Chapter Seven

Outsourcing and New Employer Entities: Challenges to Traditional Public Sector Employment

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Outsourcing is a contemporary business practice in both the private and public sectors. Typically outsourcing involves an organisation engaging under contract the services of another entity to carry out certain functions which that first organisation had performed itself. The Federal Court of Australia noted that whilst there may be varying details of the outsourcing arrangements in particular instances, outsourcing usually involves a contractor being engaged to carry out 'a function or operation, previously undertaken by the enterprise itself, in a more efficient way; perhaps by the use of more sophisticated equipment, perhaps by using specialised labour'.¹ The Australian Public Service ('APS') itself adopted a similar definition: 'Outsourcing refers to an arrangement whereby an APS agency has a function or service which was previously undertaken in-house performed by a private sector provider'.²

Various terms are applied to this outsourcing, including 'contracting out', but in the public sector the term 'privatisation' may also be used. Outsourcing or the privatisation of some APS functions commenced as far back as the early 1980s. However the real growth of outsourcing in the Australian public sector occurred from the 1990s and the pace accelerated in more recent years. In the fields particularly of information technology and human resources, there has been an enormous increase in outsourcing in the last five to ten years with implications for terms and conditions of employment of former public sector employees.

This chapter will explore first the nature and extent of this public sector outsourcing and the legal and administrative framework for that outsourcing. It then analyses the legal implications for public sector employment which occur as a consequence of the new interposed entity (which is the new employer) now performing functions previously undertaken directly by government. The question whether previous conditions of public sector employment continue to govern the terms of employment of the outsourced employees and bind the new employers will be examined, together with the concept of transmission of

business and the effects of the *Workplace Relations Act 1996* (Cth) and the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('Work Choices Act'). Reducing labour costs as a type of cost cutting might be achieved primarily through avoiding the operation of particular industrial instruments; the freedom of association objectives in the *Workplace Relations Act 1996* (Cth) can act as a safeguard to ensure there is no avoidance of such obligations through outsourcing. This will be explored in the chapter.

Other implications also arise from outsourcing — for example, in terms of discrimination, equal opportunity and affirmative action issues; whether there is an obligation to abide by the APS Values and APS Code of Conduct by the outsourced employees or new employees taking over the former government-performed functions; the shift of government control to contract management and the rights and remedies of employees moving from administrative, statutory and public law regimes to those mainly under the contract of employment. These will be examined.

The first section of this chapter provides an overview of outsourcing in the public sector.

Scanning the Landscape: Overview of Public Sector Outsourcing

The Commonwealth government's outsourcing, contracting out and privatisation activities became very significant in the 1990s.

The functions outsourced tended to be a part of the government function. In 1997, for example, the Commonwealth took the decision that IT infrastructure would be outsourced but subject to competitive tendering; it 'embarked upon one of the largest and most complex information technology outsourcing initiatives in Australia'.³ Thus in December 1999, IBM Global Services Australia and the Australian Federal Government signed an agreement, the Health Group Agencies IT Outsourcing Agreement, in which IBM undertook to provide information technology and technology services worth \$350 million over five years to the Department of Health and Aged Care, the Health Insurance Commission and Medibank Private. By December 2000, '23 departments and agencies in five groups had outsourced their IT infrastructure. This [represented] around half of the agencies in the Whole of Government Information Technology Outsourcing Initiative (the Initiative) and approximately \$1.2 billion in contract value out of a total estimated \$4 billion for the entire Initiative'.⁴ Mindful of the risks, the government decided to set up a review of the IT outsourcing initiative — to review IT outsourcing and report on risks and the future — and appointed Richard Humphrey to undertake the review. The report, submitted in December 2000 and entitled *Review of the Whole of Government IT Outsourcing Initiative*, became known as the Humphrey Report.

The Humphrey Report described the Commonwealth government outsourcing of IT policy initiative as being 'ambitious and broad-ranging' with the purpose of 'complementing modern management practices within the Commonwealth Public Service and enhancing access to wider technical skills and technologies'.⁵ Further, the aim was to achieve economies of scale and to decrease costs.⁶ Although the policy reasons were clear, the task itself was enormous, bringing with it risks and concern by members of the public and others, including members of the opposition.⁷ The Humphrey Report's comprehensive 105 pages focussed on the implementation risks and the transition from in-house provision to outsourcing.

Following the Humphrey Report, on 23 March 2001, two Commonwealth government departments, the (then) Department of Employment, Workplace Relations and Small Business and the Department of Education, Training and Youth Affairs, announced that they would pursue the outsourcing of the IT infrastructure and do this using a 'segment-by-segment approach'. Behind this decision was the consideration by the departments of the contents and recommendations of the Humphrey Report.

More generally, the government was conscious of the need to oversee the process of outsourcing. In the early 2000s, a section of the Commonwealth Department of Finance and Administration, the Competitive Tendering and Contracting Branch (CTC), oversaw the contracting out of the delivery of activities, previously performed by a Commonwealth agency, to another organisation. This form of outsourcing was described then as:

a vital part of the government's reform agenda which is about making the public sector more responsive to the needs of government; and building a performance culture through devolved decision making, responsibilities and accountability.⁸

Competitive tendering and contracting processes were utilised in numerous areas, during this period, including in Centrelink; the Department of Defence; the (then) Department of Employment, Workplace Relations and Small Business; and the Department of Foreign Affairs and Trade.

Examples of functions which have been outsourced are somewhat varied. The Department of Foreign Affairs and Trade outsourced the Australian Passport Service and its passport interviewing and application processes. Clearly this had an implication for the jobs and nature of work of those staff who remained in the Australian Passport Service within the Department of Foreign Affairs and Trade. According to the Department:

While work loads have increased due to demand and additional security requirements, staff levels have been steady as outsourcing allows staff to concentrate on policy matters and 'big picture' issues such as

improvements in customer service, instead of being focused on routine, simple processing activities, so providing greater job satisfaction.⁹

The Department of Employment, Workplace Relations and Small Business contracted out workplace services delivery to the states and contracted out its federal award and agreements inquiry and compliance services to two state governments.

Further examples of public sector outsourcing undertaken at various stages include:-

- The Department of Defence outsourced the delivery of port services and support craft for the Royal Australian Navy;
- The Department of Human Services and Health outsourced cost recovery process for medical services;
- The Department of Immigration and Multicultural Affairs outsourced the internal audit function to the private sector.

Parallels occurred in the states too where, for example, there were various models used in the outsourcing of the provision of public transport; and Tourism Victoria outsourced the core function of marketing.

In 2005, Commonwealth government agencies reported as follows:¹⁰

Overall, 49 agencies (60 per cent) reported finalising new outsourcing contracts or contract extensions in regard to at least one aspect of an ICT or HR function or service during 2004–05 ... Finalising or extending an outsourcing contract in relation to at least one aspect of ICT services occurred in 44 per cent of agencies in 2004–05, consistent with 47 per cent of agencies in 2003–04. However, there was a substantial increase in 2004–05 in the proportion of agencies that entered or extended an outsourcing contract in relation to at least one aspect of HR services (38 per cent in 2004–05 compared with 20 per cent in 2003–04).

The table below summarises the changes from 2002–2003 to 2004–2005 in respect of information and communication technology services and strategic planning and human resource services.

Agencies' outsourcing activity, 2002-03 to 2004-05

Source: Agency survey¹¹

In 2005, too, in accordance with the requirements of the *Financial Management and Accountability Act 1997* (Cth), the Commonwealth Procurement Guidelines 2005¹² were promulgated for agencies to ensure value for money in procuring goods and services, as well as efficiency, encouraging competition, accountability and transparency, and effective and ethical use of resources.

It seems that there has been a significant expansion in outsourcing in the past few years. Whilst the Commonwealth's *State of the Services Report* itself acknowledges that it is not clear whether this change is cyclical, the point remains that outsourcing is significant.¹³ Recent figures for outsourcing are not now available through the *State of the Services Report* because it was decided that it was no longer necessary to report that data. Hence the extent of current federal government outsourcing is now difficult to accurately ascertain.

How Does Public Sector Outsourcing Compare to Private Sector Outsourcing?

In the survey *Changes at Work: 1995 Australian Workplace Industrial Relations Survey*,¹⁴ according to the workplaces surveyed (both private and public sector) outsourcing was more prevalent among workplaces which had 200 or more employees. Workplaces with 200 or more employees reported 51 per cent contracting out compared to only 33 per cent of smaller workplaces. Outsourcing, even at that time, was more prevalent in the public sector, with 52 per cent, compared to the private sector, 32 per cent.

The services which were contracted out related mainly to cleaning (36 per cent), building maintenance (23 per cent) or parts of manufacturing or production processes (23 per cent). In terms of industries in which outsourcing occurred most strongly, figures are as follows:

- electricity, gas and water supply (67 per cent of firms);

- construction (61 per cent of firms);
- education (60 per cent of firms);
- mining (55 per cent of firms).

Similarly, the analysis set out in *Australia at Work: Just Managing*¹⁵ shows that the main users of outsourcing were public sector organisations — government business enterprises (53 per cent), statutory authorities (56 per cent) and State public service departments (53 per cent), whilst less than one-third of private sector firms had engaged in outsourcing.

