insolvent employer company, the Court could hear the applications jointly and have the discretion to make such orders as it sees fit, and in exercising its discretion, it should give primary consideration to the need to ensure that employee entitlements are paid, but also to the need to minimise orders that would threaten the liquidity and viability of a corporation.

In this context it is relevant to note the need to address the position where there has been a change in ownership. Currently employee rights are protected on transmission of business through industrial legislation. However there is precedent to suggest that if a company is wound up and ceases trading and the business subsequently re-commences operations under the management of another entity, there is no transmission of business.\textsuperscript{115}

Legislative amendment of the \textit{Corporations Law} can address the issue of manipulation of corporate structures to provide a remedy for where employees are unilaterally transferred to a new company employer which has little or no assets to meet employee entitlements. It should be noted that as a matter of employment law, there is considerable doubt that an employee can be unilaterally transferred by one employer entity to another: an employee’s genuine and informed consent is needed.\textsuperscript{116} Although it may be unlawful for a company to transfer employment to a related company without the employees’ consent, the unlawfulness of such a transfer will not assist with the payment of employee entitlements, notwithstanding assurances that might be made by management that there would be no difficulties with payments to employees arising out of transfer to another company.

\textsuperscript{114} This would be a relevant consideration whether voluntary administration had failed and the company was then placed in liquidation.


On transfer of business it is standard commercial practice that the sale of the business take account of outstanding liabilities - including employee entitlements. To ensure that this is adequately done and in good faith, consideration could be given to a requirement that outstanding entitlements be paid into a specified fund.

**The nature of key entitlements**

Each of the above measures would provide a deterrent to employers arranging their affairs so as to avoid liabilities, and would maximise the prospects of employees successfully pursuing the assets of recalcitrant employers. However the possibility remains that there will still be insufficient funds to meet outstanding entitlements.

The difficulties confronting employees arise largely from the limited nature of employee rights in the *pre-insolvency period*. It is useful to examine the legal nature of some of the key entitlements to understand how we might respond to this problem.

**Annual Holidays and Long Service Leave Entitlements**

Two of the most important entitlements are annual and long service leave.\(^\text{117}\)

The circumstances in which a legal right to such leave or to payment in lieu crystallises have been considered by the High Court in *Nilsen Development Laboratories Pty Ltd v Federal Commissioner of Taxation*.\(^\text{118}\) The High Court was required to determine the deductibility of long service leave and annual holiday payments under the *Metal Industry Award* and the *Metal Trades (Long Service Leave) Award*.\(^\text{119}\) A question arose as to the juristic nature of such entitlements, and in particular the way in which those entitlements crystallise.

Mason J (at 631) referred to the unanimous judgment of the High Court in *Federal Commissioner of Taxation v James Flood Pty Ltd* where the Full Court said of annual leave entitlements under the applicable federal award:

\(^{117}\) Under the *Annual Holidays Act 1944* (NSW) and the *Long Service Leave Act 1955* (NSW), an employee is entitled to prescribed annual leave and long service leave respectively.

\(^{118}\) *Nilsen Development Laboratories Pty Ltd v Federal Commissioner of Taxation* (1981) 144 CLR 616.

\(^{119}\) *Nilsen Development Laboratories* was primarily a case concerning income tax legislation (which was clarified by the insertion of s 51(4) *Income Tax Assessment Act 1936* (Cth)).
"The payment is made to the employee in respect of the period of leave and forms part of his ordinary wages. The award therefore clearly regards the payment as something made in respect of the two weeks when leave is actually taken. Prima facie it prohibits the substitution of a money payment for the leave. The prima-facie position is qualified only in the case of an employee who lawfully leaves his employment or whose employment is terminated without his fault." 120

Mason J concluded that these comments (which related to annual holiday leave) applied equally to long service leave121. Mason J also decided that the following comment from James Flood applied to long service leave under the relevant award:

"There was not an accrued obligation, whether absolute or defeasible. There was at best an inchoate liability in process of accrual but subject to a variety of contingencies ...

Mason J concluded that the employee was not entitled to any deduction “unless liability to make the payments has accrued by reason of the employee taking the leave or the occurrence of events (eg death, termination of employment in certain circumstances) by reason of which the employer is bound to make the payments”.

