

Post Script

TRANSMISSION OF BUSINESS

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Since writing the article "Transmission of Business" in the October edition of *Plaintiff*, two decisions of the Federal Court have been delivered which impact upon this issue. The first is a decision of Justice Wilcox in the matter of the *CPSU and Another v Stellar Call Centres Pty Ltd* (1999)[FCA 1224, 3 September 1999]. In *Stellar Call Centres* Telstra had participated in a joint venture with Stellar to handle an overflow of customer inquiry calls to Telstra. Stellar was a new company which accepted telemarketing from companies other than Telstra. Stellar owned most of the equipment used at the Call Centres and very few former employees of Telstra were employed by Stellar. However, the way in which the Call Centre was designed was to allow it to function in effect as a "seamless" part of Telstra's Sale Centre Services. Wilcox J applied the decision in *North Western* and held that:

"there was a substantial identity of work between employees of the new employer and that performed on behalf of the old employer"

His Honour also considered relevant the following factors:

- (a) the fact that no fixed assets were transferred is not determinative;
- (b) what was transferred was the right to act as agents in relation to a crit-

ical part of Telstra's business, namely Customer Relations. In relation to a burden transferred to it Stellar was a "successor" of Telstra.

- (c) there does not need to be a viable business or a free standing business for Section 149(1)(d) to operate. To impose such a requirement would be to render the expression "or part of a business" otiose.
- (d) the fact that Stellar entered contracts with clients other than Telstra was not decisive. The contract required it to dictate both employees and equipment to the performance of the Telstra contract but in the event provided there is substantial identity of services as between the old employer and the new employer it is immaterial that their new employer also engages in other activities, even mainly engages in the other activities."

Even more recent is the decision by the Full Federal Court (Wilcox, Ryan and Madgwick JJ) in *Finance Sector Union of Australia v PP Consultants trading as Byron Bay Pharmacy* [1999] FCA 1251 (10 December 1998). This was the decision on appeal from the earlier decisions of Matthews in *PP Consultants* discussed above. In upholding the appeal the Court drew the following conclusions:

- (a) There is no basis for the suggestion that a "part of business" must be a discrete profit centre or that the part must itself constitute a business.
- (b) A benevolent construction of the word "business" in the predecessor to the Section 149, without the express reference to part of the single business would treat part of a larger business that was itself a busi-

ness as a business within the meaning of the Section. The words "part of business" mean something more. They denote a particular bundle of activities that constitute an identifiable portion of the total activities that constitute a business.

- (c) Sometimes the part will be a discrete profit centre, sometimes it will not. That does not necessarily mean that everything done in the course of conducting a business is a "part of business".
- (d) It is undoubtedly the case here that the conduct of banking transactions with bank customers at specified premises and the functions engaged in by the employees themselves were constituent, indeed "core" functions of a bank. Furthermore, both the volume of those transactions it may readily be inferred, and the amount of work necessary to perform those functions were not insubstantial.
- (e) Although PP Consultants acted as the bank's agent, in carrying out its banking activities on and after Monday 15 September 1997, it carried out business activities that were almost identical to those carried on by the bank as principal up to and including the proceeding Friday. There was a continuity of activity and a continuity of service to customers.
- (f) The policy considerations supporting this approach were touched on in *North Western Health Care Network*, especially by Madgwick J. Section 149(1)(d) is designed, amongst other things, to protect employees against a loss of their award entitlements following a transfer of the business, or part of the business, in which they are employed. That being so, it is logical to focus on the nature of the activities undertaken by the two employers and the question of whether there is any material chain in the nature of the employee's duties or working conditions. This is more pertinent to the underlying policy of the paragraph than the characterisation of the detail of the legal arrangements between the two employers. ■

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