There is also an impact on employment; one review in 1999 concluded that: 'Public sector employment share in Australia has fallen dramatically over the past 20 years. A number of factors have contributed to this, significant among which has been the increased privatisation of functions at both Commonwealth and state levels of government'.¹⁶

Whilst both private and public sectors undertake outsourcing, it seems that, relative to the public sector, outsourcing in the private sector has become more global with functions including information technology, call centres, financial services and back-room office functions outsourced to countries such as India.¹⁷

Framework for Outsourcing

In the Commonwealth public sector, an established legislative framework is relevant to decisions by the Commonwealth to outsource, as well as to purchase goods and services which do not involve outsourcing. This Commonwealth legislative and administrative framework includes: the *Financial Management and Accountability Act 1997* (Cth), the *Auditor-General Act 1997* (Cth), the *Commonwealth Procurement Guidelines and Best Practice Guidance* (September 2001) and, more recently, the *Commonwealth Procurement Guidelines 2005*. The Department of Finance and Administration has published a number of Guidance Notes to assist in compliance with the legislative requirements and the Guidelines.¹⁸

The Commonwealth Procurement Guidelines ('CPGs') provide that:

1.2 The CPGs establish the core procurement policy framework and articulate the Government's expectations of all departments and agencies (agencies) subject to the *Financial Management and Accountability Act 1997* (FMA Act) and their officials, when performing duties in relation to procurement.¹⁹

The CPGs thus apply to 'officials' who are persons in agencies (or part of agencies) and therefore include members of the APS.²⁰

A decision to outsource the provision of a service or function (previously undertaken by members of the APS) necessarily involves responsibilities of

officials under the *Financial Management and Accountability Act 1997* ('FMA Act') and the Regulations made pursuant to the FMA Act ('FMA Regulations'), since it involves the expenditure of public monies through contracts entered into between the Commonwealth and an external service provider. The impact of this regulatory environment on the work of officials has a number of facets.

A chief executive of an agency in the APS (eg. a department) is required to ensure the efficient, effective and ethical use of public monies.²¹ The FMA Act then authorises a chief executive to issue 'Chief Executive Instructions' (to personnel in the relevant agency) to ensure that this objective is achieved.²² Further, the FMA Act provides for the chief executive to delegate powers to other officials; that is, members of the APS.²³ To support this legal framework for expenditure, the FMA Regulations provide that the Chief Executive Instructions can deal with a number of matters, including making commitments to spend public monies.²⁴

In addition, the FMA Regulations provide for the Minister for Finance and Administration to issue the Commonwealth Procurement Guidelines which an official must have regard to and, if the official takes action which is not consistent with the Guidelines, the official must record reasons for doing so.²⁵

In respect of the duties of a member of the APS, the FMA Regulations provide that a proposal to expend public monies may only be approved if it is in accord with the policies of the Commonwealth and if it makes efficient and effective use of public monies.²⁶ An official must not approve a proposal to expend public monies unless he or she is so authorised.²⁷ Of most importance in relation to outsourcing is the requirement that an official cannot enter into a contract on behalf of the Commonwealth unless a proposal for the expenditure of public monies has been approved under FMA Regulation 9.²⁸

There is therefore a range of sources of obligations of a member of the APS in respect of a proposal and a decision to outsource particular services or functions. Those obligations are enforceable not only through the ordinary contractual obligations of an employee but also through the APS Code of Conduct dealing with the obligation of members of the APS to comply with Australian laws (which of course include the FMA Act and the FMA Regulations).

In addition, individual departments may determine rules and procedures relevant to outsourcing through their rules dealing with procurement. It is also to be kept in mind that a particular official must have appropriate delegated financial authority to commit the Commonwealth to particular expenditure.

There is nothing specific in the FMA Act or the FMA Regulations which requires an official in making a proposal for, or in considering or approving, an expenditure of public monies associated with entering into a contract for outsourced services to take account of the terms and conditions of employment

of the APS employees who may be affected by the proposal. Despite this, some aspects of the APS Values and the APS Code of Conduct themselves could arguably require that consideration be given to the impact of an outsourcing decision on members of the APS — for example, s 10(1)(i) and (j) of the APS Values extracted in the Appendix to this chapter, and the requirement in the APS Code of Conduct to uphold the APS Values.²⁹

It follows that, in effect, decisions to outsource are not regarded in the basic legislative framework as being different in legal character to any other decision by the Commonwealth to enter into a contract, at least viewed from the perspective of the regulatory regime provided by the FMA Act and instruments made under it. As we have seen the regime does impose obligations on APS employees involved in implementing a government policy decision to outsource a particular function or activity.

New Employing Entities, Same Public Service Employment Conditions?

Once a decision has been made to outsource a government function as outlined above, what is the status of public sector employment rights and duties in respect of the employees affected by the outsourcing? This aspect will be explored in this section of the chapter.

There are several safeguards in the *Workplace Relations Act 1996* (Cth) which endeavour to protect employees' entitlements when businesses are restructured and which may either constrain the new employer in terms of the conditions it is obliged to continue providing to the transferring employees or constrain the entity making the decision to restructure. As we will see these protections may be less certain in their operation where the restructure takes the form of outsourcing. These legal safeguards relate to:

- The transmission of business provisions in the *Workplace Relations Act 1996* (Cth) which provide that the new employer is bound by the former employer's award, collective agreement or Australian Workplace Agreement in certain circumstances including where there is a transmission, succession or assignment of the business;³⁰
- the Freedom of Association provisions in Part 16, formerly Part XA, of the *Workplace Relations Act 1996* (Cth) which prevent an employer from undertaking conduct to avoid the operation of an award or industrial instrument.

The difficulty for a new company which takes over the business and successfully offers employment to some or all of the employees of the business is whether the transferring employees are covered by the *new* employer's awards, certified agreements or workplace agreements or the *former* employer's awards, certified agreements or workplace agreements. Fundamental to this is whether the

outsourcing arrangements do indeed constitute a transmission, succession or assignment of the business (or part of the business).

These are not always easy matters, as the cases to be examined will show. As will be seen, attempts to resolve these issues in the application of the legislation have occurred through litigation and legislative change, including through the Work Choices Act. However, considerable uncertainties remain, particularly in the public sector, as there has been no further statutory definition or elucidation of the potentially — and actually — thorny problems of what is meant by a ‘business’, what is ‘part’ of a business and what constitutes transmission, assignment or succession in relation to a business or part of it. The consequence is that there are still unresolved employment issues in the current context of outsourcing in the public sector.

In addition, the statutory protection of conditions for employees who are employed by the outsourcing entity when there is a transmission of business does not generally include recognition by the new employer of entitlements arising from the period of service with the old employer (for example, a period of service for calculation of future severance benefits). Rather the statutory protection of conditions is concerned with protection, at least for a time, of the former terms and conditions of employment as determined by the application to the new employer of the relevant award, certified agreement (that is, a pre-Work Choices Act certified agreement) or workplace agreement made under the Work Choices legislation.

There has been a range of contexts in which outsourcing has been considered by the courts in relation to whether industrial awards or agreements ‘transmit’ from the old employer so as to become binding upon the new employer. Primarily, however, the contexts before the courts fall into the following categories:

- a. outsourcing by the public service to a statutory corporation;
- b. outsourcing by the public service to a Commonwealth-owned or state-owned private corporation (i.e. a corporation incorporated under the *Corporations Act 2001*, but whose shares are held on behalf of the Commonwealth or a state);
- c. outsourcing from the public sector to a privately-owned corporation (whether its shares are listed on a stock exchange or not);
- d. outsourcing by a private corporation to another private corporation.

As will be seen, the legislative changes and court decisions have not determined that the transfer of activities carried on by the Commonwealth or by a state to a privately-owned corporation necessarily constitutes a ‘transmission’ of ‘business’; this issue remains to be resolved by case law or legislation. The case

studies below illustrate the difficulties of determining when a transmission of business has occurred.

Case Studies and Legal Questions

Four main case studies are discussed in this section, together with recent High Court rulings which may have an impact on the transmission of business question in the context of public sector outsourcing. These cases mainly occur in the environment prior to Work Choices. However they continue to be relevant. First, the Work Choices legislation did not attempt to change or clarify the law with respect to the meaning of 'transmission' of 'business'; rather the changes dealt with the consequences for employees' terms and conditions where there was a transmission of business. Secondly, the case studies provide illustrative examples of outsourcing arrangements and employment consequences, particularly in the public sector.

It is convenient to commence with a consideration of a case relating to transmission of business issues as between private employers because it sets the stage for consideration of relevant legal tests and contains significant obiter dicta relevant to government outsourcing.

Approach in the Private Sector and Relevance to the Public Sector: *PP Consultants Case*

For some years, the St George Bank had operated in Byron Bay. In 1997, it decided to close this branch of the bank. Next door to the branch of the bank was a pharmacy (PP Consultants Pty Ltd) and St George Bank entered into an agreement with the pharmacy for the pharmacy to conduct some of the bank's functions on its behalf. In short, the bank decided to outsource certain activities to an external provider. The pharmacy owners would perform such functions as monitoring the operation of the ATM, collect deposits, open accounts, make loan referrals and transact withdrawals. Under the agreement, the pharmacy was to act as the bank's agent. The bank would provide at least one former bank employee to the pharmacy to assist in this work. As events turned out, two former St George Bank employees accepted offers of employment from the pharmacy.

The issue which came before the court in proceedings instituted by the Finance Sector Union of the Australia against PP Consultants Pty Ltd³¹ was whether the employees should be governed by the St George Bank Employees Award.

The Legislative Framework

The relevant provision in the *Workplace Relations Act 1996*, as it was at the time, was the section dealing with parties to awards, and in particular whether there has been a transmission of business. Section 149(1)(d) of the *Workplace Relations Act 1996* (prior to the amendments made by the Work Choices Act) provided,

subject to any order made by the Australian Industrial Relations Commission, that an award becomes binding on an employer which is the successor, assignee, or transmittee of a business, or part of a business of an employer who was a party to the award. In particular, s 149(1)(d) provided that an award binds:

(d) any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer.

Thus the question in this case was whether there had been a transmission by St George Bank of its Byron Bay branch operations to the pharmacy, whereby the pharmacy then became party to the award and was obliged to pay its employees (who were the former St George Bank employees) the same terms and conditions that they had enjoyed previously under the award applicable to St George Bank.

From Federal Court to High Court

At first instance, Justice Matthews of the Federal Court concluded that there had *not* been a transmission of business by the bank to the pharmacy and noted that, although the pharmacy employed staff to undertake bank duties, 'to suggest that in doing so it is conducting part of the business of the bank is, in my view, extending the concept of a "business" beyond all realistic levels.'³² Matthews J took the view that the pharmacy had not acquired any part of the bank's business as a going concern and that there had not been a succession, assignment or transmission of business. Whilst there was a substantial identity between previous activities of the branch of the bank and those that were carried on by the pharmacy on behalf of the bank, such substantial identity between two entities and activities was not enough to make out transmission of business under s 149(1)(d).