Barwick CJ said:

"It is quite wrong, in my opinion, in this connection to treat any liability as either accruing or having accrued at any time prior to the time when the employee enters upon the leave, whether it be annual or long service."122

It is clear from the foregoing that normally no debt crystallises in relation to long service leave or annual holiday leave until certain contingencies occur. Under the law as it stands, there is no legal right to be paid these entitlements prior to termination that a company could be legally obliged to put funds aside for.

120 Federal Commissioner of Taxation v James Flood Pty Ltd (1953) 88 CLR 492 at 504-505.

121 Nilsen Development Laboratories Pty Ltd v Federal Commissioner of Taxation (1981) 144 CLR at 631

The commercial approach to the nature of leave entitlements

In *Nilsen*, the High Court upheld the decision of the majority of the Full Federal Court (Brennan and Deane JJ) below.

In *Nilsen* before the Full Federal Court, Deane J said:

> “When it becomes antecedently clear that, apart from the contingency of a change of ownership of the undertaking, an employer will be required to make future payments in respect of annual leave or long service leave without receiving any corresponding quid pro quo by way of services, prudent accountancy practice requires that provision be made in the employer's accounts to cover the future obligation to make the payment. To the extent to which the employees’ entitlement to such leave would be based upon the services rendered during a particular accounting period, prudent accountancy practice requires that the relevant provision be made before the ascertainment of the profit or loss of the period.”

123 (Emphasis added)

Deane J’s observations are of considerable significance. They suggest that the legal characterisation of the employee’s right to unpaid leave entitlements is not consistent with “accountancy practice and commercial reality”.

So as the law currently stands, employers cannot be legally obliged to set aside such entitlements during employment where the relevant contingencies have not occurred such that no debt has crystallised at law.

Redundancy Payments

Redundancy payments take a variety of forms. They normally constitute payments pursuant to the *Employment Protection Act* (NSW) or relevant industrial awards. Sometimes they may take the form of *ex gratia* payments pursuant to an understanding falling short of any contractual arrangement; they may constitute amounts supplementing statutory or award entitlements.

As the law currently stands, the problems of unpaid redundancy payments upon insolvency are even more acute than those in relation to unpaid annual leave or long service leave.

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123 *Federal Commissioner of Taxation v Nilsen Porcelains (Australia) Pty Ltd* (1979) 41 FLR 36 at 45
payments. The reason for this is that even from a practical commercial point of view such entitlements do not - unlike annual and long service leave entitlements - accrue over time in any real sense.

Entitlements to redundancy payments arise - both legally and from a practical commercial point of view - only upon termination of employment.

Securing the Prompt and Regular Payment of Occupational Superannuation Contributions

There are a number of examples of employer failure to make superannuation contributions for employees into a fund, in some cases not paying contributions for many months. In the letters I have recently received from employees and unions in the context of insolvency, superannuation is, disturbingly, raised on a frequent basis as having being unpaid.

Individual superannuation trust deeds and industrial instruments may, if these individual instruments specify, require contributions to be paid on a regular basis. But not all awards do, and there is a question about enforcement. There is currently no mandatory and universal statutory obligation that superannuation contributions be paid promptly and on a regular basis. Employees may not be aware that contributions are not being made. It is only at the end of the financial year that an employer who has failed to make superannuation contributions into a fund as required must pay the equivalent as a tax with interest, charges and a penalty.

Consideration should be given to a legislative requirement that employers make superannuation contributions for employees into a complying fund on a regular basis, perhaps monthly.

I note that it was reported in *The Australian Financial Review* on 8 July that this approach is supported by a specialist with the Institute of Chartered Accountants, and also by the Association of Superannuation Funds of Australia.

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124 The Inquiry by the Federal Parliamentary Joint Committee on Corporations and Securities, 1998 submission No. 18 by the ALH-MWU, p 9.

125 Also for example, see Jackson, A, "Firm's failure cost worker job and $46,000", *Sydney Morning Herald*, 6 July 1999, p 4.

126 *Superannuation Guarantee (Administration) Act* 1992 (Cth.)
This requirement would need to be enforced. It is recommended that there be a penalty for failure to make superannuation payments on a regular basis and that this be of sufficient level to have deterrent effect.

This matter has recently been raised with the federal Treasurer by the NSW government. It was proposed that there should be a federal legislative requirement that superannuation contributions be mandatorily paid by employers on a regular basis, such as monthly. This would avoid many months passing without contributions being paid, and avoid the risk of funds to pay contributions not being available in the event of a business being wound up. This approach would involve a penalty for failure to make such contributions, with the penalty needing to be of sufficient level to have a deterrent effect. The detailed scheme of enforcement under the *Superannuation Guarantee Charge Act* 1992 (Cth.) appears to leave no place (as a matter of inconsistency under s. 109 of the Australian Constitution) for State law to operate to implement such a scheme.

**Mechanisms for ensuring that workers are paid**

I have argued that it is important to find a mechanism to protect employee entitlements in the pre-insolvency period. There must be a mechanism that will ensure that workers are paid, and paid promptly. There are a variety of options for achieving this.

**Employer-based or industry-based trust funds**

The trust fund approach would involve corporations, on an individual company basis, holding the accrued entitlements of their employees in trust so that other creditors (secured and unsecured) could have no claim against these funds in the event of insolvency. One measure worthy of consideration is that at the point of entitlement to take long service leave (after 10 years service under the *Long Service Leave Act* (NSW)), the monetary value of the entitlement be compulsorily paid into a fund - one possibility may be the employee’s superannuation account. The employee would have access to the entitlement (the monetary value of the leave, plus any interest, less administration charges) if and when the leave was taken under the *Long Service Leave Act* as currently, or if it were not taken, upon termination or retirement.

This approach would require employers would be obliged to set aside the long service leave entitlement during employment and it would not be necessary for relevant contingencies such
as retrenchment or dismissal to occur before the funds are secured. The measure should not impose unduly on employers, as it reflects, as noted above, prudent commercial practice.

This measure is, like others, not itself a panacea: but would lessen the burden on other measures proposed. An issue does arise as to the treatment of employees with between 5 and 10 years service. These employees would, under NSW legislation, have a pro rata entitlement if retrenched. The requirement on the employer to contribute should, perhaps, arise at 5 years' service, with provision for refunding of contributions should the entitlement never crystallise.

This approach also has merit in application to accrued annual leave. Currently under the *Annual Holidays Act 1944* (NSW) an employee must be given and take the four weeks annual leave within six months of the anniversary date. Otherwise, an employee is only paid the holiday pay upon termination. As with other entitlements, if insolvency occurs first, the employee may not see this money. Consideration could be given to paying the value of accrued annual leave, to a prescribed amount, into some form of trust account in the same way as it is proposed that long service leave be secured.

There are some limitations in this approach. Periods of leave are paid for (or paid out) at the employee’s salary at the time of payment. However contributions in relation to that leave may have been made some years before. Smaller fund will find it harder to achieve sufficient earnings to pay the full entitlement. And, as argued previously, it is difficult to require the making of progressive contributions in relation to redundancy where the liability may be substantial (for example, three weeks for each year of service), but may never arise. The administrative costs of establishing and maintaining a small fund could also be substantial. The argument may be made that contributions at interest rate to cover anything more than very basic leave entitlements would place a substantial impost on working capital available to companies.

Industry funds, such as those proposed by the AMWU, allow for economies of scale which may better address the needs of companies and of workers.

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127 Section 3, *Annual Holidays Act 1944* (NSW). It is possible to postpone the taking of leave, but this requires consent of the Industrial Registrar.

128 Section 4, *Annual Holidays Act 1944* (NSW).
Wage Protection Insurance

The Employee Protection (Wage Guarantee) Bill 1998 (Cth) seeks to set up a system of compulsory insurance to ensure payment of employee entitlements if a company becomes insolvent and has insufficient funds to pay employee entitlements.

This approach seeks to provide a remedy to all employees who would otherwise not recover entitlements, irrespective of the reason for the company’s failure.