Following the union's successful appeal to a full bench of the Federal Court³³ in which the court decided that there was a high degree of similarity in the activities undertaken by the pharmacy and the bank and hence a transmission of business had occurred, the pharmacy appealed to the High Court. In *PP Consultants Pty Ltd v Finance Sector Union*,³⁴ the High Court overturned the full bench's decision but was reluctant to formulate any *general test* in order to ascertain whether one employer had succeeded to the business or part of the business of another³⁵ — it noted that the question of succession was a mixed question of fact and law and that the word 'business' was a 'chameleon-like word'.³⁶ However, the court did look at the business activities of the former employer and the business activities of the new employer and noted that if they were the same, usually there would have been a transmission of business.

Although the pharmacy did involve itself in banking activities, the High Court determined that it could not be said to be carrying on the business of banking;

the business it carried on was that of a bank agency. The bank had simply changed the way it conducted its business, rather than transferring or disposing of its business.

Relevance to Public Sector Outsourcing

In the *PP Consultants* case, the joint judgment³⁷ of the High Court proposed a three-step process for deciding succession of business involving *private sector employers*:

As a general rule, the question whether a non-government employer who has taken over the commercial activities of another non-government employer has succeeded to the business or part of the business of that other employer will require the identification or characterisation of the business or the relevant part of the business for the first employer, as a first step. The second step is the identification of the character of the transferred business activities in the hands of the new employer. The final step is to compare the two. If, in substance, they bear the same character, then it will usually be the case that the new employer has succeeded to the business or part of the business of the previous employer.³⁸

The High Court in this instance was not being asked to consider whether there was a transmission of business from a government body of some kind to a non-government body. However the joint judgment did make some observations which pertain to outsourcing in the public sector where the transfer is between a *public sector employer* and a *private sector employer*:

Whilst the notions of 'profit' and 'commercial enterprise' will ordinarily be significant in determining whether the activities of a private individual or corporation constitute a business, they play little, if any, role in identifying whether one government agency is engaged in the business of government previously undertaken by another government agency. In that situation, it is sufficient to ascertain whether or not the activities of the former are substantially identical to the activities or some part of the activities previously undertaken by the latter. That is because the word 'business' takes on a special or particular meaning in the expression 'the business of government'. It is not because, as a matter of ordinary language, 'business' means or includes activities undertaken in the course of business.³⁹

Without explaining what it had in mind by the reference to 'government agency', the court further said:

As already indicated, special considerations apply when one government agency succeeds to the activities of another. And there may well be other

considerations where a government contracts with a non-government body for the performance of functions previously carried out by a government authority.⁴⁰

No doubt as the court did not need to elaborate these comments, it did not do so. On the face of these observations, nonetheless, the court appeared to have left open the possibility that some approach, other than the characterisation of the nature of the activities test, should be applied to situations in which transfers of activities occur from a government agency to the private sector; that situation is typically the case in public sector outsourcing arrangements.

Outsourcing by Government-Owned Corporation of Call Centres

In *Stellar Call Centres Pty Ltd v CPSU*,⁴¹ the question was whether Telstra Awards and certified agreements bound the new outsourced employer, Stellar Call Centres Pty Ltd ('Stellar'). The factual circumstances were that Telstra, a corporation with majority government ownership, had entered into an agreement whereby in essence an outside private organisation was to undertake some call centre activities by way of handling the overflow from Telstra's Call Centres, so that part of Telstra's functions were to be outsourced without Telstra relinquishing its main call centre activities. Telstra's agreement was by way of a joint venture with Excel Asia Pacific Pty Ltd, known as Stellar Call Centres, which was to provide services to Telstra by way of a call centre handling the overflow from Telstra's Centres of enquiries by Telstra customers (by telephone) in relation to billings, new products, and availability and connection of services.

The arrangement was to operate in such a way that Telstra customers would not be aware that they were not talking to an employee of Telstra. Under the terms of the arrangement, staff were not transferred from Telstra to Stellar, and there was no transfer of goodwill.

Was There a Transmission of Business?

In the legal action brought by the public sector union, the Community and Public Sector Union, the legal question was whether there was a transmission of part of a business from Telstra to Stellar within s 149 of the *Workplace Relations Act 1996*. At first instance, Justice Wilcox of the Federal Court of Australia held that there was a transmission of business under the Act as there was substantial identity of the work between that performed by employees of Stellar and that previously performed by employees of Telstra.⁴² Wilcox J stated:

Stellar now performs work that otherwise would be done by Telstra itself. Contact with customers is a critical part of Telstra's business. No doubt it is burdensome and costly to provide that contact, but it is critical to do so. Without good marketing and attention to customer queries, the

business would quickly founder. The effect of the arrangement between Telstra and Stellar is that Stellar has taken on part of the burden of customer contact. In relation to the part of the burden transferred to it, Stellar is the “successor” of Telstra.⁴³

Substantially Identical Character of the Business

On appeal by Stellar, the Full Court of the Federal Court held that there was not a transmission of business and followed the High Court in the *PP Consultants* case, concluding that Stellar was not Telstra’s successor.⁴⁴ Even though the businesses performed similar functions, and the employees also performed similar functions, the Federal Court took into account the activities performed by the new employer, by comparison to the business or part of the business of the old employer — in order for there to be a transmission there must be a substantially identical character of the business. That did not arise.⁴⁵

It was not sufficient to focus on the similarities between the functions of the old employees and the functions they performed for the new employer. The answering of customer telephone calls was not a distinct part of Telstra’s business and there was no transfer or assignment from Telstra to Stellar. This meant that the awards and agreements binding Telstra would not apply to Stellar Call Centres.

The Approach to Outsourcing *within* the Public Sector: Outsourcing Health Services

In *North Western Healthcare Network v Health Services Union of Australia*,⁴⁶ the issue of transmission of business arose in the context of a public body taking over the functions previously performed by the public service, hence outsourcing occurred *within* the public sector, broadly defined. Traditionally, Victorian public mental health services had been directly provided by the Victorian government through staff engaged as members of the Victorian Public Service, that is, as public servants. The government decided that these services were to be outsourced, as part of the implementation of a major review of the mental health system operating in Victoria. The North Western Healthcare Network (‘the Network’), a public hospital which was a body corporate established under State legislation, took over the operation of part of the Victorian mental health services. The question was whether the Network had become a ‘successor, assignee or transmittee of part of the business’ of the State of Victoria under s 149(1)(d) of the *Workplace Relations Act 1996* (Cth), thereby binding it to the following awards: the Health and Community Services (Nursing, Healthcare and Associated Group) Interim Award 1994 (‘the 1994 Award’), and the Victorian Health and Community Services (Psychiatric, Disability and Alcohol and Drug) Services Award 1995 (‘the 1995 Award’). These awards had applied to the

employment of the relevant staff when they were employed as public servants in the provision of mental health services.

The Network took the view that the 1994 and 1995 Awards did not apply; rather the Network considered that another award, the Nurses Victorian Health Services Award ('the Nurses Award'), applied to the Network staff, including those staff now employed by it who had been previously employed by the state as public servants. The Health Services Union of Australia instituted proceedings, seeking penalties against Network for failure to pay employees benefits due under the 1994 and 1995 Awards in respect of employees who had transferred to the Network.

At first instance, Marshall J decided on 22 October 1997 that there had been a transmission of part of the business, so that the 1994 and 1995 Awards potentially applied.⁴⁷

Can a Government Function Be a 'Business'?

Critical to the argument was the question whether a government function could be a 'business'. The Network's argument was that provision of mental health services was not a 'business' within s 149(1) of the Act as such provision is a public function of government under statutory duties and powers, rather than a market-driven commercial venture; therefore the Network would not 'inherit' the Award binding the state government.

Marshall J rejected this argument, adopted a wide interpretation and concluded that the provision of mental health services was 'part of a business' of the State of Victoria within the meaning of the *Workplace Relations Act 1996*. Provision of mental health services had now been taken over by the Network, and the state had previously provided such services. Applying a 'substantial identity test', Marshall J concluded that there was a substantial identity of the services provided by the Network compared to those provided by the Victorian government. Whilst there were some changes in relation to management and relocation of some services as well as operational differences, these did not affect substantially the identity of the services provided.

Applicability of Public Sector Awards to Non-Public Servant Employees

The Network also argued that the 1994 and 1995 Awards could not apply to it because they only applied to Victorian state public servants and, of course, the Network did not employ any such employees. Marshall J took the view that when the Australian Industrial Relations Commission (the Commission) made the Awards, there was no evidence that these Awards were intended to apply only to public service employees of Victorian state government.

The Problem of the Clash of Awards

On the judicial reasoning to this point, the 1994 and 1995 Awards were transmitted to the Network. However, there was an additional problem in that the Nurses Award also seemed to apply. Justice Marshall declined to determine which award was more appropriate but stated:

The situation where two Awards govern the terms and conditions of employment of certain employees, whilst relatively unusual is not an unknown one. In those circumstances, the employer is obliged to accord to its employees the better conditions in respect of the matters dealt with in the Awards, thus obeying all its obligations.⁴⁸

Full Court's Decision on Appeal

The Network appealed to a Full Court of the Federal Court which, in essence, upheld the decision of Marshall J.⁴⁹ On the question whether there could be a transmission of previously government-provided activity within the meaning of the Act, the Full Court decided that the fact that a government held legislative responsibility for providing health services did not prevent it from transmitting the business of providing those services to a third party; it is sufficient if there has been a transfer, as a matter of practice or reality, from one entity to another — there need not be a technical legal 'transmission' of a business. The Federal Court upheld the use of the 'substantial identity test' applied by Marshall J.

The Commission had not clearly and unambiguously stated that the 1994 and 1995 Awards were to bind public servants only and thus Network could be bound by these Awards. The Federal Court noted that the intention of the (then) *Workplace Relations Act* and its predecessor was that award conditions extend to all employers and all employees regardless of the 'public' or 'private' identity of the employer. To hold otherwise would mean that awards would have to be revised every time there was a change in employer.

In this instance, the Federal Court therefore determined that a public servant who accepted employment by a public hospital remained entitled to the benefit of awards applicable to him or her as a member of the Victorian public service, although he or she was now an employee of an employer outside the true public service.

Privatising the Commonwealth Employment Service

The case of *Employment National Limited v CPSU* ('*Employment National case*')⁵⁰ arose out of the Australian government's decision to 'privatise' or outsource most of the work performed by the Commonwealth Employment Service (CES) and Employment Assistance Australia (EAA) from the Commonwealth to, amongst others, Employment National Limited (EN) and Employment National (Administration) Pty Ltd (ENA). The case before the Federal Court involved

three different applications, but in essence, the issue to be decided was whether ENA was bound by four federal awards applicable to certain personnel in the Australian Public Service (which were part of the set of seven awards that themselves were consolidations of some 130 awards which applied across the Australian Public Service). The awards were:

- the APS General Employment Conditions Award;
- the APS Administrative Service Officers (Salaries and Specific Conditions) Award;
- the APS Professional Officers (Salaries and Specific Conditions) Award; and
- the APS Senior Executive Service (Salaries and Specific Conditions) Award.

There was also a certified agreement made between the Minister of State for Employment, Workplace Relations and Small Business and the Non-Senior Executive Service staff and certified in March 1998 — which was made during the process of privatisation.

Background of Privatisation

The privatisation background was fully set out in the judgment of Einfeld J.⁵¹ CES was established under the *Re-establishment Employment Act 1995* (Cth); it commenced operation in 1946 and remained until April 1998 as part of the Department of Employment and Workplace Relations (in its various names). Whilst the CES had statutory functions relating to maintaining high employment and providing services to those wishing to be employed, it actually served as a labour exchange providing job placement services, including screening of job seekers, assessing their needs, canvassing suitable employers and matching the two in order to place people in employment. It also conducted ‘case management’ for those who were long term unemployed, it provided its services free to the public (via as many as 300 branches around Australia), and in some limited cases it was paid a fee for service. The employees providing services to the CES were public servants employed under public service legislation. In 1994, the *Employment Services Act 1994* was enacted whereby EAA was established as a ‘sister’ organisation to the CES to take over individual case management of longer term unemployed. EAA used the services of up to 250 external contracted case managers on a fee-for-service basis, and the Employment Services Regulatory Authority was set up to regulate EAA case maintenance system.

In the August 1996 budget, the Australian government announced that there would be a change to the delivery of employment services and a process of ‘outsourcing, mainstreaming or contracting out’ of employment services was commenced. The services previously provided by CES and EAA were to be provided by contracted bodies who had to compete first for government tenders and, when won, then interview customers (job seekers). Contractors were to be paid according to their success in achieving various performance indicators and

delivering outcomes set by the government. In essence, 'they would be paid by the Commonwealth according to how successful they were in placing people into jobs.'⁵² In 1996 a Ministerial statement 'Reforming Employment Assistance'⁵³ was issued which outlined proposed changes. The government was to retain some services, others were to be contracted out to the 'job network' of employment service providers and EN/ENA was to be established by the Commonwealth as one such employment service provider.

Pursuant to the *Commonwealth Services Delivery Agency Act 1997* (Cth), which created Centrelink, Centrelink became the service delivery agency as the government decided that the public sector should continue to provide, through this service delivery agency, a uniform national service for the registration of job seekers and so on. Centrelink provided some of the functions previously carried out by the CES, particularly the initial registration of unemployed persons. It also made available a self-help computerised search of a data base of employment opportunities. Centrelink was described in a Ministerial Statement as integrating some of the 'public contact services' of both CES and EAA. Its employees were engaged under the *Public Service Act 1999* (Cth). Amongst other things, it referred job seekers to Job Networks such as EN and administered the unemployment benefit scheme.

EN, incorporated in the ACT in August 1997 under the name Public Employment Placement Enterprise Limited, was wholly owned by the Commonwealth. The Commonwealth provided its start-up capital, the shareholders held all of the company's shares as representatives of the Commonwealth and EN engaged a Managing Director. ENA, a corporation established under the Corporations Law, was a wholly owned subsidiary of EN and employed over 1000 people. It was formed in September 1997 in order to provide services and employees to EN to enable EN to operate its business, which was, essentially, labour exchange services.

EN entered into two contracts with the Commonwealth:

- the first, in November 1997, was a transitional contract covering the conduct or management of the work of CES/EAA;
- the second, made on February 1998, the 'Employment Services Contract', was the principal contract obliging it to supply employment services to the Department.

There was also an agreement between EN and ENA whereby relevant services were provided by ENA to EN to enable EN to fulfill its obligations under the contract. EN, however, was not the only contractor providing services — following a competitive tender process approximately 310 providers, consisting of both private and public community organisations, were awarded contracts. The contracts were to last for 18 months whereupon the Commonwealth would

call for new tenders. Performance would be monitored by the government and breaches of its code of conduct would result in cancellation of the contract. Payment would be in accordance with the contract.⁵⁴

Threshold Question

Justice Einfeld considered first whether the activities of the governmental entities constituted a 'business' for the purposes in s 149(1) of the *Workplace Relations Act 1996* (Cth). The judge adopted the broad interpretation of the term 'business' which the court had used in the *North Western* case. This included a notion that the term was neither technical nor a term of art; that 'business' related to the word 'activities', and that there was a long practice of interpreting the term in an industrial context by reference to the definition of 'employer'. Einfeld J said:

As I see the position, there is no reason to consider that the activities of public servants which are capable of giving rise to an 'industrial dispute' to which the employer is capable of being a party, and which leads to an Award within the meaning of section 149, should not be construed as a 'business' for these purposes.⁵⁵

He took the view that it would indeed be a strange result if a certified agreement or an award could be made under the *Workplace Relations Act* in respect of a business to which a government was a party but the business did not come within the meaning of s 149!

Was ENA a Successor to the Business of CES/EAA?

The answer to this successor question depended on 'whether, as a matter of fact, there is "substantial identity" between the activities of respective entities (or of their employees whose activities go to make up what their employers do) in a corresponding business or part of the business. If so, transmission of the business will have occurred'.⁵⁶

The judge looked at the principal contract providing 'Flex 1, 2 and 3', which denoted flexible labour exchange services. Flex 1 provided for job matching; Flex 2 provided for job search training and Flex 3 was a system whereby payments were made in stages to a person in need of considerable assistance, training or retraining to obtain and hold a job. The judge noted that an examination of the scheme, as set up under the principal contract, as well as the evidence of employees who were transferred from government to ENA revealed that substantially the same activities were undertaken by EN as previously were carried on by CES/EAA. The transferred employees (now called 'employment consultants') did not receive any new training, apart from one day of orientation to use a new information database.

According to the evidence in the case of a former Assistant Secretary of the Department, there were four significant differences between the business of CES and EN:

- first, the different framework within which the employees operated;
- secondly, EN was operating in a competitive, market-exposed environment;
- thirdly, the EN employees focused on ‘employment outcomes’;
- fourthly, there were different procedural guidelines for the respective employees - CES operated according to strict guidelines when referring persons to employers whereas EN consultants operated in a more flexible environment.

After hearing considerable testimony, Einfeld J said that the 1998 fundamental changes to structure did not alter the substantive activities of the employees providing labour exchange services. His Honour stated:⁵⁷

That the structural or organisational framework altered upon transmission from government to ‘private’ employers is undoubted but in my opinion this change did not in itself mean that the actual ‘business’ or activities were any different. There is no reason to believe that public service personnel were not ‘substantially focused’ on achieving the outcome of employment, and although obviously not as directly affected by actual placements as when success is linked to reward, individually they were surely required to perform in order to maintain their positions or gain advancement.

On the question of government employees being constrained by government procedure whereas private competition ‘permitted more relaxed and discretionary practices,’⁵⁸ Einfeld J said that procedures required of EN employees were ‘not relevantly different’ and:

Indeed the CES duty statement established that its employees were expected to respond creatively to the labour market, and were required to exercise ‘discretionary and professional’ skills, whatever the particular prescriptions governing their work. To borrow from the language utilised by EN in another context, the employees received only minor training on the adjusted *means* to carry out the same *functions* of providing labour exchange and case management services to the unemployed. That was the business transmitted.⁵⁹

Further, the asset and stock previously used by and belonging to the government were transferred to EN and were used by EN employees — this included computers, telephones and furniture. Properties used by CES and leased by them were transferred to EN and EN took over much of the customer base of CES.

Einfeld J agreed that it was not necessary to establish a legal relationship between the old business and the new, although this could be done in this case. All that was necessary was that the notions of 'succession', 'business' and other terminology in s 149(1)(d) of the *Workplace Relations Act* be given a general, non-legal specific characterisation. The issue that the legislation raised was not whether the businesses were structurally different, but whether the workers were doing, and therefore the employer was delivering, the same or different work.⁶⁰

The judge also described EN and ENA as 'emanations of the Commonwealth',⁶¹ because, whilst they were run as fully competitive enterprises along commercial lines, they both provided services in accordance with departmental policy; the Commonwealth completely controlled the companies — it was the sole shareholder and also determined in a real sense the content of the companies' incorporation documents. In the words of the judge:⁶²

It is artificial to conceive of them as anything other than two Commonwealth corporate entities in the business of providing employment services to the community relevantly and indistinguishably from CES/EAA.

Einfeld J also rejected the argument by EN relating to the competitive framework that there should be a distinction between the functions of the department and its agencies, and the means of it discharging those functions. Just because EN might now compete with over 300 other providers did not add anything of relevance to the transmission question. Einfeld J stated:⁶³

... I consider that the businesses themselves did not materially change. The ethos and legal framework changed so that the governing regime moved from a statutory base to a contractual base. However, EN is in the business of providing labour exchange and intensive or longer term assistance services, and these businesses were transmitted to it from CES/EAA. I find that a transmission of the businesses to which the awards and agreements related occurred on 1 May 1998.