Compulsory insurance would necessarily impose a cost burden on all businesses, including those that are both solvent and responsible. Further costings and actuarial advice are needed to assess the cost of this option.

Depending on these costings, this option could be less of a financial burden for employers than either the employer-based trust model or the wage earner protection fund model.

A Wage Earner Protection Fund

A wage earner protection fund scheme involves individuals having the ability to claim against a general pool of funds. The "wage earner protection fund" approach was raised in the Australian Law Reform Commission’s 1988 General Insolvency Inquiry Report. The key architect of that report, Mr Ron Harmer, wrote in a 1993 article that:

"... The ALRC, while it concluded that the interests of employees would be best protected by the creation of such a fund or alternative social welfare legislation, stopped short of making a recommendation because it considered that the issue was ‘a matter of policy that is more appropriate for the government to determine as part of, or in the light of, its social welfare and income support policies.’"129

It is time for us to have that policy debate.

In 1994, Australia ratified ILO Convention 173 - Protection of Workers Claims (Employer Insolvency) 1992. However, Australia only ratified Part II of the Convention, which concerns a privilege in the ranking of claims. Part III of the Convention deals specifically with guarantee funds and specifies the minimum entitlements that should be protected. These are:

* Wages for the eight weeks immediately preceding the insolvency or termination of employment;

* holiday pay for the six months immediately preceding the insolvency or termination of employment;

* claims for other amounts due in respect of paid absences during the eight weeks immediately preceding the insolvency or termination of employment;

* severance pay.

The Convention does not stipulate how the fund should be organised, managed, operated or financed - leaving each government flexibility in implementing the scheme.

Ireland, Belgium Finland, Germany, Sweden, and Norway operate a fund for entitlements (funded in different ways, with a cap on claims).

In 1998 it was suggested that the Federal Government consult with the States about ratification of ILO Convention 173, Part III, Protection of Workers Claims by a Guarantee Institution. So far the Federal Government has failed to act on this. The ratification of this Convention would, based on the external affairs power of the Constitution, provide the Commonwealth with the legislative ability to implement a wage earner protection fund.

It has been suggested that the Commonwealth legislate to use the external affairs power of the Constitution to provide the Commonwealth with means to enact federal legislation to establish a wage earner protection fund, based on ILO Convention 173.

It is difficult to assess the costs of a wage earner protection fund. There are no accurate estimates of the value of lost employee entitlements due to insolvency. Neither ASIC has nor Australian Bureau of Statistics have reliable data. Nor does the Department of Social Security collect information as to claims for benefits by employees retrenched due to company insolvency, although it is worth remembering that the establishment of a wage earner protection fund would mean fewer claims on the social security system.

Depending on the costs involved, we may have a number of options. A statute-based wage earner protection fund could operate on a universal employer levy system. This could function in combination with alternative effective mechanisms, allowing employers to opt for
other models. For example, an employer and union may set up a trust fund or the employer might take out appropriate insurance.

Alternatively, and depending on costs, the Federal government could establish a government funded scheme. This could provide immediate relief to workers owed entitlements, and then pursue the relevant employer, directors, or related companies for recovery of the entitlements. Under this system the bulk of the burden would fall on the relevant employers, as is appropriate.

It is untenable that Australia continues to fail to develop and implement a scheme to meet the serious industrial and social difficulties that arise in practical terms on a regular basis in Australian workplaces from the failure to pay employee entitlements. To maintain a void in this area is in stark contrast to other nations.

CONCLUSION

At the 15 April 1999 meeting of the Ministerial Council on Corporations, NSW urged the introduction of corporate law reform. Specific reforms advocated by NSW were:

- the imposition of the liabilities of employers on related entities within a corporate group, with the courts to be given a discretionary power to make contribution orders directed to related companies;

- personal director liability where, for example, a director has not acted with due diligence to make provision for the payment of entitlements;

- an anti-avoidance provision, to invalidate a contract or arrangement whose purpose or effect is to avoid legal obligations to pay employees their industrial entitlements.

I have also raised in this paper the possibilities of:

* measures to secure long service and annual leave;

* the wage earner protection fund approach; and

* measures to secure the regular payment of superannuation contributions.