International Approach to Transmission of Business

Drawing an international comparison, the judge noted that the Commonwealth legislative scheme and the courts' approach to transmission of business were consistent with developments in the European Community. The European Court of Justice had placed an emphasis on 'substance over form' in deciding whether a business transfer had taken place 'in a manner reflective of the approach of this Court generally favouring transmission and the corresponding protection'.⁶⁴

Application of Award to Public Sector Only?

In rejecting the argument that the award applied to the public service only and could not be applied easily outside that sector, the Federal Court took the view that it is not relevant that an award is inconvenient or not ideally suited to the circumstances of the transmittee. Einfeld J said:⁶⁵

Indeed, the purpose of the transmission provisions of the Act is precisely to guard against an employer deciding of its own accord that the award conditions, which are part and parcel of the business to which it has succeeded, do not suit its wishes or operating conditions. There is adequate provision for the alteration of the content of an award after transmission where the employer has or perceives difficulties in observing its terms. If EN considered that the award was so APS-specific that it was totally unsuitable to its employees or employment environment, it could energise those processes. But as a matter of law the award transmission is unaffected.

Moreover, given that the transmission provisions operate to avoid any undermining of the industrial relations system, policy required the approach to apply equally to both private and public sector employees - 'all other things considered, the section must apply to public sector transfers of business or "outsourcing"'.⁶⁶ There are not any 'compelling circumstances' to construe the awards to 'allow for their frustration by the transmission of the relevant business to EN'.⁶⁷

Possible Limitations

Thus the Federal Court, in keeping with the *North Western* case, concluded that in substance the functions of government employees and the privatised service employees were substantially the same, and the application of the award could not be avoided by the change in identity of the employer and service provider. The process of coming to this decision necessitated much minute analysis of the considerable testimony as to the factual position relating to the entities, their structure and operation, thereby underscoring the complexities in making these determinations about transmission in the context of privatisation with its significant implications for public servants.

The High Court later handed down its judgment in the *PP Consultants* case (discussed above) in which it raised the question whether a different approach to transmission applied in the context of privatisation of government functions. Whilst the legal approach of Einfeld J in the *Employment National* case is compelling, it is not certain that the High Court would have reached the same conclusion.

Implications for Commonwealth Outsourcing from Developments in the High Court

In March 2005, the High Court of Australia handed down its decision in *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* ('Gribbles case')⁶⁸ in which it held (by majority) that Gribbles Radiology Pty Ltd (Gribbles) was not bound by the previous federal award binding Dell, as there was no succession or transmission of business when Gribbles took over the functions previously undertaken by Dell, including using the same premises. In this case, which involved private sector employees, the court held that:⁶⁹

...to be a 'successor' to the business or part of the business of a former employer, the new employer must enjoy some part of the 'business' of the former employer... it will not suffice to show that the new employer pursues the same kind of business activity.

Whilst this case has been regarded as raising more issues than it resolved, it did not exclude the possibility that there could be transmission of business in similar scenarios where there was a transfer of tangible and intangible assets.⁷⁰ The particular facts and legal relationship must be examined. In practical terms, what this means for public sector employers or agencies which outsource part of their functions is that sometimes the outsourcing might give rise to a transmission of business and sometimes it might not.

The *Gribbles* case emphasised that the individual facts will be important, for example, whether there is transfer of assets. Nonetheless, in principle, the judgments in *Gribbles* and *PP Consultants* suggest that:-

- where the Commonwealth outsources activities to a private company (A), under a contract with A, it is not clear whether A will be a transmittee of industrial instruments binding on the Commonwealth;⁷¹ and
- where company A's contract is later terminated or not renewed by the Commonwealth, and another private company (B) enters into the contract for the provision of the same services to the Commonwealth, company B will not be bound by company A's industrial instruments, even if some or all of company A's employees are recruited by company B so as to enable it to provide the services required under the contract.⁷²

Even in the absence of the Work Choices amendments concerning transmission of business discussed below, based on the *Gribbles* case, there could be no question of transmission of industrial instruments from the Commonwealth to company B when it is awarded the contract in the circumstances above.

Legislative Solutions

In an attempt to resolve some of the issues concerning the application of industrial instruments to transmittees of a business, a Bill was introduced in the

Commonwealth Parliament in 2001⁷³ and ultimately the *Workplace Relations Act 1996* (Cth) was amended to provide a procedure whereby application could be made to the Australian Industrial Relations Commission for an order that the certified agreement apply or not, or for a limited time, to the new employer of the transmitted business.⁷⁴ It had already been possible in the case of an award for the application of transmission provisions to be varied by order of the Commission.

Further, the legislation now sets out different provisions in relation to transmission of business and the applicability of an award, collective agreement or Australian Workplace Agreement. The *Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), provides in Part 11 for the application of old awards or agreements to the new employer.

Whilst there must still be a transmission of business, the old instrument — whether it is an award or certified or other collective agreement — will apply only so long as certain conditions are met; one significant condition is that the old instrument will apply so long as there are employees of the old employer still being employed by the new employer.⁷⁵ The transmittee employer is only bound by the transmitted award or agreement in respect of a transferring employee.⁷⁶ Thus, once there are no longer old employees of the former employer being engaged, the instrument ceases to apply and there will be a natural end to the application of it to the new employer. Furthermore, the transmitted industrial instrument only applies for a maximum period of 12 months from the date of transmission and can be superseded during that period by a new workplace agreement.⁷⁷

Public sector employees who become private sector employees as a result of a privatisation or outsourcing, sooner or later, will cease to have the benefit of the public sector terms or conditions, even if there is a ‘transmission’ of business.

Generally the amended transmission of business provisions apply to workplace agreements made under the post-reform Act, as well as to awards, collective agreements and Australian Workplace Agreements made under the pre-reform Act (whilst those instruments still apply).⁷⁸ There is however one specific change in the transmission provisions (applicable to both pre-reform and post-reform instruments) which possibly is designed to provide a statutory foundation for arguments which failed in cases such as *North Western Healthcare Network*. In that case, it was argued that the public service awards were incapable of applying to the Network as it was a statutory corporation. That argument was rejected.⁷⁹ For the reasons set out below, this line of reasoning might now be at least an arguable proposition.

The Work Choices Act introduced into the Act a provision⁸⁰ which establishes the concept of a 'transferring employee in relation to an industrial instrument'. This provides that a transferring employee (that is, one who was previously employed by the old employer immediately before the time of transmission and who has become an employee of the new employer in the business being transferred) is a transferring employee *in relation to an industrial instrument* if:

- a. the instrument applies to the employee immediately before the time of transmission; and
- b. when the employee becomes employed by the new employer, 'the nature of the transferring employee's employment with the new employer is such that the instrument is capable of applying to employment of that nature'.⁸¹

In short, the industrial instrument will not apply to the employee, even if the employee is a transferring employee, unless the instrument is appropriate to the new employment. Ordinarily, the nature of the employment will not change merely because of the transmission of business. However this may not always be the case. For example, the nature of the work required may vary in the new employment compared to the old. More importantly, perhaps, the nature of employment in the new employment may not be the same — possibly where the employment is with a private employer rather than a public or government employer with its different characteristics (as exemplified by the specific Values and Code of Conduct applicable to employees in the Australian Public Service). If this is so, then the new provision may apply, so that the industrial instrument does not apply to the new employment. The possibly different approach to the concept of 'transmission of business' which the High Court in the *PP Consultants* case identified as requiring consideration in the context of government agency transfers to private employers (compared to private sector transmission) might not be necessary because of the new provision.

It is at least arguable that the nature of employment of a private sector employee (engaged by an employer who is a contracted provider of services to the Commonwealth) is different from the employment of a public servant in providing these services directly to the Commonwealth as a member of the APS. If this is so, then it will be potentially far more difficult for a former public sector employee to claim the benefit of agreements with the Commonwealth employer applicable to him or her, when he or she takes up employment with the new private sector employer in the transferred business.

It should be emphasised that the provisions under Work Choices have not shed light on the meaning of transmission of business generally; hence, in the context of Commonwealth outsourcing, there remain the uncertainties analysed in the discussion of the applicable legal principles in the sections 'Case Studies' and 'Implications for Commonwealth Outsourcing from Developments in the High Court'.

Cost-Cutting Reasons for Outsourcing and Freedom of Association

One of the main motivators for outsourcing would undoubtedly be costs; if an external provider can provide a particular service to an organisation at a lower cost, an employer would often prefer to use such a provider, all other things being equal. When governments outsource to external providers, the potential providers generally are required to go through a competitive tendering process. One of the legal issues in this context is the role of freedom of association provisions under the *Workplace Relations Act 1996* (Cth), as shown in the case discussed below.

Greater Dandenong Council Case

Illustrative of the pressure to reduce costs and legal issues raised by implementing outsourcing, albeit in the local government sector, is the case of *Greater Dandenong City Council v Australian Municipal Clerical and Services Union*.⁸² The Greater Dandenong City Council ('the Dandenong Council') had decided to outsource its home and community care services that it provided to disabled, aged and frail persons within the community. It employed about 75 people in connection with home and community care services, and in March 1996 foreshadowed seeking tenders to provide home and community care services.

By virtue of the *Local Government Act 1989* (Vic), as amended by the *Financial Management Act 1994* (Vic), local government councils in Victoria were obliged to follow a regime of compulsory competitive tendering. This meant that in the financial year 1994-1995, councils were obliged to have competitive arrangements for 20 per cent of their expenditure, and in 1995-1996, this obligation increased to 50 per cent of their expenditure. Tenders could be provided by external providers but also by 'in-house' teams of council employees.

Tenders sought by the Dandenong Council in accordance with these compulsory competitive tendering processes — for the provision of community care services for the Council — closed on 23 December 1998. There were two bids, from:

1. Silver Circle; and
2. A Council in-house team.

The Silver Circle tender was for approximately \$6.6 million and the in-house bid was for approximately \$7.8 million. An evaluation committee appointed by the Council assessed the bids, looking at them from the view point of four criteria:

- financial stability;
- price;
- capability to develop and deliver specified outcomes; and
- management capability qualifications.

Both tenders passed in respect of financial stability and were competitive in relation to capability and management. Price, however, yielded a big difference. This was largely because Silver Circle employees were engaged under an award ('Silver Circle Award') which provided for lower wages and penalties than the Council employees received under an award and a certified agreement binding on the Council in respect of its employees. The in-house team had decided to put in its bid based on their current entitlements as Council employees to wages and conditions under the certified agreement and award.

On 22 February 1999, the Council considered the report of the evaluation committee and decided, by majority of seven to three, to accept the Silver Circle tender. There was extensive debate relating to the cost difference between the two tenders, arising for the reasons mentioned earlier.

The Council terminated the employment of its home and community care workers on the grounds of redundancy on 23 May 1999. Silver Circle had already indicated to the Council's employees that they could apply to work for Silver Circle. As a result, nearly 50 workers previously employed by the Council were engaged by Silver Circle. However, as noted by Madgwick J in the Federal Court at first instance: 'As a result, these workers were then paid significantly less for doing virtually identical work'⁸³ and for the same clients.

The Legal Framework at the Time

The legal framework in the *Workplace Relations Act 1996* (Cth) which was then relevant to the *Greater Dandenong City Council* case were the provisions in Part XA of the Act dealing with Freedom of Association.⁸⁴ In particular, s 298K(1) provided:

An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

- a. dismiss an employee;
- b. injure an employee in his or her employment;
- c. alter the position of an employee to the employee's prejudice;
- d. refuse to employ another person;
- e. discriminate against another person in the terms or conditions on which the employer offers to employ the other person.

'Prohibited reason' was further fleshed out in s 298L which identified conduct which constitutes a prohibited reason. The relevant conduct in this case was covered by paragraph (h) of s 298L⁸⁵ - that the employee 'is entitled to the benefit of an industrial instrument or an order of an industrial body'.

As it applied at the time, s 298V of the *Workplace Relations Act 1996* provided for a rebuttable presumption that the conduct was carried out for the particular reason alleged (in a proceeding against a respondent). In the context of

outsourcing, this provision could raise some difficult issues for the new employer undertaking the outsourced functions when it was the respondent in proceedings alleging breach of the freedom of association provisions.

The Courts' Decisions

In legal proceedings brought by the Australian Municipal Clerical and Services Union against the Dandenong Council, Madgwick J held⁸⁶ that the Council had contravened s 298K(1)(c) (on 22 February 1999) by resolving to contract out the home and community care services, and declared that the Council contravened s 298K(1)(a) in dismissing the employees on 23 May 1999. The judge ordered their reinstatement. Thus the judge found that the Council contravened the *Workplace Relations Act* by altering the position of the employees to their prejudice and by dismissing employees, in each instance on account of the prohibited reasons relating to the entitlement of employees to the benefit of a certified agreement.

In the appeal by the Dandenong Council, the majority of the Federal Court upheld the decision of Madgwick J.⁸⁷ Focussing relevantly on the ground of appeal relating to the interpretation of s 298L(1)(h), the differing reasons of the majority judges result in the decision on that point being less clear cut. Wilcox J, agreeing with the interpretation by Madgwick J of s 298L(1)(h) and his application of that section to the circumstances of the case, stated that:

Section 298L(1)(h) does not apply only to conduct motivated by the fact that an industrial instrument or order applies to an employee. It applies, also, where the employer is motivated to engage in proscribed conduct because of the **content** of the instrument or order.⁸⁸

Wilcox J also noted the implications of outsourcing in the context of the *Workplace Relations Act* as follows:

Although the details vary from case to case, outsourcing typically involves the engagement of a contractor who carries out a function or operation, previously undertaken by the enterprise itself, in a more efficient way; perhaps by the use of more sophisticated equipment, perhaps by using specialised labour. It will generally be possible for an outsourcing employer, accused of s 298K(1) conduct for a s 298L(1)(h) reason, to negative that reason by proving other reasons for the decision to outsource. What makes this case unusual is that the functions to be undertaken by Silver Circle were exactly the same as previously undertaken by the council and would be performed by many of the same people and in virtually the same way. It was not suggested that new equipment would be used; the only envisaged 'efficiency' was a saving in costs by moving the labour force from the certified agreement to the [Silver Circle] Award.⁸⁹

It was open to the judge at first instance, in the view of Wilcox J, to find that the Council had failed to establish that the reason for the dismissal or any other conduct was not because of the Council's workers entitlement to benefits of the certified agreement. Thus,

a principal reason why it took that course was that, whilst employed by the council, the [health and community care] employees were entitled to the benefit of the award and certified agreement while employees of Silver Circle (even if they were the same people) would not be so entitled.⁹⁰

Merkel J made the following significant comments:⁹¹

An employer will have breached ss 298K(1) and 298L(1)(h) where the dismissal or other prejudicial conduct is for the reason that the employer is not prepared to pay the award entitlement of the employee. As an employer is obliged to pay award rates, the employer is expected to be capable of organising its business so as to be able to meet its award obligations. The mere fact that an award increase cannot be passed on or is inconvenient does not relieve the employer of the constraints of ss 298K(1) and 298L(1)(h). Thus, the section can extend to prejudicial conduct which is carried out for the reason that the award rates have made the employer's business less profitable.

Merkel J acknowledged that profitability could involve 'questions of degree' so that 'where the reason for the prejudicial conduct is that the employer is unable to pay the award entitlement or the employer's business is not capable of operating at a profit by reason of the entitlement, it is likely that the section will not have been breached'.⁹² He noted that the same principles would apply to certified agreements or Australian Workplace Agreements.

Merkel J reasoned slightly differently and concluded that Madgwick J erred in the positive inference he drew about the reason for the dismissal of the employees but, nonetheless, the appellant Council had not established that there was an error in concluding that there had been a breach in the provisions of the Act when the councillors resolved to accept Silver Circle's tender. The Council had not established that it had rebutted the presumption of the reason for the conduct, so the judge correctly found a contravention of the Act. The Council might have been in a position, for example, to have brought evidence to show that a reason for accepting Silver Circle's bid was not because councillors took the view that the community care workers were unreasonably holding on to their award and certified agreement conditions in formulating their bid.⁹³

The Current Legal Framework for Freedom of Association

In conclusion, under the pre-reform legislation the freedom of association provisions provided a check to ensure that a purpose for the outsourcing was not to avoid the obligations of employers under awards or agreements, as illustrated in the *Dandenong Council* case. That degree of protection of employees has now been significantly undermined. In the amended *Workplace Relations Act* after Work Choices, s 792(4) now provides that the prohibited reason must be the 'sole' or 'dominant' reason for the employer's actions if the freedom of association provisions are to apply. Thus the safeguards in the *Workplace Relations Act* are now more limited. Outsourcing by the government for the reasons of cost-cutting by avoiding the operation of industrial instruments, even where the former public servants are doing the same job, may not involve a contravention of the Act.

Public Sector Values

Whilst there is doubt about the 'transportability' of the public service agreement or award provisions through the transmission of business provisions, the question arises whether the values of the Australian Public Service in relation to employment are carried across to the new employers.

We have seen that the *Public Service Act 1999* (Cth) sets out the APS Values and Code of Conduct.⁹⁴ Several of the Values, which are set out in the Appendix to this chapter, relate directly to employment — employment decisions based on merit: (b); workplace free from discrimination: (c); workplace relations which value communication and consultation: (i); a fair and flexible workplace: (j); managing performance: (k); and equity in employment: (l). Arguably, some of these have counterparts in the private sector — for example through anti-discrimination legislation — but most are specific values to the public service, there being neither a general legal requirement that Australian workplaces be fair or equitable nor implied obligations in the contract of employment to generally follow fair practices.⁹⁵

Government agencies could require, via the contract which outsources the function to the private sector, the new employer to comply with standards in employment that are equivalent to the APS values. Such decisions are in the province of the agency to determine to the extent that they are not directly regulated by the mandatory requirements in the procurement guidelines relevant to the contract.⁹⁶ In the absence of express contractual requirements, public sector values are not likely to be 'transferred' to the private sector outsourced employers.⁹⁷

In addition, in s 13 of the *Public Service Act 1999*, there is some guidance as to implementation of the APS Values, through the APS Code of Conduct provisions as to how the employee should behave — with honesty, integrity, following

lawful orders and so on. Many of these arguably are very similar to those duties implied by the common law in the contract of employment and would be imposed in this way on private sector employees. However, some of the public sector values and duties do not correspond with such implied duties — for example, the APS employee's obligation to treat everyone with respect and courtesy; to disclose any conflict of interest, real or apparent; and to behave overseas in way which will uphold the good reputation of Australia.

Arguably the standards imposed on the public sector employee are higher than those on the private sector employee. In particular the Values in the APS which together make up a bundle of values emphasising service and loyalty transcend simple employee loyalty to an employer, and are more akin to a loyalty to one's country 'to serve', that is, to perform a true 'public service'. These values could not easily be replicated in duties on employees working for private sector employers who have the main motive of profit for the business. Thus some values may inevitably be lost by transfer of government function to the private sector.

Diminution of Public Remedies When the Nature of the Entity Changes: A Question of Contract

Although the *Public Service Act 1999* in respect of employment matters has to a degree expressly replicated, through the APS Code of Conduct, some obligations which are similar to those of an ordinary employee in the private sector which arise from the contract of employment itself, the change in the character of employment from public to private involved in outsourcing has significant implications for employees in matters of workplace conduct or performance or in relation to restructuring and redundancy.

A person holding office under statute, for example, may have certain public law (administrative law) remedies which are removed once the entity changes its nature. Even if the person in question is not the holder of an office, but is a public servant with the status of an employee, the change from public to private is not without significance. Formal inquiry and disciplinary processes under the *Public Service Act 1999* and prescriptions for the nature of remedies open to employers for employee breach, for example, of the APS Code of Conduct, are designed to protect the public servant from arbitrary or unreasonable action and have strong procedural as well as substantive protections. This is of course very different from the situation for employees of employers with 100 or fewer employees in the private sector; they have lost unfair dismissal protection under the *Workplace Relations Act 1996* (Cth) after the Work Choices Act.

In its degree of procedural and substantive protection the regime for Commonwealth public servants is more prescriptive than what might be regarded as the norm even for employers with 101 or more employees in the private sector,

who remain subject to the unfair dismissal provisions of the *Workplace Relations Act* in respect of harsh, unjust and unreasonable dismissal.⁹⁸

Thus the obligations of the new private sector employer will not include the previous procedural and substantive obligations under the *Public Service Act* in respect of the transferring employees. Moreover, the employee now engaged by the private sector employer does not have any public sector remedy that might previously be available. Any rights are largely governed by contract, which might include any policy incorporated as terms of the contract of employment. Thus contractual rights assume major importance and, depending on the circumstances, may or may not provide the employee with any real relief. The procedures for fair promotion, a feature of public sector employment, will not generally be a facet of private sector employment, thus promotion appeal rights will be lost to the newly privatised workforce.

Other Legal Issues Emerging from Private Sector Control

Other issues raised by the change to private control of employees can be identified. They are legal issues which may have an impact on the way employers operate or should operate, and which may later surface dramatically in ways which with hindsight may have been avoided.

Public Service Career and Redeployment Opportunities

To the extent that outsourcing reduces the number of positions in the Australian Public Service then there is a lessening of redeployment opportunities where required, for example, after a workplace injury or illness. Firstly, the Commonwealth policy of endeavouring to provide suitable alternative employment for injured employees able to return to some form of work within the public service may not be able to be fulfilled where there has been a downsizing of the public service. As pointed out by the Administrative Appeals Tribunal in the case of *Gail Goldsmith v Comcare*,⁹⁹ the spirit of the *Safety Rehabilitation Compensation Act 1988* (Cth) which, 'envisages rehabilitation and return to work programs in lieu of compensation' is 'at odds with the reality of the public service environment and government policy at this time. The public sector is being downsized in favour of privatisation'¹⁰⁰ resulting in fewer offers of alternative employment.

Secondly, to the extent that individual departments and agencies with APS staff see themselves as operating as independent 'entities', it may become practically more difficult to arrange for redeployment of personnel between agencies. The agencies' operation as 'separate corporate entities' was alluded to by the AAT in the *Goldsmith* case as another factor in the intentions of the *Safety Rehabilitation Compensation Act 1988* (Cth) being 'thwarted by the realities of the public sector environment in which it is operating today'.¹⁰¹

The public service employees who have been transferred to a private sector organisation now performing the functions previously employed by the government will also lose the possibility they once enjoyed of being redeployed within the public sector. Similarly, they will lose the public service career structure. Whilst they may gain career possibilities within the private sector entity, these will be of a different nature to the public sector and they will certainly not include the possibility of moving between departments and within the public service in the way provided by the more traditional career public service.

Discrimination, Equal Opportunity and Affirmative Action

Private sector employers who are constitutional corporations and Victorian employers¹⁰² will be subject to the *Workplace Relations Act 1996* (Cth), and, irrespective of their legal status or place of activity, to the law relating to the contract of employment, anti-discrimination legislation and occupational health and safety laws. Clearly such private employers will not be subject to the *Public Service Act 1999*. It has been argued that they will not usually have to import the APS Values and the APS Code of Conduct in the arrangements in the private sector, although some of these may correspond to implied duties in the contract of employment.

The public service has equal opportunity and diversity policies imposed via the *Public Service Act 1999* (Cth) and its Code of Conduct and Values, together with the policies developed by agencies at agency level. No such specific overarching policy applies at private sector, save for the anti-discrimination legislation itself¹⁰³ and, relevant specifically to employment of women, the *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

However, consistent with policies for diversity in employment, employers of over 100 employees were obliged under the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth), the predecessor of the 1999 legislation, to develop an 'affirmative action program', to ensure that:

- a. appropriate action is taken to eliminate discrimination by the relevant employer against women in relation to employment matters; and
- b. measures are taken by the relevant employer to promote equal opportunity for women in relation to employment matters.¹⁰⁴

The *Equal Opportunity for Women in the Workplace Act 1999* (Cth) now prescribes the equal opportunity programmes and reporting requirements for employers with a shift away from terminology about affirmative action.

Thus there is a difference in source and degree of equal opportunity policies and requirements on public and private sector employers.

Access to Information about the Operation of the Service

At both Federal and state levels, freedom of information legislative provisions share the basic premise of providing for accessibility to government-held information, unless specific exemptions can be made out.

As freedom of information legislation has no application to private entities (including private employers), where provision of a service is outsourced the change in nature of the entity carrying out the service from public sector to private sector necessarily takes the private entity and employer outside the scope of the freedom of information legislation. It follows that the change in the nature of the entity has an impact on the entitlements of persons (including employees) to utilise this legislation in a number of different but practically significant ways.

This change in relation to access to information can have a significant impact on accountability of the way in which the services to the public are operated — for example, access by private organisations or individuals who are concerned to monitor the effectiveness of services is more limited and there is a diminution of material publicly available. These limitations in mechanisms for accountability in turn may affect the work performance of employees and may ultimately require other mechanisms to promote accountability of the services in private hands.

In the employment context, as a consequence of the change in the character of their employer from public to private, employees themselves are unable through freedom of information legislation to access information held by their private employer which might be relevant in a range of employment matters such as employment promotions, disciplinary matters, unfair dismissal proceedings and so on. However, had they remained members of the APS, they would be entitled to access at least to some information relevant to such matters from their employer through the utilisation of freedom of information provisions. This is not to say of course that such information may not be available through other mechanisms (such as discovery in litigation); rather it is to emphasise that the change in the status of the employer removes one significant means which would be available to the public employee to obtain information relevant to decisions concerning the exercise of their employment rights in such matters.

Conclusion

Outsourcing has contributed to the shrinking of the public sector and the diminution of public sector rights and values in employment. Contract management is the new means of controlling the performance of the activities which were formerly conducted by government and subject to control through administrative direction. Whilst it is possible that contract management could extend to determining maintenance of employee conditions after outsourcing, in the cases studies considered this was not done.

Where there is genuine transmission of business in outsourcing, generally the new employer must abide by the former public service conditions under a transmitted award or collective agreement. The case studies show that there are considerable legal and factual complexities in determining whether a transmission of business has indeed occurred, resulting in uncertainties for employees and employers as to whether they remain under the public service conditions.

The amendments to the *Workplace Relations Act 1996* (Cth) by the Work Choices Act ensure that these public sector conditions cannot be maintained indefinitely, even where there is a transmission of business. Outsourcing taking place now will move the employees more rapidly to private sector conditions; consequently, there is a move to private sector employment remedies away from possible remedies under the *Public Service Act 1999* (Cth) and certainly no access to administrative law remedies. Amongst other implications which have been considered, there are implications for access by employees to information held by their employer as a consequence of the non-application of freedom of information legislation in the private sector. Furthermore, there are differential policies relating to equal opportunity between public and private sectors. It has been argued that many public sector values are inevitably lost by transfer of government function to the private sector.

The challenge to traditional public sector employment has come about from shifting, to the private sector, employees and functions previously performed directly by the public service.

Appendix

In s 10 of the *Public Service Act 1999* (Cth), the Values outlined are as follows:

1. *The APS Values are as follows:*
 - a. *the APS is apolitical, performing its functions in an impartial and professional manner;*
 - b. *the APS is a public service in which employment decisions are based on merit;*
 - c. *the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;*
 - d. *the APS has the highest ethical standards;*
 - e. *the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;*
 - f. *the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;*

- g. *the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;*
 - h. *the APS has leadership of the highest quality;*
 - i. *the APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;*
 - j. *the APS provides a fair, flexible, safe and rewarding workplace;*
 - k. *the APS focuses on achieving results and managing performance;*
 - l. *the APS promotes equity in employment;*
 - m. *the APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment;*
 - n. *the APS is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government;*
 - o. *the APS provides a fair system of review of decisions taken in respect of APS employees.*
2. *For the purposes of paragraph (1)(b), a decision relating to engagement or promotion is based on merit if:*
- a. *an assessment is made of the relative suitability of the candidates for the duties, using a competitive selection process; and*
 - b. *the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required for the duties; and*
 - c. *the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the duties; and*
 - d. *the assessment is the primary consideration in making the decision.*

ENDNOTES

- ¹ Wilcox J in *Greater Dandenong City Council v Australian Municipal Clerical and Services Union* [2001] FCA 349 at para 81.
- ² *State of the Service Report 2004-5*, Australian Government, Commonwealth of Australia, 2005, Ch 12, 'Outsourced services' at 289.
- ³ Ibid.
- ⁴ *Review of the Whole of Government Information Technology Outsourcing Initiative, Report*, 4.
- ⁵ Ibid.
- ⁶ In the words of the Humphrey Report, *ibid*, the outsourcing of technology would 'introduce discipline in the use of technology to achieve economies of scale and reduce overall costs'.
- ⁷ Ibid.
- ⁸ On website 2001 <<http://www.dofa.gov.au/ctc/ctc>>.
- ⁹ On website 2001 <http://www.dofa.gov.au/ctc/ctc/case_studies/dfat.html>.
- ¹⁰ Agencies report only contracts in excess of \$100,000.
- ¹¹ *State of the Service Report 2004-5*, Australian Government, Commonwealth of Australia, 2005, Ch 12 'Outsourced services'.
- ¹² <http://www.finance.gov.au/ctc/commonwealth_procurement_guide.html> accessed August 30 2006.
- ¹³ 'Given the limited trend data available, it is difficult to determine whether this increase is cyclical representing many agencies renewing and/or extending their outsourcing contracts for HR services in 2004-05': *State of the Service Report 2004-5*, Australian Government, Commonwealth of Australia, 2005, Ch 12 'Outsourced services'.
- ¹⁴ A Moorhead, M Steele, M Alexander, K Stephen, L Duffin, *Changes at Work: 1995 Australian Workplace Industrial Relations Survey*, (Melbourne, Longman, 1997).
- ¹⁵ Australian Centre for Industrial Relations for Research and Training, 1999.
- ¹⁶ Research Note no. 29 2005-06, Tony Kryger, 'The incredible shrinking public sector', Statistics Section, 24 March 2006' at <<http://www.aph.gov.au/Library/Pubs/RN/2005-06/06rn29.htm>> accessed August 2006.
- ¹⁷ This information about the private sector being more willing to *globally* outsource is based on inferences from the data available on the destinations of outsourced functions.
- ¹⁸ These can be viewed at <<http://www.finance.gov.au>>.
- ¹⁹ See Guidelines at <http://www.finance.gov.au/procurement/procurement_guidelines.html#CPGs-Purpose> accessed January 2007.
- ²⁰ See s 5 *Financial Management and Accountability Act 1997* (Cth) (FMA Act).
- ²¹ Section 44 *ibid*.
- ²² Section 52 *ibid*.
- ²³ Section 53 *ibid*.
- ²⁴ Regulation 6, FMA Regulations.
- ²⁵ Regulation 8 *ibid*.
- ²⁶ Regulation 9 *ibid*.
- ²⁷ Regulation 10 *ibid*.
- ²⁸ Regulation 13 *ibid*.
- ²⁹ See generally chapters 2 [Weeks] and 3 [Nethercote] in this volume.
- ³⁰ In the *Workplace Relations Act 1996* (Cth), prior to the amendments of Work Choices, s 149(1)(d) governed the application of award in instances of transmission of business. Most of the transmission cases dealt with the application of the old award to the new employer. Similar provisions applied to certified agreements and Australian Workplace Agreements. In the *Workplace Relations Act* as amended by Work Choices, Part 11 now governs application of awards, collective workplace agreements and Australian Workplace Agreements.
- ³¹ Initially *Finance Sector Union of the Australia v PP Consultants Pty Ltd* [1999] FCA 631.
- ³² *Ibid* at para 38.
- ³³ *Finance Sector Union of the Australia v PP Consultants Pty Ltd* (1999) FCR 337; [1999] FCA 125.

³⁴ [2000] HCA 59; (2000) 201 CLR 648; 176 ALR 205; 75 ALJR 19.

³⁵ Ibid at para 14.

³⁶ Ibid.

³⁷ Gleeson CJ, Gaudron, McHugh and Gummow JJ; Callinan J delivered a separate judgment concurring in the outcome.

³⁸ [2000] HCA 59; (2000) 201 CLR 648; 176 ALR 205; 75 ALJR 19 at para 15.

³⁹ Ibid at para 13.

⁴⁰ Ibid at para 14.

⁴¹ [2001] FCA 106 (Full Federal Court — Ryan, Lee and Branson JJ).

⁴² *CPSU v Stellar Call Centres Pty Ltd* [1999] FCA 1224; 92 IR 224.

⁴³ Ibid at para 48.

⁴⁴ Stellar made application to Katz J of the Federal Court to stay the application of the decision of Wilcox J at first instance pending the appeal. Interestingly, Katz J held that Stellar would not be disadvantaged significantly by complying with the Telstra awards and certified agreements until the appeals were heard: *Stellar Call Centres Pty Ltd v CPSU* [1999] FCA 1236. By way of contrast, Wilcox J had concluded that the employees would be disadvantaged if the Telstra instruments were not applied because they would not be able to be retrospectively compensated for non-monetary benefits which were not given to them during the period of the appeal.

⁴⁵ [2001] FCA 106 at para 30.

⁴⁶ [1999] FCA 897 (2 July 1999).

⁴⁷ *Health Services Union v North Eastern Health Care Network; Health Services Union v Western Health Care Network* [1997] FCA 1084.

⁴⁸ Ibid in section 'Award Application Consequences'.

⁴⁹ *North Western Health Care Network v HSU of Australia* [1999] FCA 897.

⁵⁰ [2000] FCA 452 (11 April 2000, Einfeld J).

⁵¹ This section is drawn from the judgment of Einfeld J *ibid*.

⁵² Ibid at para 17.

⁵³ Ibid at para 18.

⁵⁴ Following this but not relevant to the judgment, some of the contracts with service providers were not renewed after the 18 month term.

⁵⁵ [2000] FCA 452 at para 38.

⁵⁶ Ibid at para 43 per Einfeld J.

⁵⁷ Ibid at para 62.

⁵⁸ Ibid at para 63.

⁵⁹ Ibid.

⁶⁰ Ibid at para 77.

⁶¹ Ibid at para 78. The judge acknowledged these words of the CPSU.

⁶² Ibid.

⁶³ Ibid at para 83.

⁶⁴ Ibid at para 95.

⁶⁵ Ibid at para 114.

⁶⁶ Ibid at para 119.

⁶⁷ Ibid.

⁶⁸ [2005] HCA 9; (2005) 222 CLR 194; 214 ALR 24; 79 ALJR 679.

⁶⁹ Ibid at para 35.

⁷⁰ The High Court stated in relation to tangible and intangible assets, *ibid* at para 39: 'The "business" of an employer may be constituted by a number of different assets, both tangible and intangible, that are used in the particular pursuit, whether of profit (if the "business" is a commercial enterprise) or other ends (if the activity is charitable or the "business" of government). In the case of a commercial enterprise, identifying the employer's "business" will usually require identification both of the particular activity that is pursued and of the tangible and intangible assets that are used in that pursuit. The "business" of an employer will be identified as the assets that the employer uses in the pursuit of the

particular activity. It is the assets used in that way that can be assigned or transmitted and it is to the assets used in that way that an employer can be a successor.’

⁷¹ This is based on *PP Consultants* case

⁷² This is based on *Gribbles* case.

⁷³ See Bills Digest No. 123, 2000-01 Workplace Relations Amendment (Transmission of Business) Bill 2001, Parliamentary Library, <<http://www.aph.gov.au/library/Pubs/bd/2000-01/01BD123.htm>> accessed June 2006.

⁷⁴ *Workplace Relations Amendment (Transmission of Business) Act 2004* (Cth).

⁷⁵ *Workplace Relations Act 1996* (Cth) as amended by the Work Choices legislation: as to awards, s 595(2); as to collective workplace agreements, s 585(2); and as to Australian Workplace Agreements, s 583(2).

⁷⁶ *Ibid*: awards, s 595(1); collective workplace agreements s 585(1); Australian Workplace Agreements, s 583(1).

⁷⁷ *Ibid*: awards, s 595(2); collective workplace agreements, s 585(2); Australian Workplace Agreements, s 583(2) as applied by s 580(4).

⁷⁸ See Part 11 and Schedule 9 of the *Workplace Relations Act 1996* (Cth), as amended by the Work Choices Act.

⁷⁹ *North Western Health Care Network v HSU of Australia* [1999] FCA 897.

⁸⁰ *Workplace Relations Act 1996* (Cth), s 582 and Schedule 9.

⁸¹ *Ibid* s 582 (1)(b).

⁸² [2001] FCA 349.

⁸³ [2000] FCA 1231 at para 81.

⁸⁴ Freedom of association provisions are now contained in Part 16 of the *Workplace Relations Act* as amended by Work Choices Act 2005.

⁸⁵ Now s 793 *Workplace Relations Act 1996* as amended by the Work Choices Act 2005.

⁸⁶ [2000] FCA 1231.

⁸⁷ *Greater Dandenong City Council v Australian Municipal Clerical and Services Union* [2001] FCA 349. Wilcox and Merkel JJ were in the majority with Finkelstein J in dissent.

⁸⁸ *Ibid* at para 81.

⁸⁹ *Ibid* at para 80.

⁹⁰ *Ibid* at para 91.

⁹¹ *Ibid* at para 162.

⁹² *Ibid*.

⁹³ See, *ibid*, at paras 168 to 181.

⁹⁴ See especially chapters 2 [Weeks], 3 [Nethercote] and 4 [Molloy] in this volume.

⁹⁵ This general statement may be slightly qualified by the implied duty of mutual trust and confidence at common law. However this duty, even if accepted fully in Australia, would not go so far as to instil such values via the contract: see generally R Owens and J Riley, *The Law of Work* (2007). The proposed charter of employment rights may promote such values: see M Bromberg and M Irving (eds) *Australian Charter of Employment Rights*, (Australian Institute of Employment Rights, Hardie Grant Books, 2007).

⁹⁶ See Australian Public Service A-Z Index, *APS Values and Code of Conduct in Practice*, ‘Working with the private sector and other Stakeholders’ <www.apsc.gov.au/values/conductguidelines8.htm>.

⁹⁷ See R Mulgan, ‘Outsourcing and public service values: the Australian experience’ (2005) 71(1) *International Review of Administrative Services*, 55-70.

⁹⁸ *Workplace Relations Act*, Part 12, Division 4 deals with termination of employment. See M Pittard, ‘Fair Dismissal: A Devalued Right’, chapter in Teicher et al (eds), *Work Choices: The New Industrial Relations Agenda* (Pearson Prentice Hall, 2006).

⁹⁹ [1998] AATA 830 (AAT 13394, decision of Administrative Appeals Tribunal on 21 October 1998).

¹⁰⁰ *Ibid* at para 57.

¹⁰¹ *Ibid*.

¹⁰² ‘Constitutional corporations’ are defined in s 4(1) of the *Workplace Relations Act 1996* (Cth) as trading, foreign or financial corporations. Also employers in the Territories which are not incorporated are covered by the *Workplace Relations Act*, as also is the Commonwealth as employer.

¹⁰³ Also the *Workplace Relations Act 1996* (Cth) provides for unlawful termination of employment where there is dismissal for discriminatory reasons: Part 12.

¹⁰⁴ Section 3(1) *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth).