

**Centre for Employment and Labour Relations Law
The University of Melbourne**

November 2007

Working Paper No. 42

**PROTECTION OF EMPLOYEES IN A
TRANSMISSION OF BUSINESS:
WHAT IS LEFT IN THE WAKE OF
WORKCHOICES AND SUBSEQUENT
STATUTORY AMENDMENTS**

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ISSN 1321-9235

The Centre for Employment and Labour Relations Law gratefully acknowledges the support of the following major legal practices and organisations:



Protection of Employees in a Transmission Of Business: What is Left in the Wake of WorkChoices and Subsequent Statutory Amendments

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ABSTRACT

Regulation of the employment relationship in the context of a transmission of business has undergone substantial revision as a result of the Workplace Relations Amendment (WorkChoices) Act 2005 (Cth), and more recently, the Workplace Relations Amendment (A Stronger Safety Net) Act 2007 (Cth). The first part of this paper reviews the statutory treatment of transmission of business in the past and considers the traditional justification for regulatory intervention in this area. The focus then turns to a detailed examination of the new statutory provisions and analyses the possible impetus for the changes, as well as identifying potential shortcomings. Finally, it looks at recent amendments relating to the application of duress in connection with Australian Workplace Agreements. It is argued that, despite the growing body of case law in this area, statutory intervention was necessary in order to ensure that, in a transmission of business, the obligations of employers were clearly prescribed and the market position of employees was properly protected.

I INTRODUCTION

*Part and parcel of a modern economy is that businesses are bought and sold. When this happens it is important the entitlements of employees are protected.*²

*The Government's so-called guarantee that employees' existing entitlements will be protected for a 12 month period on the sale of a business...is not worth the paper it is written on.*³

Dealing with employees in a transmission of business presents a number of legal and practical conundrum. Despite a number of High Court decisions which have attempted to unravel this issue, it is often difficult to decipher, firstly, whether a transmission of business has occurred, and secondly, what the legal ramifications are for those employees whose employment is transferred from one entity to another.⁴ Although some entitlements, such as long service leave, are secured by State legislation,⁵ most key conditions of employment have been sourced from an award, or more recently, a statutory agreement. One of the primary aims of the pre-reform Act,⁶ and its predecessors, was to ensure that conditions of employment were

¹ LLB. Lawyer, Baker & McKenzie, Melbourne. The views expressed in this paper are those of the author and should not be taken to represent those of Baker & McKenzie.

² Hon Kevin Andrews, the then Minister for Employment and Workplace Relations, 'Launch of WorkChoices', Second Reading Speech (2 November 2005)

<<http://mediacentre.dewr.gov.au/mediacentre/MinisterAndrews/Releases/LaunchOfWorkchoices.htm>> at 8 October 2006.

³ Interview with Stephen Smith, the then Shadow Minister for Industry, Infrastructure and Industrial Relations (Canberra, 11 October 2006) <<http://www.alp.org.au/media/1006/dsiiriii110.php?print=on>> at 12 October 2006.

⁴ See, e.g. *Amcor v CFMEU* (2005) 214 ALR 56 ('Amcor'); and *Gribbles Radiology Pty Ltd v Health Services Union of Australia* (2005) 214 ALR 24 ('Gribbles').

⁵ See *Long Service Leave Act 1992* (Vic), s 60(1)-(8); *Long Service Leave Act 1955* (NSW), s 4(11)(c); *Industrial Relations Act 1999* (Qld), ss 43-44, 68-69; *Long Service Leave Act 1987* (SA), ss 3 and 6(1); *Long Service Leave Act 1958* (WA), ss 6(2)(a), (4) and 8(1); *Long Service Leave Act 1976* (Tas), s 5(4)-(8); *Long Service Leave Act 1976* (ACT), ss 10-11; *Long Service Act 1981* (NT), s 12(6)-(9). Awards may also contain provisions which deal with the preservation of long service leave entitlements upon transmission, see, e.g., Metal, Engineering and Associated Industries Award 1998 – Part IV – Long Service Leave, cl 5.5 and 5.6.

⁶ All references to the 'pre-reform Act' should be taken as referring to the *Workplace Relations Act 1996* (Cth) as it stood immediately before 27 March 2006, the date on which WorkChoices largely took effect.

maintained following transmission of business and to stop employers avoiding award coverage by way of business restructure.⁷

However, in the wake of WorkChoices, the legal landscape looks remarkably different.⁸ Firstly, the constitutional foundation of the entire system has shifted away from one based on the conciliation and arbitration power to one largely founded on the corporations power.⁹ As part of this change, and for the first time in Australian industrial relations history, the Federal Government has legislated for a set of key minimum conditions of employment by introducing the Australian Fair Pay and Conditions Standard (*AFPCS*).¹⁰

Given that the WorkChoices amendments have now been held to be constitutionally valid,¹¹ and with the forthcoming Federal election potentially turning on questions of industrial relations policy, it is a prime opportunity to analyse the ways in which the transmission of business protections have altered in response to these wider changes, explore whether they have effectively achieved their objective of providing ‘for the transfer of employer obligations under certain instruments when the whole, or a part, of a person's business is transmitted to another person’¹² and question whether they should be retained in their current form.

On the face of the legislation, Part 11 and Schedule 9 of the amended Act still provide that, in a transmission of business, those industrial instruments which were binding on the transmitter will bind the transmittee to the extent that it engages employees in the business being transferred. However, the transmitted instrument no longer applies on an indefinite basis, but has a maximum lifespan of 12 months. In addition, the transmitted instrument will not cover any new employees hired by the transmittee following transmission. Another critical difference between the pre-reform and post-reform provisions is that WorkChoices attempts to formalise the transfer of accrued entitlements and introduce a set of notification requirements. Despite these amendments, a fundamental feature linking the current Act and its immediate predecessor is the heavy reliance on case law. Nowhere is this more prominent than with respect to the definition of ‘transmission of business’, which continues to pose a

⁷ See *George Hudson Ltd v Australian Timber Workers Union* (1923) 32 CLR 413, 450-1.

⁸ See *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) (*‘WorkChoices’*), amending the *Workplace Relations Act 1996* (Cth). Note that all references to ‘the Act’ or ‘WRA’ are to the *Workplace Relations Act 1996* (Cth), as amended and renumbered by WorkChoices and subsequent amendments.

⁹ See M Kirby and B Creighton, ‘The Law of Conciliation and Arbitration’ in S Macintyre and J Isaac (eds), *The New Province for Law and Order: 100 years of Australian Industrial Conciliation and Arbitration* (2004); and A Stewart, ‘Federal Labour Law and New Uses for the Corporations Power’ (2001) 14 *Australian Journal of Labour Law* 145.

¹⁰ For further discussion of the AFPCS see C Fenwick, ‘How Low Can You Go? Minimum Working Conditions Under Australia’s New Labour Law’ (2006) 16 *Economic and Labour Relations Review* 85; S Cooney, J Howe and J Murray, ‘Time and Money under WorkChoices: Understanding the New *Workplace Relations Act* as a Scheme of Regulation’ (2006) 29 *University of New South Wales Law Journal* 215; and R Owens, ‘Working Precariously: The Safety Net after WorkChoices’ (2006) 19 *Australian Journal of Labour Law* 1. It should also be noted that parental leave, rest breaks and public holidays were entrenched in the 1993 legislative reforms.

¹¹ See *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* (2006) 231 ALR 1. The majority of the High Court, consisting of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ with Kirby and Callinan JJ dissenting, held that the Federal government had the power to enact the WorkChoices legislation under s 51(xx) of the Constitution. In reaching this conclusion, it rejected challenges from the State and Territory governments and unions, in respect of the entire legislation, as well as particular provisions.

¹² WRA, s 580(1).

major threshold problem in terms of determining when the transmission of business provisions actually apply.¹³

The Explanatory Memorandum does not discuss the impetus for these amendments. Similarly, the Government has failed to proffer any justification for this change in policy. What is clear, however, is that WorkChoices has introduced various ways in which a transmittee may circumvent these statutory restrictions and requirements. Indeed, it has been suggested that these provisions, together with the introduction of employer greenfields ‘agreements’ and the further encouragement of AWAs, means that some employers may now more easily escape the operation of awards and agreements by creating a transmission of business.¹⁴ On the other hand, further refinement of the duress provisions, together with the introduction of the ‘fairness test’, appears to have closed at least some of these legislative loopholes.

This paper will outline the original justification for legislative protection of employees in transmission of business and look at some of the critical legal developments which have occurred in the past century. It will then explore the transmission of business provisions under WorkChoices, with a particular focus on the treatment of transmitted instruments. This inquiry will seek to determine whether the provisions represent a genuine attempt to protect employees, or whether they are focused more towards protection of the ‘enterprise’, that is, business profitability and managerial prerogative.¹⁵ The final part of the paper will examine recent legislative amendments in relation to the application of duress in the context of transmission of business. While these amendments are said to ‘spell out the existing law in this area’,¹⁶ it will be argued that statutory intervention was necessary to ensure that the worst excesses of ‘deregulation’ were kept in check.

II AN HISTORICAL OVERVIEW

A A Case for Legislative Regulation of Transmission of Business

To better appreciate the justification for legislative intervention in a transmission of business, it is perhaps useful to first understand the problems posed by contract law and the Constitution, as well as the regulatory aims of these provisions.¹⁷

1 *Failures of the Common Law*

¹³ Whilst this issue is of fundamental importance, it is extremely complex and has been explored at length elsewhere. As such, this paper will not be reviewing relevant case law in any length, but see C Sutherland and N Ruskin, ‘When Business Changes Hands: The Issue of Severance Dough’ (2006) 80(4) *Law Institute Journal* 54; N Ellery and C Jones, ‘Restructures, Transmissions and Redundancies’ (2005) 18 *Australian Journal of Labour Law* 184; R Klein and G Smith ‘Test for Transmission of Business: High Court Decision – Case Note; Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd’ (2005) 11(2) *Employment Law Bulletin* 21. For a detailed summary of case law preceding *Ancor* and *Gribbles* see K Godfrey, ‘The Evolution of Transmission of Business – Where Have We Been? Where are we Going’ (2003) 31(5) *Australian Business Law Review* 344.

¹⁴ A Stewart, ‘WorkChoices: The High Court Challenge’ a supplement to *Labour Law* (2005) <<http://www.federationpress.com.au/pdf/WorkChoicesHighCtChallenge%20.pdf>> at 14 October 2006.

¹⁵ See C Arup, ‘Labour Law as Regulation: Promises and Pitfalls’ (2001) 14 *Australian Journal of Labour Law* 229, 229.

¹⁶ See Explanatory Memorandum, Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (Cth), [194].

¹⁷ For further discussion of these issues see T Sebbens, ‘“Wake, O Wake” – Transmission of Business Provisions in Outsourcing and Privatisation’ (2003) 16 *Australian Journal of Labour Law* 1, 1.

As was most famously enunciated in *Nokes v Doncaster Amalgamated Collieries*¹⁸ an employee, being a servant rather than a serf, cannot be transferred from one employer to another without his or her consent.¹⁹ Although a transmission of business does not necessarily have the effect of terminating the employment contract by operation of law, it undoubtedly has a significant impact on its operation.²⁰

In general, employees are entitled to assume that they have been dismissed where their employer transfers its business to another entity.²¹ If this dismissal does not accord with the terms of the contract, for example, the employer has failed to provide the requisite period of notice of termination, the employer will be taken to have repudiated the contract. The employee is then faced with a decision as to whether to sue for wrongful dismissal or refuse to accept the repudiation as terminating the contract in an attempt to acquire or extend rights based on continuity of service.²²

On the one hand, these contractual principles mean that employees cannot be forced to accept employment with the transmittee. On the other hand, reliance on the common law means that these same employees cannot compel the new employer to make an offer of employment.²³ It is also apparent that sole dependence on private ordering results in the new employer, rather than the transferring employee, being left in a relatively strong bargaining position.²⁴

2 Constitutional Limitations and Common Rule Awards

Common rule awards were originally seen to be a panacea to the shortcomings of the common law.²⁵ By maintaining employment conditions across an industry, a transmission of business would have no lasting effect on the entitlements of employees. Shortly after Federation, however, it became clear that due to constitutional limitations, Federal awards

¹⁸ [1940] AC 1014, 1026.

¹⁹ See also *McCluskey v Karagiozis* [2002] FCA 1137. For discussion of these principles see D Chin, 'Servant or Serf? Severance Pay on Transmission of Business and the Right to Choose an Employer' (2003) 16 *Australian Journal of Labour Law* 172.

²⁰ See B Creighton, 'Transmission of All or Part of a Business: A Neglected Issue in Australian Industrial and Employment Law' (1998) 26 *Australian Business Law Review* 162, 164.

²¹ *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014; *Burton v Litton Business Systems* (1977) 16 SASR 162.

²² In practice, an action for wrongful dismissal will run into problems where the employee has accepted employment with the new employer given that there is, in most circumstances, no loss suffered as a result of the transmitter's breach, namely the failure to give proper notice. In line with this, reg 12.13, Pt 12 of the Workplace Relations Regulations 2006 (Cth) provides that an employer is not obliged to give the statutory periods of notice normally required under s 661 of the Act if the employee accepts employment with the transmittee and the transmittee has agreed to recognize the employee's prior service. This does not, however, remove the employer's obligation to provide notice under any applicable contract, award or registered agreement. See, e.g., *Re Associated Dominions Assurance Society Pty Ltd* (1962) 109 CLR 516. See Andrew Stewart, 'Employment issues in the transmission of businesses: avoiding the pitfalls' (2003) 9 *Employment Law Bulletin* 57.

²³ The position in the United Kingdom somewhat different in this respect by virtue of the *Transfer of Undertakings (Protection of Employment) Regulations 1981*. See L Braginsky, 'How Changes in Employer Identity Affect Employment Continuity: A Comparison of the United States and the United Kingdom' (1995) 16 *Comparative Labour Law Journal* 231.

²⁴ For more detailed regulatory analysis see J Howe, '“Deregulation” of Labour Relations in Australia: Toward Command and Control' Centre for Employment and Labour Relations Law, Working Paper No 34 and H Collins, 'Justification and Techniques of Legal Regulation of the Employment Relation' in H Collins, P Davies and R Rideout, *Legal Regulation of the Employment Relation* (London, Kluwer Law International, 2000).

²⁵ Whilst there are separate State legislative mechanisms which apply to transmission of business, these were never as critical as the Federal legislation given that State awards generally applied on a common rule basis. See, e.g., *Industrial Relations Act 1996* (NSW), ss 8, 101, 102. These State Acts are set to become more marginalised under WorkChoices, which effectively excludes the application of State employment laws in respect of Federal system employers. See WRA, s 16.

could not operate on a 'common rule' basis.²⁶ Soon after, it became equally apparent that legislative protection was needed to prevent employers from avoiding award obligations by transmitting or all part of its business to another entity not named as a respondent to the award.²⁷

B Past Legislative Regulation

As a result, transmission of business provisions were introduced into the *Conciliation and Arbitration Act 1904* (Cth), which provided that an award was binding on 'any successor, or assignee or transferee of the business of a party bound by the award, including any corporation which [had] acquired or taken over the business of such a party.'²⁸ Later, in response to various other High Court decisions,²⁹ a series of legislative amendments were passed to ensure that successors to parties to industrial agreements would be bound by those agreements and to provide that an employer only need to be a successor 'of a party to a dispute' to be bound by the award.³⁰ These provisions, which have been described as having 'ensured and protected the continuity and growth of the Federal industrial regime in its infancy',³¹ remained virtually unchanged until the enactment of the *Industrial Relations Act 1988* (Cth) (the *IR Act*).³²

A number of major changes were introduced by the IR Act. Firstly, the legislation had the effect of empowering the Commission to make an order varying or excluding the application of a transmitted award, or alternatively, that a new award be made. Secondly, the words 'whether immediate or not' were inserted in order to capture transmissions which involved more than one legal transaction and more than one successor to the award, that is, it effectively bound subsequent employers where there was a chain of transmissions.³³ Simultaneously, the words 'of a party bound by the award' were deleted and replaced in order to preclude successor employers being bound by a transmitted award if the transmitter employer was a party to such an award by virtue of its membership of an organisation rather than because it was a party to the dispute when it was settled.³⁴ A final key amendment was the insertion of the words 'part of a business' which recognised the economic reality of

²⁶ *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 11 CLR 311 ('*Whybrow Case*'). See also R McCallum and G Smith, 'Opting Out from Within: Industrial Agreements Under the Conciliation and Arbitration Act 1904' (1986) 28 *Journal of Industrial Relations* 574.

²⁷ In response to the High Court decision in the *Whybrow Case*, amendments were made to the *Conciliation and Arbitration Act 1904* (Cth) in order to ensure that awards were binding on 'any successor, or any assignee or transferee of the business

of a party bound by the award, including any corporation which has acquired or taken over the business of such a party.' See Creighton, above n 20.

²⁸ *Conciliation and Arbitration Act 1904* (Cth), s 29(ba).

²⁹ *Proprietors of the Daily News Ltd v Australian Journalist Association* (1920) 27 CLR 532; and *Carter v E W Roach & J B Milton Pty Ltd* (1921) 29 CLR 515.

³⁰ *Conciliation and Arbitration Act 1904* (Cth), ss 24(1) and 29(ba). The constitutional validity of these amendments was confirmed by the High Court in *George Hudson Ltd v Australian Timber Workers Union* (1923) 32 CLR 413. See Godfrey, above n 13, 347.

³¹ J Howe, "Deregulation" of Labour Relations in Australia: Towards a More "Centred" Command and Control Model' in C Arup et al, *Labour Law and Labour Market Regulation* (Annandale, Federations Press, 2006), 153.

³² There were a number of minor amendments, however, such as the renumbering of s 29(ba) as s 50(d) of the *Conciliation and Arbitration Act* in 1947. In 1956, this was later changed to s 61(d). See Creighton, above n 20.

³³ Creighton, above n 20.

³⁴ But see IR Act, ss 195(2) and 390. See Creighton, above n 20, 173.

outsourcing, namely that a part of a business could be severed from the whole and transmitted.³⁵

With the election of the Howard Government, and its increased focus on enterprise bargaining, the statutory transmission of business provisions underwent further change.³⁶ Under the pre-reform Act, awards continued to be binding on 'any successor, assignee or transmittee'.³⁷ Similarly, certified agreements binding on the transmitter were applied to the transmittee³⁸ as were AWAs entered into by a transferring employee and their former employer.³⁹ With respect to statutory agreements, however, the instruments would only transmit if the new employer was of a kind eligible to have made the certified agreement or AWA in the first instance.⁴⁰ Another important distinction under the pre-reform Act between the transmission of awards as compared to agreements, is that the latter type of instruments did not follow the employees, but rather the business being transferred. This meant that a transmittee could find itself bound by a transmitted certified agreement, despite the fact that it did not engage any of the employees who were previously covered by the agreement.⁴¹

Whilst parties to transmitted awards could challenge their application before the Commission, parties bound by transmitted agreements were left without the same recourse until the enactment of s 170MBA in 2004. This provision was inserted to rectify the problem often faced by transmittees, that is, the difficulty of being bound by several certified agreements following transmission all with differing nominal expiry dates, which had the effect of imposing a somewhat haphazard set of terms and conditions of employment.

III THE PURPOSE OF TRANSMISSION OF BUSINESS PROVISIONS

Whilst issues relating to transmission of business have been lurking for a long time, there has been scant analysis regarding the purpose of the legislative provisions which are designed to address them.⁴² In its original formulation, the High Court found that the purpose for the transmission of business provisions in particular, and the *Conciliation and Arbitration Act 1904* (Cth) more generally, was to:

- (a) encourage and maintain industrial peace;
- (b) preclude any deliberate avoidance of awards by employers;
- (c) prevent competitive advantage which may be gained by employers who avoided their award obligations through business restructuring; and

³⁵ See Sebbens, above n 17, 6.

³⁶ See pre-reform Act, s 3. See also M Pittard, 'Collective Employment Relationships: Reform of Arbitrated Awards and Certified Agreements' (1997) *Australian Journal of Labour Law* 62.

³⁷ See pre-reform Act, s 149(d). Whilst section 149(1)(d) was preserved in the Act, ss 195(2) and 309, which effectively provided unions with a greater opportunity to 'rope-in' transmittees, were repealed. The process of 'roping-in', by way of an application to the Commission, was generally used by unions to make Federal awards binding on employers who were not previously bound. This process was particularly effective in circumstances where it was unclear as to whether there had been a 'transmission' for the purposes of s 149(1)(d) of the IR Act. See Creighton, above n 20, 173.

³⁸ See pre-reform Act, s 170MB.

³⁹ See pre-reform Act, s 170VS.

⁴⁰ Stewart, above n 22, 61.

⁴¹ Ibid.

⁴² But see Sebbens, above n 17, 12.

- (d) minimise unfairness to employees who had assumed that the agreement they struck with their employer would be binding.⁴³

Despite the significant gap between decisions, similar reasoning was adopted by the Federal Court in the 1990s.⁴⁴ More recently, however, the macro-economic effect of the award system has been undermined by a number of High Court decisions⁴⁵ which overturned the earlier decisions of the Federal Court and effectively downplayed the policy considerations upon which it had relied. The broad, purposive approach of the Federal Court also prompted the legislature into action and, as a direct result of the decisions of the Federal Court, the Coalition Government proposed a number of amendments to the pre-reform Act in order to ensure that the traditional rationale for the transmission of business provisions was not extrapolated ‘to an unsustainable level of abstraction.’⁴⁶

In adopting a literal interpretation of the provisions, the High Court seems to have had little regard to the pivotal role of the Commission under the pre-reform regime, which was charged with the task of reconciling ‘the protective function of labour law advanced by the trade unions with competing policy concerns, such as the promotion of business productivity and competitiveness.’⁴⁷ A number of commentators, who have criticised the restrictive interpretation adopted by the High Court, have pointed out that since the Commission possessed the ability to make binding orders which excluded or modified the application of a transmitted award or agreement, any hardship that might be suffered by an employer could be averted.⁴⁸

However, in light of the revised objectives of the Act with its emphasis on enterprise bargaining,⁴⁹ the relevancy of this reasoning and its aims appears questionable. The

⁴³ *George Hudson Ltd v Australian Workers’ Union* (1923) 32 CLR 413. See also Godfrey, above n 13.

⁴⁴ See, e.g. *Community and Public Sector Union v Stellar Call Centres Pty Ltd* (1999) 92 IR 224; *North Western Health Care Network v Health Services Union of Australia* (1999) 92 FCR 477; *Employment National Ltd v Community and Public Sector Union* (2000) 173 ALR 201 and *Finance Sector Union v PP Consultants Pty Ltd* (1999) 91 FCR 337. See generally, P Ginters, ‘The Transmission of Business Provisions in the Workplace Relations Act 1996 (Cth): Reaffirming the Primacy of the “Substantial Identity” Test’ (1999) 12 *Australian Journal of Labour Law* 211.

⁴⁵ See, e.g. *PP Consultants* (2000) 201 CLR 648; *Ancor* (2005) 214 ALR 56; *Gribbles* (2005) 214 ALR 24.

⁴⁶ Sebbens, above n 17, 13. In the wake of the Federal Court decisions discussed above, the Government indicated that it was considering rewriting the legislative provisions: see P Reith, *Transmission of Business and Workplace Relations Issues*, Ministerial Discussion Paper, Parliament of Australia, Canberra, 2000. See also Workplace Relations Amendment (More Jobs, Better Pay) 1999 (Cth), Workplace Relations Amendment (Transmission of Business) Bill 2001 (Cth) and Workplace Relations Amendment (Transmission of Business) Bill 2002 (Cth). However, following the High Court decision in *PP Consultants Pty Ltd v FSU* (2000) 201 CLR 648, it was instead decided to simply empower the Commission to make adjustment orders in relation to the transmission of certified agreements. See Workplace Relations Amendment (Transmission of Business) Act 2004 (Cth).

⁴⁷ See Howe, above n 31, 158. See also A Frazer, ‘Industrial Tribunals and the Regulation of Bargaining’ in Chris Arup et al (eds), *Labour Law and Labour Market Regulation* (Annandale, Federation Press, 2006), 223 – 241.

⁴⁸ In *Minister of State for Employment Workplace Relations and Small Business v CPSU* (2001) 109 FCR 302, Beaumont J stated: ‘The purpose of the transmission of business 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.’ See also Sebbens, above n 17, 13.

⁴⁹ See WRA, ss 3(d) and (e), which were largely transposed from the previous objectives of the pre-reform Act. Section 3(d) provides that the legislation is aimed at ‘ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level.’

traditional justification for the transmission of business provisions loses force in relation to the transmission of statutory agreements which operate less like a protective set of universal rules and more like a tailored set of terms and conditions of employment which reflect the circumstances of each particular business or employee.⁵⁰ Whilst the removal of the common rule award system was of concern at the turn of last century, it is less so today, particularly given that WorkChoices has now entrenched a key set of minimum conditions of employment by way of the AFPCS.⁵¹ Furthermore, WorkChoices is unabashedly designed to encourage an increasing individualisation of the workforce⁵² and is deliberately aimed at ‘deregulation’.⁵³ Regardless of whether it effectively achieves these objectives, it is apparent that the policy arguments based on the notion of awards and agreements as providing a ‘safety net’ are less potent when one acknowledges the partial dismantlement of the award system. In saying that, the fact that the ‘fairness test’ established under the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) derives its force from the underlying framework of awards (and former awards such as NAPSAs) means that these industrial instruments will continue to play an important role in the future.⁵⁴

The legal challenges which are present in a transmission of business, and outlined above, are useful in highlighting the ‘regulatory trilemma’ of simultaneously achieving effectiveness, responsiveness and coherence.⁵⁵ This is evidenced by the fact that, despite the amendments under WorkChoices, or conversely because of them, criticisms continue to be levelled at the transmission of business provisions from both sides of the political spectrum.

Employer groups have consistently maintained that an increasingly competitive and globalised marketplace means that any legislative framework which imposes unfair and unwieldy restrictions on the capacity of Australian corporations to outsource or transmit their businesses will inevitably result in more investment and jobs moving offshore.⁵⁶ Whilst such arguments tend to focus only on the costs to the employer and not on the net costs of regulation, it has been argued that ‘even after such a sophisticated calculus of comparative advantage with respect to labour regulation has been conducted...it seems, likely that the pressures for reduction in employment standards still remains.’⁵⁷

In contrast, unions continue to underline the well-established policy rationale for the transmission of business provisions, namely protection of employees and the non-avoidance of obligations set out in awards and statutory agreements. Similarly, others have maintained that to prevent the transmission of collective agreements (or to allow for the easy avoidance of such) is to ignore the central principle of enterprise bargaining, namely the ‘the notion that

⁵⁰ This proposition is somewhat questionable, however, when one considers the prevalence of pattern bargaining in particular industries such as construction.

⁵¹ Whether the AFPCS effectively preserves the ‘safety net’ is the subject of some debate. See, e.g., Fenwick, above n 10.

⁵² See S Deery and R Mitchell, ‘The Emergence of Individualisation and Union Exclusions as an Employment Relations Strategy’ in S Deery and R Mitchell, (eds) *Employment Relations: Individualisation and Union Exclusion* (Leichardt, Federation Press, 1999).

⁵³ See Howe, above n 31.

⁵⁴ It should be noted, however, that NAPSAs cease to have effect from 27 March 2009. It is not yet clear whether rationalised awards will be ready in time to fill this gap in regulation.

⁵⁵ See P Gahan and P Brosnan, ‘The Repertoires of Labour Market Regulation’ in C Arup et al (eds) *Labour Law and Labour Market Regulation* (Annandale, Federation Press, 2006), 136

⁵⁶ See AIG Submission, Senate Employment Workplace Relations, Small Business and Education Legislation Committee, Workplace Relations Amendment (WorkChoices) Bill 2005 (Cth), Parliament of Australia, Canberra, November 2005, 57.

⁵⁷ See Collins, above n 24, 15.

industrial participants should bargain in good faith, and the corollary of that proposition, that they should be bound by the outcomes of that process.⁵⁸

IV TRANSMISSION OF BUSINESS UNDER WORKCHOICES

A Overview of Major Changes

Since WorkChoices, transmission of business is primarily dealt with in Part 11 of the Act, with transitional instruments being regulated pursuant to Schedule 9.⁵⁹ Whilst WorkChoices has retained some of the protections outlined above, in many ways it heralds a new era in the regulation of transmission of business.⁶⁰ The way in which industrial instruments are treated upon transmission marks a significant shift. Another important change is the insertion of a new Division dealing solely with the transfer of employee entitlements accrued under the Standard.

Transmission of business under the pre-reform Act, and the legislation which preceded it, was highly regulated and far more restrictive. Indeed, unless transmittees could successfully obtain an order from the Commission releasing it from its obligations under the legislation, the transmittee would be bound by the transferring agreement for the life of the instrument and beyond. Comparatively, under WorkChoices, the transmission of business rules have been described as offering ‘purchasers of established businesses, the option to make employment arrangements with the employees they “inherit”, on their own terms.’⁶¹

B A Thorny Issue: When has a Transmission of Business Occurred?

Despite the differences just mentioned, one overriding issue that unites the pre and post-reform Act is the continuing failure to define key terms. Similar to its legislative predecessors, the definitive section and that which triggers legislative protection simply provides that a transmission of business has occurred ‘if a person (the *new employer*) becomes the successor, transmittee or assignee of the whole, or a part, of a business of another person (the *old employer*).’⁶² This definition not only gives rise to a familiar set of questions, such as what constitutes a ‘business’ or ‘part of a business’ and who falls within the category of ‘successor, transmittee or assignee’,⁶³ but by deleting the words ‘(whether immediate or not)’ it is not clear whether these provisions are capable of encompassing successors of successors.

⁵⁸ See Labour Senators’ Report, Senate Employment Workplace Relations, Small Business and Education Legislation Committee, Workplace Relations Amendment (Transmission of Business) Bill 2001 (Cth), Parliament of Australia, Canberra, June 2001, 9.

⁵⁹ See also sections 346DA - 346DC of the Act which deal with the treatment of workplace agreements that have been lodged with the Workplace Authority, but are yet to be formally assessed under the fairness test at the time of transmission.

⁶⁰ It should be noted that for most employers who are located outside of Victoria and the Territories, the central provisions of WorkChoices apply only to those employers who fall within the definition of ‘constitutional corporation’ as defined in s 51(20) of the Constitution. But see WRA, Pt 8, Sch 9 which deals with the transmission of transitional instruments in relation to excluded employers and Pt 7, Sch 9 in relation to excluded employers in Victoria.

⁶¹ See Australian Labour Law Reporter, ¶26-800.

⁶² WRA, s 580(1). This is slightly different to the way in which ‘transmission of business’ was defined under the pre-reform Act, for example, s 170MBA of the pre-reform Act provided that a certified agreement would be binding on the new employer if it ‘becomes at a later time, or is likely to become at a later time, the successor, transmittee or assignee (whether immediate or not) of the whole or a part of the business of the [old employer].’

⁶³ See Creighton, above n 20, 174.

Despite the confusion surrounding these key terms, and the inevitable problems they create,⁶⁴ the Government did not capitalise on the opportunity to clarify their meanings, which are left undefined under the Act. Given the plethora of commentary which has explored this vexed issue, as well as the case law surrounding it,⁶⁵ this paper will not discuss these questions at any length, except to note that in analysing the reach of the WorkChoices amendments in a transmission of business, one must always have regard to the common law.

In practice, a key indicator in determining whether there has been a transmission of business is whether the employing entity has changed.⁶⁶ This change most often occurs in transactions involving a sale or acquisition of assets of a business, a merger of two businesses to form a new entity, outsourcing a particular function within a business, the privatisation of a public undertaking and incorporation of a previously unincorporated entity, a phenomenon which is set to increase under WorkChoices.⁶⁷ However, interceding events such as the shut down of a business or a lack of connection between the transmitter and the alleged transmittee serves to complicate this inquiry and may result in the finding that no relevant transmission of business has occurred.⁶⁸

On the other hand, without a change in the identity of the employer, it is unlikely that a transmission of business will be found to have occurred. Consequently, transactions involving an acquisition of shares in the employer corporation or cases, where a receiver is appointed to carry on the business as agent for the employing entity or its shareholders, is not likely to fall within the purview of Part 11.⁶⁹

C Transmission of Industrial Instruments

Essentially, Divisions 3 to 6 of Part 11 deal with the transmission of awards,⁷⁰ as well as post-reform instruments, such as collective agreements,⁷¹ AWAs and APCs (together, the *instruments*) in the context of a transmission of business.⁷² The following section of this paper will be devoted to discussion of the operation of these provisions generally, before examining the different ways each of these instruments interact. As mentioned previously, Schedule 9 to the Act deals specifically with transitional industrial instruments.⁷³ This

⁶⁴ See, e.g., *Amcor* (2005) 214 ALR 56; *Gribbles* (2005) 214 ALR 24; and *PP Consultants Pty Ltd v FSU* (2000) 201 CLR 648.

⁶⁵ See generally the papers cited above n 13.

⁶⁶ Creighton, above n 20, 163.

⁶⁷ *Ibid.*

⁶⁸ But see extended definition of 'transferring employee': WRA, s 581(2).

⁶⁹ Creighton, above n 20, 163.

⁷⁰ Section 4(1) of the amended WRA defines the term 'award' as meaning: (a) an award made by the Commission under section 539; or (b) a pre-reform award. It is further noted that section 539 provides the AIRC with the power to make new awards as part of the award rationalisation process and a 'pre-reform award' is defined as meaning 'an instrument that has effect after the reform commencement under item 4 of Schedule 4 to the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth).

⁷¹ A workplace determination may also transmit in a transmission of business and are treated as if it were a collective agreement: s 506(1). It should be noted, however, that s 588(4) effectively excludes the operation of s 506(3), which generally provides that a transmitted workplace determination cannot be terminated prior to its nominal expiry date.

⁷² It should also be noted that, as a result of further amendments to the Act, redundancy provisions contained in a workplace agreement are preserved in certain circumstances: WRA, s 399A(4). These preserved redundancy provisions are also capable of transmission under Part 11 of the Act: WRA, Part 11, Div 6A and Sch 9, Part 5A.

⁷³ The term 'transitional industrial instruments' is defined by s 3 as including 'a pre-reform AWA; a pre-reform certified agreement; a section 170MX award; an exceptional matters order; a notional agreement preserving State awards; or a preserved State agreement.'

Schedule will only be discussed to the extent that its operation differs from Part 11. Further, given the relatively limited circumstances in which the fairness test impacts on the operation of the transmission of business provisions, these sections will not be considered in detail.⁷⁴

1 *When is a new employer bound by an instrument?*

By force of Part 11, a new employer will become bound by an instrument in relation to a 'transferring employee'⁷⁵ if the person was employed by the old employer and bound by the instrument immediately before the time of transmission⁷⁶ and, within two months from this time, becomes employed by the new employer in the business being transferred.⁷⁷ Further, in order to deter dubious business restructures, the definition of 'transferring employee' is extended to include those employees whose employment was terminated by the old employer wholly or partly on the basis of 'genuine operational reasons'⁷⁸ within one month of the time of transmission and employed by the new employer within two months from this time.⁷⁹ In general, a new employer who is a successor, transmittee or assignee to a business or part of a business, would be bound by the instrument that was previously applied to all the transferring employees of the old employer it engaged, subject to the condition that the transmitted instrument is capable of covering the employee's employment with the new employer.⁸⁰

These provisions are further qualified in two important respects. Firstly, the instrument will only transmit if one or more employees accept employment with the new employer. Secondly, the transmitted instrument will apply to the transferring employees and not to any new employees who are employed following the transmission of business or any existing employees of the new employer.⁸¹ In other words, the transmitted instrument will not have the effect of tainting the existing or future workplace relations arrangements of the new

⁷⁴ But see sections 346DA to 346DC of the WRA, which deal with the situation where a workplace agreement becomes binding on a new employer and a transferring employee or transferring employees before the Workplace Authority has applied the fairness test to the agreement or where the workplace agreement was varied by the old employer and becomes binding on the new employer, but before the Workplace Authority has decided whether the varied workplace agreement passes the fairness test. See also sections 346YA, which sets out the employment arrangements that take effect in relation to the new employer and a transferring employee should the workplace agreement cease operating as a result of failing the fairness test and section 346ZD, which provides for the method of calculating the compensation payable to a transferring employee in this situation.

⁷⁵ Section 579 provides that the term 'transferring employee' has the meaning given by ss 581 and 582.

⁷⁶ Section 579 defines the term 'time of transmission' by reference to s 580(3), which states as follows: 'the time at which the new employer becomes the successor, transmittee or assignee of the business being transferred is the *time of transmission*, for the purposes of this Part.' Generally, in most corporate transactions, the time of transmission will equate with the date of completion.

⁷⁷ WRA, s 580(2) defines 'business being transferred' as the 'business, or the part of the business, to which the new employer is successor, transmittee or assignee...'

⁷⁸ 'Operational reasons' is not defined in Part 11. However, the Explanatory Memorandum states that 'operational reasons' is attributed with the same meaning as s 643(9), which relates to unfair dismissal proceedings. This section provides that 'operational reasons' are 'reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business.'

⁷⁹ In line with this extended definition of 'transferring employee', s 581(3) also makes clear that a reference to a particular state of affairs existing immediately before the time of transmission is to be read as a reference to that state of affairs existing immediately before the person last ceased to be an employee of the employer.

⁸⁰ WRA, ss 581-582.

⁸¹ Section 582(1) provides that an instrument will only transfer under these provisions, where the instrument applied to the transferring employee's employment immediately before the time of transmission and the nature of the employee's employment with the new employer is such that the instrument is capable of applying to employment of that nature.

employer. This is different from the pre-reform position, which effectively provided that transmitted awards were not confined to the transmitted business, but rather applied to all employees of the transmittee who were capable of falling within the scope of the award and, moreover, that the most generous of the two awards should be applied.⁸²

Similarly, the issues which previously arose in relation to transmitted collective agreements are largely resolved via the interaction rules contained in Part 11. For example, it is no longer relevant which agreement was lodged first, rather the rules make clear that the transmitted collective agreement takes priority over any existing collective agreement for the transmission period.⁸³ In saying that, the transmitted collective agreement may be overridden at any time, if the transferring employee and new employer enter into a new workplace agreement, even if the transmitted collective agreement has not passed its nominal expiry date.⁸⁴ It should be noted, however, that if the transmitted agreement has not passed its nominal expiry date, employees and employers alike will be prevented from taking any protected industrial action.⁸⁵ In practice, this would effectively weaken the bargaining strength of transferring employees.

The Act also makes clear that the transmission of an instrument by force of Part 11 does not affect the rights and obligations of the old employer in respect of a transferring employee that arose before the time of transmission.⁸⁶ In other words, it is not intended that a transmitted instrument would have the ancillary effect of transferring liability for accrued employee entitlements to the new employer.⁸⁷

2 *When does the new employer cease to be bound by the instrument?*

The circumstances in which a particular transmitted instrument ceases to have effect under Part 11, and the way in which this instrument interacts with any existing awards or agreements of the new employer is detailed and complex.⁸⁸ In summary, there are generally four events which would have the effect of releasing the new employer from the transmitted instrument.⁸⁹ It is important to note that the new employer would cease to be bound from the time at whichever of the following events occurs earliest.

Firstly, the transmitted instrument is terminated in accordance with the Act.⁹⁰ Part 11 makes clear, however, that the unilateral termination provisions are not available, even if the

⁸² See *Health Services Union of Australia v North Western Health Care Centres* (1997) 79 FCR 43 (Marshall J). See also Godfrey, above n 13, 3.

⁸³ WRA, s 586(2).

⁸⁴ WRA, s 587.

⁸⁵ See, e.g., WRA, s 494.

⁸⁶ See WRA, ss 583(3), 585(6), 595(7) and 598(3) respectively.

⁸⁷ But see WRA, Div 7, Pt 11.

⁸⁸ The primary provisions relating to the cessation of each respective instrument are as follows: AWAs, s 583(2); collective agreements, s 585(2); awards, s 595(2); APCS, s 598(2); pre-reform AWAs, cl 7(2), Sch 9; pre-reform certified agreements, cl 10(2), Sch 9; and State transitional instruments, cl 19(3), Sch 9. The operation of these provisions may also be affected by other sections relating to termination and interaction, amongst others.

⁸⁹ As NAPSAs have a limited life span under the Act (i.e. three years from reform commencement date), there is an additional means by which a new employer can cease to be bound by the transmitted instrument: WRA, cl 19(2), Sch 9.

⁹⁰ In respect of transitional industrial instruments, the termination provisions in the pre-reform Act apply, see e.g. s 170VM(1) for termination of pre-reform AWAs; s 170MG for pre-reform certified agreements. Schedule 9 makes clear, however, that a pre-reform AWA may not be terminated under ss 170VM(3) or (6) of the pre-reform Act, even if it has reached its nominal expiry date. Similarly, a pre-reform certified agreement cannot be terminated under ss 170MH or 170MHA of the pre-reform Act during the transmission period.

nominal expiry date of the transmitted instrument has passed.⁹¹ In addition, a transmitted award will also cease to have effect if it is revoked as part of award rationalisation or award simplification or where the award is no longer applicable or obsolete.⁹² Secondly, the transmitted instrument ceases to be in operation because it is replaced by a new workplace agreement that binds the transferring employee and the new employer.⁹³ The practical operation of this provision may be subject to special interaction rules, which are discussed in more detail below. Thirdly, the transmitted instrument is no longer binding on the new employer because the transferring employee ceases to be classified as such, that is, because their employment with the new employer is terminated,⁹⁴ the nature of their employment changes so that the transmitted instrument is no longer applicable⁹⁵ or the transmission period expires.⁹⁶ Finally, the transmitted instrument would cease to have any binding effect on the new employer once the transmission period of 12 months comes to an end.⁹⁷ This event effectively acts as a default mechanism in order to ensure that the transmitted instruments do not bind the new employer indefinitely.

Assuming that a new workplace agreement has not come into operation in the meantime, once the new employer ceases to be bound by the transmitted instrument, the employees will be covered by whichever instrument is capable of applying to their employment with the new employer, for example, the employer's existing collective agreement or award, or if there is no such instrument, the AFPCS.

3 *Interaction Rules*

Under Part 11, the transmitted instruments often interact in a distinctive way with existing agreements and with any new workplace agreements that are made between the transferring employees and the new employer.⁹⁸ The underlying reason for the separate treatment of transmitted instruments is somewhat difficult to discern and seems to serve conflicting purposes. Some rules seemed to be designed to provide the new employer with greater flexibility, whilst others appear to be aimed at ensuring the protections provided by Part 11 are not undermined.

⁹¹ Contrary to the general right to unilaterally terminate a workplace agreement under ss 392(2) or 393(2), s 584 expressly provides that an AWA cannot be terminated during the transmission period in this manner, even where the AWA has passed its nominal expiry date. See also s 588(2) which has the same effect in relation to collective agreements. Accordingly, the only way in which to terminate a transmitted collective agreement is by obtaining the approval of a valid majority of employees covered by the agreement: WRA, s 386(2).

⁹² WRA, s 595(2).

⁹³ It should also be noted that if the new employer becomes bound by a Federal award during the transmission period, this will also have the effect of breaking the transmission link between the new employer and any transmitted notional agreement preserving state awards or NAPSA: WRA, cl 19(3)(d), Sch 9.

⁹⁴ WRA, s 582(2)(a).

⁹⁵ WRA, s 582(2)(b).

⁹⁶ WRA, s 582(2)(c). It should be noted that this subsection does not apply if the instrument is an APCS. In other words, expiry of the transmission period of 12 months does not have the effect of ending the employee's classification as a 'transferring employee' for the purposes of Part 11. However, this does not have any practical impact as the APCS forms part of the AFPCS and applies by force of Part 7 rather than Part 11.

⁹⁷ WRA, s 583.

⁹⁸ There are also similar anomalies in relation to the interaction of transitional industrial instruments. For example, a transmitted pre-reform AWA operates to the exclusion of all other transitional industrial instruments, despite the fact that s 170VQ of the pre-reform Act provided that in particular circumstances a pre-reform certified agreement would prevail over an AWA to the extent of any inconsistency: WRA, cl 8, Sch 9.

For example, if the new employer, who is bound by a transmitted collective agreement, enters into a new collective agreement with the transferring employee, the transmitted collective agreement will cease to have effect even if its nominal expiry date has not yet passed.⁹⁹ These specific interaction rules are in direct contradiction to the general rules, which provide that a new collective agreement will only come into effect after the nominal expiry date of the old collective agreement has passed.¹⁰⁰ It is also important to highlight that the transmitted collective agreement will apply to the transferring employee for the transmission period, despite the fact that the new employer has an existing collective agreement which would otherwise apply to the employee.¹⁰¹ This avoids the problems of priority which previously arose under s 170LY of the pre-reform Act.¹⁰²

Similarly, transmitted awards also have a unique application. Again, contrary to the general interaction provisions of the Act¹⁰³ and unless the transferring employee agrees otherwise,¹⁰⁴ a collective agreement that is in operation at the time of transmission does not have effect in relation to an employee's employment while the transmitted award operates.¹⁰⁵ If, on the other hand, the new employer enters into a new workplace agreement with the transferring employee, the transmitted award ceases to operate and will not revive following termination of the workplace agreement.¹⁰⁶ This effectively places employees covered by transmitted awards in a particularly precarious position given that entry into a workplace agreement potentially means that, in any future bargaining with the new employer, there will be no threat that protected award conditions will ultimately revive.

Comparatively, the operation of s 399(1), which generally provides that industrial instruments have no effect following termination of a workplace agreement, is expressly excluded under Part 11.¹⁰⁷ In other words, in the event that the new employer ceases to be bound by the transmitted AWA, the existing collective agreement or award that is binding on the new employer may apply to this employee. This is different to the general principle that upon termination of a workplace agreement, the employee falls back on the AFPCS and any protected award conditions which may apply.¹⁰⁸ The note to this provision confirms that,

⁹⁹ WRA, s 587(3).

¹⁰⁰ WRA, s 347(5). Similarly, contrary to the general rules regarding the interaction between collective agreements and AWAs, if a new employer bound by a transmitted collective agreement enters into an AWA with the transferring employee, this would have the effect of permanently terminating the transmitted collective agreement rather than merely suspending its operation. See WRA, s 587(2); cf s 348(2).

¹⁰¹ WRA, s 586(2).

¹⁰² Under s 170LY of the pre-reform Act, a certified agreement would only prevail over a previous certified agreement where the nominal expiry date of the latter had passed. In circumstances, where the nominal expiry date of the earlier agreement had not yet passed, a later certified agreement would have no effect on an earlier certified agreement to the extent of any inconsistency between the two agreements.

¹⁰³ See WRA, s 349.

¹⁰⁴ WRA, s 596(3). If the employee agrees that the collective agreement is to operate in relation to their employment with the new employer, the transmitted award ceases to operate in relation to that employment and the employee will no longer be covered by any protected award conditions upon termination of the collective agreement. There seems to be no requirement, however, that any such consent be genuine. It is also unclear as to whether such an agreement would obviate the notification requirements in relation to the transmitted award.

¹⁰⁵ WRA, s 596(2).

¹⁰⁶ WRA, s 597. This is distinct from the way in which awards and workplace agreements normally interact. Section 349 of the Act provides that an award has no effect in relation to an employee while a workplace agreement is in operation in relation to the employee. In effect, the award is suspended for as long as the workplace agreement is in operation. Upon termination of the workplace agreement, the employee will be covered by the AFPCS and any protected award conditions which may apply. See WRA, s 399.

¹⁰⁷ WRA, s 584(2).

¹⁰⁸ WRA, s 399.

technically, the end of the transmission period does not terminate the transmitted instrument, it simply means that the new employer ceases to be bound by it.¹⁰⁹

4 Powers of the Commission

As noted above, the Commission previously had limited powers to order that the ‘incoming employer’ was not bound by a transmitted certified agreement, or was bound only to a limited extent.¹¹⁰ Under WorkChoices, the Commission’s powers to modify or exclude the application of a collective agreement¹¹¹ in a transmission of business have been strengthened.¹¹² In contrast to the detailed provisions which regulated the Commission’s powers with respect to transmitted certified agreements,¹¹³ under the amended Act, the Commission can make an order for modification or exclusion of a transmitted collective agreement on the basis of submissions of the relevant persons.¹¹⁴

Importantly, the Commission no longer has to be satisfied that the order does not disadvantage employees in relation to the terms and conditions of their employment nor does it have to take into account whether the terms and conditions imposed by the incoming employer would result in a loss of employee entitlements or the length of time remaining on the transmitted collective agreement.¹¹⁵ The only express limitation on the Commission’s power is one not in favour of employee protection, but rather employer flexibility, that is, the Commission cannot make an order extending the transmission period.¹¹⁶ The underlying objective of these amended provisions appears to be to allow an outgoing employer the ability to change the industrial relations landscape and, in doing so, make the business being

¹⁰⁹ WRA, s 584(2). On a literal reading of this provision, it is arguable that if a transmitted AWA is terminated during the transmission period, any transmitted collective agreement may revive. Although it may be counterargued that the collective agreement has not transmitted with respect to that particular employee because, immediately before the time of transmission, the AWA was the only instrument which was binding on the old employer and the employee.

¹¹⁰ Pre-reform Act, s 170MBA.

¹¹¹ The application of a transmitted pre-reform certified agreement can also be challenged before the Commission: WRA, Div 2, Sch 9.

¹¹² WRA, s 590(1). It should be noted that Subdivision B, Div 4, Pt 11 contains separate definitions for key terms. These distinct definitions are designed to ensure that the time before, at and after the actual transmission of business is captured. For example, the term ‘old employer’ which is generally defined in s 580(1) is referred to in this subdivision as the ‘outgoing employer’. Similarly, ‘time of transmission’ is referred to as ‘transfer time’ and ‘business being transferred’ is defined as ‘business concerned’: WRA, s 589. These terms reflect those used previously under s 170MBA(1) of the pre-reform Act.

¹¹³ Under s 170MBA of the pre-reform Act, the Commission could not make an order unless it was satisfied that, amongst other things: the new employer and the parties to the certified agreement agreed to the proposed order; or the proposed order would not disadvantage employees or would be part of a reasonable strategy to deal with a short term crisis. See, e.g. *Minister for Administering the State Service Act 2000 v ANF* [2004] AIRC PR948716 (Unreported, DP Leary, 30 June 2004). See also, Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2006), 243-244.

¹¹⁴ The Act provides that an application for such an order can be made before, at or after the transfer time (s 591). The timing of any such application, however, will affect who has standing (s 592(1)). After making an application, the applicant must take ‘reasonable steps’ to give written notice to the other persons who may make submissions in relation to the application (s 593). In determining whether to make such an order, the only relevant requirement imposed on the Commission is to give the relevant persons an opportunity to make submissions (s 594).

¹¹⁵ See pre-reform Act, s 170MBA(2A)(c).

¹¹⁶ WRA, s 595(6).

transferred more attractive for sale and provide the incoming employer with maximum flexibility in determining the terms and conditions of employment.¹¹⁷

It should also be noted that whilst the Commission retains a general power to make orders in relation to the application or cessation of transmitted awards,¹¹⁸ there appears to be no express power to modify or exclude the operation of a transmitted APCS or AWA. The policy imperative for the differential treatment of collective agreements as compared to AWAs is somewhat unclear. One effect of this is that AWAs represent the most certain way of achieving and preserving entitlements in a transmission context. In saying that, transmitted AWAs can still be overridden by a new AWA entered into between the transferring employee and the new employer. Some believe this differentiation is linked to the 'hidden agenda of the Government', that is, 'to undermine collectivism in industrial relations.'¹¹⁹ In line with this sentiment, other commentators have observed that the agreement-making provisions under WorkChoices, by giving greater priority to individual agreements, will have the inevitable effect of undermining collective bargaining.¹²⁰

D Transfer of Accrued Entitlements

In many ways, Division 7 of Part 11 simply entrenches the common law with respect to transfer of liabilities. In other words, it represents a formalisation of the 'clean break' approach that is commonly adopted by parties involved in a transmission of business.¹²¹ It does not, however, legislatively entrench the principle first established in the *Termination, Change and Redundancy Case 1984*, or deal with the key issue arising in the *Ancor* case, that is, Division 7 does not have the effect of ensuring that a severance pay entitlement would not arise in cases where there is a transfer of employment by virtue of a succession, assignment or transmission of business.¹²²

Parental leave is treated separately to the other entitlements arising under the AFPCS. Whilst there is an automatic transfer of parental leave liability from the old employer to the new employer in a transmission of business, other liabilities will only transfer if, before the time of transmission, the new employer agrees in writing to assume liability for and recognise

¹¹⁷ So far, the Commission has been required to use its powers under clause 14, Schedule 9 in a limited number of cases. See, e.g., *Construction, Forestry, Mining and Energy Union v Fugen Masonry Pty Limited* [2006] AIRC PR974320 (Unreported, Commissioner Harrison, 9 November 2006) and *Seven Network (Operations) Limited Captioners Agreement 2004* [2007] AIRC 43 (Unreported, SDP Drake, 19 January 2007). At the time of writing, there appeared to be no decided cases where the Commission had considered an application made under Division 4, Part 11.

¹¹⁸ WRA, s 595(5).

¹¹⁹ See Labour Senators' Report, Senate Employment Workplace Relations, Small Business and Education Legislation Committee, Workplace Relations Amendment (Transmission of Business) Bill 2001 (Cth), Parliament of Australia, Canberra, June 2001, 15.

¹²⁰ See A Forsyth and C Sutherland, 'Collective Labour Relations Under Siege: The WorkChoices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183.

¹²¹ Explanatory Memorandum, Workplace Relations Amendment (WorkChoices) Bill 2005 (Cth), 1951. In many cases, it is in the interests of both the old and new employer that there should be continuity of employment, despite the transmission of all or part of a business. This can be easily effected through an express or implied agreement between the parties, which recognises continuity of service in relation to termination and leave entitlements. If there is an express agreement in place, the transmitter and transferee would generally agree to a reduction of the purchase price to take into account the transfer of accrued liabilities or a continuing indemnity in relation to such liabilities. See Creighton, above n 20, 164.

¹²² See generally Ellery and Jones, above n 13.

continuous service in relation to a transferring employee's entitlements generally¹²³ or with respect to a particular matter.¹²⁴ Without a written agreement between the old and new employer in relation to the transfer of liabilities, accrued entitlements arising under the AFPCS will not transfer by force of the Act.¹²⁵

In calculating an employee's service for the purposes of Division 7, service with the old employer, as well as any service with a previous employer that the old employer recognised, will be included.¹²⁶

E Notification Requirements

A new employer must provide written notice to the transferring employees about the general effect of the transmission of business on the application of the relevant industrial instruments within 28 days after the transferring employee commences employment with the employer.¹²⁷ This notice must be lodged with the Workplace Authority Director¹²⁸ and penalties apply for failure to comply with these requirements.¹²⁹

The obligation to provide notice to employees can be largely avoided, however, if the new employer enters into a new workplace agreement¹³⁰ with the transferring employee within 14 days of the time of transmission.¹³¹ This aspect appears to give new employers an even greater incentive to enter into workplace agreements with transferring employees as soon as possible, which potentially places further doubt about the 'protections' afforded under Part 11.¹³²

¹²³ WRA, s 601.

¹²⁴ WRA, s 600.

¹²⁵ It is not clear whether the mandatory transfer of parental leave liability only applies to that which arose under the AFPCS. If, for example, the employee was entitled to parental leave under an award or registered agreement, it is difficult to discern whether this section would apply. This same ambiguity arises in relation to other entitlements which are said to have 'accrued under the [AFPCS]...before the time of transmission.': WRA, s 600(2).

¹²⁶ WRA, ss 599(2), 600(3), 601(3). The old employer is also required to provide particular information and documents to the new employer in relation to any transferring employees who have applied for, or are currently taking, parental leave: WRA, ss 599(3), (4). See also Regulation 19.17(2) of Chapter 2 of the Workplace Relations Regulations 2006 (Cth), which requires the old employer to transfer to the new employer all records concerning the transferring employees.

¹²⁷ WRA, s 602. The notice must, amongst other things, identify the transmitted instrument, specify the date on which the transmission period ends and specify the kinds of instruments (if any) that can replace, or exclude the operation of the transmitted instrument: WRA, s 602(3). A new employer is under a similar obligation in relation to the transmitted transitional industrial instruments: WRA, cls 28 and 29, Sch 9; and preserved redundancy provisions: WRA, s 603A.

¹²⁸ WRA, s 603.

¹²⁹ WRA, s 605.

¹³⁰ It should be noted, however, that if there is a transmitted AWA or collective agreement, the notice requirements can only be avoided if the new employer and the transferring employee become bound by an AWA within 14 days after the time of transmission: WRA, s 602(6)(b). This seems to be inconsistent with the fact that a collective agreement entered into between the new employer and the transferring employee effectively overrides the transmitted collective agreement.

¹³¹ WRA, s 602(6).

¹³² It is unclear, however, why there are different periods for the giving of notice (i.e. 28 days) as compared to that for the making of a new workplace agreement obviating the need to comply with the notification requirements in the first place (i.e. 14 days). Another distinction is that the former period runs from the time the

It should also be noted that an old employer is under an obligation to take reasonable steps to notify the Workplace Authority that a workplace agreement (or a variation thereof) that has not been assessed for the purposes of the 'fairness test' is now binding on a new employer because of the transmission of business provisions.¹³³

It is also interesting to note that the notification requirements arguably fail to rectify the inherent informational asymmetry in a transmission of business, given that in most cases, transferring employees will have limited, if any opportunity to find out information about their new employer. The new employer, on the other hand, is likely to have undertaken a detailed review of the business they are intending to acquire. Under the notification requirements, employees only have to be informed of the alteration to the terms and conditions of employment after the employing entity has already changed and after their employment with the new employer has already commenced. While there are stiff penalties for non-compliance with the notification requirements, the information arrives too late to affect market decisions and is relatively limited in its content.¹³⁴ Further, there is no capacity for the workplace agreements to be declared void because of a failure to comply with these legislative provisions. In order to seek such a remedy, the employee would be forced to rely on other parts of the Act which prohibit the making of a false or misleading statement.¹³⁵ It is unclear whether silence would be a sufficient ground to sue under this section.

V ALTERNATIVE PROTECTION OF EMPLOYEES

As illustrated in the preceding analysis, the weakening of legislative protections means that employees are more exposed than ever before to a possible reduction to the terms and conditions of their employment in a transmission of business. In the immediate wake of WorkChoices, various commentators predicted that the cumulative failure of Part 11 and Schedule 9 to effectively safeguard employees in a transmission of business, combined with the prioritisation of AWAs and the introduction of employer greenfields agreements, meant that there were greater opportunities for employers to avoid the application of industrial instruments by way of a business restructure.¹³⁶ For example, by artificially creating a transmission of business and by transferring a workforce between related entities, employers were able to break the continuity of employment and introduce either an employer greenfields agreement or AWAs, both of which had the direct or indirect effect of undermining union power in the workplace.¹³⁷ Further, given that the freedom of association provisions have been watered down¹³⁸ and the unfair dismissal laws tightened up,¹³⁹ there are very few

transferring employee commences employment with the new employer, whilst the latter period begins at the time of transmission.

¹³³ See generally WRA, s 346ZEA. This notice must identify the workplace agreement, state whether the old employer remains bound by the workplace agreement, specify the date of the end of the transmission period and identify the new employer: WRA, s 346ZEA(2).

¹³⁴ See Collins, above n 24, 8.

¹³⁵ WRA, s 401.

¹³⁶ Andrew Stewart, 'The WorkChoices Legislation: An Overview' supplement to *Labour Law* (2005) <<http://www.federationpress.com.au/pdf/WorkChoicesLegislation300306.pdf>> at 13 October 2006.

¹³⁷ For a discussion about the impact of transmission of business on trade union coverage in the pre-reform context see Creighton, above n 20, 181- 182.

¹³⁸ Although the onus of proof still rests on the defendant to show that they did not engage in the alleged conduct for a prohibited reason, this is reversed where the plaintiff is seeking an interim injunction. Further, where an employer is alleged to have taken action against a person because of the entitlement to the benefit of an industrial instrument or the AFPCS (s 793(1)(i)), this must have been the 'sole or dominant' reason for the action, not merely one of various reasons (s 792(8)). Stewart has argued that '[b]oth changes are plainly intended to make it harder for unions to bring freedom of association cases against employers who have restructured their

alternative mechanisms available to employees who wish to challenge or resist a restructure and retain their employment on the terms and conditions that they previously enjoyed.

Prior to the passage of the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth), the response to the potential regulatory failure of the transmission of business provisions was a renewed focus, particularly on the part of the inspectorate, on the question of whether employers were applying duress to transferring employees in connection with an AWA.¹⁴⁰

A Duressed for Success? Redefining the Concept of “Duress”

Section 400(5) of the Act provides that a person must not apply duress to an employer or an employee in connection with an AWA.¹⁴¹ In many respects, this provision virtually mirrors its legislative predecessor,¹⁴² with one fundamental exception. As a result of the WorkChoices amendments, the Act now makes clear that a person does not apply duress, for the purposes of the legislation, merely because the person makes an AWA a condition of engagement.¹⁴³ Although the Explanatory Memorandum to the Workplace Relations and Other Amendment Bill 1996 (Cth) previously contained a statement to the same effect,¹⁴⁴ there was conflicting case law on its relevance to the question of whether or not duress had been applied.¹⁴⁵

Whilst the prohibition on the application of duress provides some measure of protection from coercive action by employers, the legislative qualifier in relation to ‘take it or leave it AWAs’ (at least before the passage of the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth)) meant that such protection was potentially weakened in a transmission of business. Further, depending on whether an AWA could of itself be classed as being ‘less favourable’ than a collective agreement, this exclusion may also mean that an employee who

operations or their employment conditions in a bid to get staff onto individual agreements, rather than collectively negotiated or arbitrated terms.’ See Stewart, above n 136.

¹³⁹ For example, employers that employ 100 employees or less are excluded from the unfair dismissal regime, as are employees who are terminated for ‘genuine operational reasons’. See generally, M Pittard, ‘Back to the Future: Unjust Termination of Employment Under the WorkChoices Legislation’ (2006) 19 *Australian Journal of Labour Law* 225.

¹⁴⁰ The legislative prohibition against coercion may also provide a mechanism for protecting employees in a transmission of business, particularly in relation to new employers who seek to impose an ‘employer greenfields agreement. Given the limited confines of this paper, these provisions will not be discussed at any length, but see M Lee, ‘Crafting Remedies for Bad Faith Bargaining, Coercion and Duress: “Relative Ethical Flexibility” in the Twenty-First Century’ (2005) 18 *Australian Journal of Labour Law* 26.

¹⁴¹ Section 869 of the Act extends the application of Part 8 and related provisions to excluded employers and employees in Victoria.

¹⁴² An additional difference is that s 170WG of the pre-reform Act added that a person must not apply duress in connection with ‘an AWA or ancillary document.’ [Emphasis added]. The term ‘ancillary document’ was defined in s 170VA of the pre-reform Act to include a variation agreement, an extension agreement, a termination agreement and a termination notice. There is some doubt about whether the deletion of this term from s 400(5) will mean that the duress provision is more limited in its application under WorkChoices or whether the term ‘in connection with’ can be read broadly to include not only the making of an AWA, but any subsequent variation or termination of that AWA.

¹⁴³ WRA, s 400(6).

¹⁴⁴ The Explanatory Memorandum stated that s 170WG(1) of the WROLA Bill stated that ‘to stipulate that entry into an AWA is essential to obtain employment with the offeror will not, of itself, or necessarily, constitute duress.’

¹⁴⁵ *Australian Services Union v Electrix Pty Ltd* (1999) 93 IR 43 (‘*Electrix*’). Cf *Burnie Port Corporation v Maritime Union of Australia* (2000) 104 FCR 440 (‘*Burnie*’).

refused to accept an offer of employment from the transmittee may be left without any entitlement to severance pay.¹⁴⁶

However, as noted above, this regulatory gap has now been remedied by the *Workplace Relations (A Stronger Safety Net) Act 2007* (Cth). In particular, section 400(6A) clarifies that the prohibition on applying duress in connection with an AWA extends to the engagement of employees in the context of a transmission of business.¹⁴⁷ This amendment means that, if employers make continued employment conditional on the transferring employees entering into an AWA, they cannot rely on the exemption in section 400(6) to escape allegations that they have applied duress. In effect, it will be much more difficult for an old or new employer to manipulate the transmission of business provisions in order to serve their own interests at the expense of transferring employees.

Interestingly, the Explanatory Memorandum to the Stronger Safety Net amendments implies that this recent amendment does nothing more than ‘spell out the existing law in this area’. It refers to the case of *Schanka v Employment National (Administration) Pty Ltd* as supporting the proposition that, in the context of a transmission of business, a requirement to make an AWA may amount to duress.¹⁴⁸

In light of this statement, the next section provides a brief analysis of the *Schanka* decision and explores the question of whether the insertion of section 400(6A) merely entrenches the case law in this area or has the effect of extending the common law principles.

B Past Interpretation of the Duress Provisions

In the past, a major problem in effectively utilising the statutory duress provisions was the judicial tendency to import common law notions of duress and the associated requirement that an employee show that ‘illegitimate’ pressure was applied.¹⁴⁹ At common law, the mere fact that an employee is in a weak bargaining position, either because of lack of skills or lack of job opportunities, is not enough to warrant judicial intervention.¹⁵⁰ As one commentator aptly observed, ‘the spectre of unemployment, of itself, has never been enough to attract the

¹⁴⁶ Previously, it was common for a transmitter to apply to the Commission to vary the application of the severance pay scale in the event that acceptable alternative employment was found for the employee, or where the employee had unreasonably refused such an offer. For an analysis of what constitutes ‘acceptable alternative employment’ see, e.g., *Clothing and Allied Trades Union of Australia v Hot Tuna Pty Ltd* (1988) 27 IR 226. More recently, however, in *Feltex Australia Pty Ltd v Textile, Clothing and Footwear Union of Australia* (Unreported, AIRC, SDP Watson, 21 November 2006), [46], it was held that: ‘[T]he form of industrial regulation applicable to the relevant employees, in itself, is not a material consideration in determining whether the employment proposed, on the basis proposed, constitutes acceptable alternative employment. The Act provides for a range of forms of workplace agreements, and does not elevate one form over another.’

¹⁴⁷ See also WRA, s 400(8) which defines key terms used in s 400(6A) such as ‘business being transferred’, ‘new employer’ and ‘transferring employee’.

¹⁴⁸ See Explanatory Memorandum, Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (Cth), [194].

¹⁴⁹ But see interlocutory decision in *Electrix* (1999) 93 IR 43, Marshall J found not only that the employer had breached the duress provisions by offering of AWAs as a condition of engagement, but further described its behaviour in the particular context of the case as amounting to ‘unconscionable conduct which no employee in a humane, tolerant and egalitarian society should have to suffer’ at 45. For further discussion of this case and its possible ramifications, see J C Tham, ‘“Take it or Leave it” AWAs: A Question of Duress’ (1999) 12 *Australian Journal of Labour Law* 142.

¹⁵⁰ *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40, 45-46. See also David Chin, ‘Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism’ (1997) 10 *Australian Journal of Labour Law* 1.

mercy of the courts for individual employees labouring under unfavourable terms and conditions of employment.¹⁵¹ The regulatory failure of private ordering has been exacerbated by the judiciary's reluctance to rectify the inherent inequality of bargaining power, which is perceived to be a politically sensitive issue given its close association with matters such as managerial prerogative and labour mobility.¹⁵² As a result, the courts have traditionally preferred to rely on the legislature to provide sufficient safeguards to protect contracting parties who, for various reasons, could not protect themselves.¹⁵³

The strength of these legislative safeguards were authoritatively tested in the *Schanka* litigation, which provided the courts with an opportunity to consider a number of key questions in relation to the statutory prohibitions on the application of duress, namely:

- (a) whether the provisions are concerned with the application of duress only when an AWA is made;
- (b) whether the legislature intended the common law notion of duress, if such a notion could be identified, to be incorporated into the interpretation of the statutory provision; and
- (c) whether making an AWA a condition of engagement was of itself an application of duress.¹⁵⁴

Both at first instance, and on appeal, it was found that the duress provisions could be activated in relation to proposed, as well as operative AWAs, and the legislative provisions were broad enough to capture conduct occurring during the negotiation phase. The Full Court stated that to conclude otherwise would mean that 'even the most reprehensible conduct engaged in by a party in relation to a proposed AWA to go unexamined by a court if no concluded agreement were to come into existence.'¹⁵⁵

In relation to the second issue, and in line with previous authority,¹⁵⁶ Moore J attempted to identify the 'apparent purpose' of s 170WG(1) in the statutory context in which it then appeared.¹⁵⁷ Moore J held that whilst there was no settled common law meaning of 'duress', the underlying policy of the protective legislative framework meant that any statutory agreement made between an employer and an employee should be 'reached through a process of real and not illusory negotiation and general agreement'. In other words, the AWA should be a product of 'free bargaining'.¹⁵⁸ Whilst the common law test for duress may be relevant in determining whether an employer has breached the legislative provision, it should not be taken as limiting the statutory prohibition on the application of duress in respect of AWAs.¹⁵⁹

The question of whether pressure is illegitimate will ultimately depend on the context in which the duress arises. Moore J initially harboured some doubt as to whether the offering of an AWA as a condition of engagement was sufficient to show that the requisite level of

¹⁵¹ Ibid 18. See, e.g., *Westpac Banking Corp v Cockerill* (1998) 152 ALR 267.

¹⁵² Ibid 19.

¹⁵³ Ibid.

¹⁵⁴ For a detailed overview of the *Schanka* litigation, see S McCrystal and R Grossi, 'Duress and Australian Workplace Agreements – The *Schanka* Litigation and Other Developments' (2002) 15 *Australian Journal of Labour Law* 184.

¹⁵⁵ *Schanka v Employment National (Administration) Pty Ltd* (2000) 97 FCR 186, 195.

¹⁵⁶ See, e.g., *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

¹⁵⁷ *Schanka v Employment National (Administration) Pty Ltd* (1999) 166 ALR 663, 679.

¹⁵⁸ *Schanka v Employment National (Administration) Pty Ltd* (1999) 166 ALR 663, 680.

¹⁵⁹ See commentary in Creighton and Stewart, above n 113, 253-254.

illegitimate pressure had been intentionally applied.¹⁶⁰ In an earlier decision, Ryan J in *Burnie* found that the clear policy of the pre-reform Act was to facilitate arm's length bargaining. Therefore, making AWAs a condition of engagement, despite the presence of aggravating factors such as high regional unemployment, did not contravene the duress provision. Ryan J further held that the requirement for AWAs to comply with the 'no-disadvantage test' meant that the potential detriment suffered by an employee who entered into an AWA was minimised.¹⁶¹ After considering this decision, Moore J reached the opposite conclusion. His Honour found that, in the particular circumstances of the case, not least of which was the fact that it involved a transmission of business between related entities, the imposition of AWAs as a condition of engagement contravened the duress provisions.¹⁶²

The critical distinction between the circumstances in *Burnie*, as compared to that in *Schanka*, appears to rest on two key factors. Firstly, each of the employees in *Schanka* were seeking employment with the transmittee only so that they could continue working in the same or similar positions to that which they held while employed by the transmitter.¹⁶³ Although there was no pre-existing relationship between the employee and the transmittee, the transmittee was formed by, and associated with, the then existing employer.¹⁶⁴ Comparatively, the employees in *Burnie* were strangers to the employer. Further, their refusal to accept the proposed AWA meant that the employees faced the prospect of continued unemployment, but it did not have the effect of altering their current circumstances to their detriment. Although the distinction between these two cases may be subtle, it has been observed that a key difference between the situation in *Schanka* and that in *Burnie* was that the former was purposefully 'engineered by the employer concerned.'¹⁶⁵

C The Case of the Not So Talented: Ten Talents and Cyberlink

Although the Prime Minister appears to believe that '[i]t was always the intention that an employer who takes over a business cannot require an employee to sign an AWA as a condition of employment,'¹⁶⁶ it is apparent that not all employers (and their advisors) appreciated the somewhat delicate distinction highlighted above.

In fact, in the interim period between the passage of WorkChoices and the Stronger Safety Net amendments, a number of prosecutions commenced on the basis that employers had applied duress to employees in the context of a transmission of business.¹⁶⁷ In particular, it

¹⁶⁰ *Schanka v Employment National (Administration) Pty Ltd* (1999) 166 ALR 663, 681.

¹⁶¹ McCrystal and Grossi, above n 154, 11.

¹⁶² *Schanka v Employment National (Administration) Pty Ltd* (2001) 112 FCR 101. Moore J imposed a penalty of \$10,000 on ENA to be paid to the union, which amounted to \$2,500 for each incident of duress. Penalties for breach of the 'civil remedy provisions', such as s 400(5), were substantially increased under the pre-reform Act. See *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (Cth). These significant penalties (e.g. up to \$33,000 for a body corporate) have been maintained under the Act. In addition, the Act now provides the Federal Court with the power to declare AWAs void. This was not available to Moore J at the time of his decision in *Schanka*.

¹⁶³ In line with this, it seems courts are also willing to find that duress has been applied where existing employees are threatened with termination of employment in order to induce them to enter into an AWA. See, e.g., *Canturi v Sita Coaches Pty Ltd* (2002) 116 FCR 276 ("*Canturi*"). Cf *Bishop v Ropolo Services Pty Ltd* (2006) 152 IR 165 ("*Bishop*").

¹⁶⁴ McCrystal and Grossi, above n 154, 1.

¹⁶⁵ *Ibid*, 12.

¹⁶⁶ PM J Howard, 'A Stronger Safety Net for Working Australians' (Media Release, 4 May 2007), 11.

¹⁶⁷ For example, the OWS has also prosecuted BP for allegedly applying duress to two petrol station attendants, both of whom were under 18 years of age. In documents filed with the court, the OWS submits that the company

seems that many employers had assumed that by expressly allowing for 'take it or leave it' AWAs, WorkChoices was impliedly condoning the practice of offering AWAs as a condition of employment in the context of a transmission of business.

A case which attracted a significant amount of interest involved the acquisition of the Hilton IGA supermarket by Ten Talents Pty Ltd (*Ten Talents*) in late 2006. As part of the acquisition, Ten Talents offered employment to existing employees of Action Supermarkets Pty Ltd (commonly referred to as 'Metcash') on the condition that they sign an AWA. Two such employees refused, whilst the other 63 employees, who accepted the offer of employment, found themselves on inferior terms and conditions including the loss of penalty rates, roster protections and pay increases which were previously provided under the relevant collective agreement.¹⁶⁸ Soon after, the Office of Workplace Services (*OWS*) (now known as the Workplace Ombudsman) investigated and then instituted proceedings against Ten Talents and their advisers Cyberlink Pty Ltd (*Cyberlink*).¹⁶⁹

In its application to the Federal Magistrates' Court, the OWS claimed that Ten Talents and Cyberlink¹⁷⁰ applied duress to two employees to sign AWAs in breach of s 400(5) of the Act. The OWS sought penalties and compensation for loss suffered by the employees.¹⁷¹ The critical question for the Court and that which formed the crux of the OWS investigation was whether 'duress was placed on employees to sign the AWA, and whether it was lawful for an employer to make an AWA a condition of employment in circumstances where the employees are part of a business transmission.'¹⁷² In an interlocutory decision, Lucev FM dismissed an application by Cyberlink, for summary dismissal of the OWS proceedings against it, on the basis that there was sufficient evidence to suggest that a claim of duress might succeed. In reaching this conclusion, his Honour applied a set of factors derived from previous case law. First, Lucev FM identified employment in the same job as the key determinant in cases concerning duress. His Honour noted that, in the leading case of *Schanka*,¹⁷³ the Court had found that employees have a reasonable expectation that positions with the transmittee entering into an existing business will not be on terms and conditions materially inferior to those under their previous employment and that the employee's 'relative position in the marketplace was...threatened' if 'they were threatened with loss of such existing expectations

sought to take advantage of a transmission of business to pressure the employees to sign. See 'BP to face court over alleged unlawful AWA duress', *Workplace Express*, 5 February 2007 at <http://www.workplaceexpress.com.au/news_selected.php?act=2&selkey=33200&hlc=2&hlw=BP%20to%20face%20court> at 25 October 2007.

¹⁶⁸ S Smith, 'United Petroleum Case Asks More Questions' (Media Statement, 5 October 2006)

<<http://www.alp.org.au/media/1006/dsiiri110.php?print=on>> at 12 October 2006.

¹⁶⁹ See 'OWS to check employer greenfields agreement in take-over', *Workplace Express*, 5 October 2006 at <http://www.workplaceexpress.com.au/news_selected.php?act=2&selkey=32519&hlc=2&hlw=check%20employer%20greenfields> at 25 October 2007 and OWS (Media Release, 9 October 2006)

<http://www.ows.gov.au/asp/index.asp?page=media_releases_ows&cid=5231&id=512> at 9 October 2006.

¹⁷⁰ It should be noted that the OWS has instituted proceedings against Cyberlink under s 728 of the Act, which gives the OWS power to prosecute advisers if they have 'aided and abetted' a contravention by their client.

¹⁷¹ It is not clear, however, whether they also sought to void the AWAs that were operating in respect of the majority of employees under WRA, ss 408(g) and 409.

¹⁷² N Wilson, Director of OWS as quoted in 'OWS launches test case on transmission of business protections', *Workplace Express*, 9 October 2006 <

http://www.workplaceexpress.com.au/news_selected.php?act=2&selkey=32537&hlc=2&hlw=launches%20test%20case> at 25 October 2007.

¹⁷³ (2001) 112 FCR 101, 139 (Moore J). For a detailed discussion of the Schanka litigation see S McCrystal and R Grossi, 'Duress and Australian Workplace Agreements – The *Schanka* Litigation and Other Developments' (2002) 15 *Australian Journal of Labour Law* 184.

unless they entered into AWAs.¹⁷⁴ His Honour confirmed that 'take it or leave it' AWAs could amount to unconscionable conduct,¹⁷⁵ which potentially breached the duress provisions and the actual or threatened reduction in employee entitlements could be a relevant factor in determining whether 'the course of conduct...constitutes pressure bordering on the illegitimate.'¹⁷⁶

Another relevant factor identified by Lucev FM was whether there was any prior relationship between the new employer (or their advisors) and the transferring employees, and in particular, whether the transmission of business provisions would have applied in the event that the AWA was not accepted. In this respect, his Honour commented that:

...the transmission of business provisions in the [Act] might be said to be such as to create a special relationship between an offeror and potential new employee, particularly where the relevant industrial instrument would ordinarily apply to the potential new employee, absent the offer and acceptance of employment on the terms of an AWA only and where, as here, [the employees] arguably had a reasonable expectation of ongoing employment in their pre-existing positions.¹⁷⁷

Importantly, his Honour stated that there was 'sufficient evidence that a claim of duress might succeed on the basis of this factor, if not alone, then perhaps in combination with other evidence.'¹⁷⁸ Other factors identified as significant included whether or not there was an actual or threatened reduction in employee entitlements, the level of opportunity to negotiate, either to the form of the industrial instrument or its content,¹⁷⁹ and whether the inherent power disparity between the prospective employer and the transferring employees had been used to apply illegitimate pressure.¹⁸⁰ In respect of these factors, Lucev FM found that there was evidence in this case which might support a successful prosecution of the claim including, amongst other things, the potential loss of employee entitlements, the tight timeframes imposed on the employees, the lack of information provided to the employees about the AWA and the intimidatory nature of the interviews in the pre-sale period.¹⁸¹

VI CONCLUSION

The inherent tension between the conflicting purposes of labour market regulation is brought into stark relief in a transmission of business. Economic imperatives, globalisation and privatisation are the driving forces behind the sale or purchase of a business. However, in the absence of statutory intervention, a transmission of business can effectively leave employees without a job and in a relatively weak bargaining position.¹⁸² Legislative regulation of transmission of business has traditionally been viewed as necessary to rectify the failings of

¹⁷⁴ *Balding v Ten Talents Pty Ltd & Anor* [2007] FMCA 145 (Unreported, Lucev FM, 15 February 2007), [35] ("*Ten Talents*"), quoting with approval: *Bishop* (2006) 153 FCR 357, 361-362 (Madgwick J).

¹⁷⁵ *Ten Talents* [2007] FMCA 145 (Unreported, Lucev FM, 15 February 2007) [36], citing *Electrix* (1999) 53 IR 43.

¹⁷⁶ *Ten Talents* [2007] FMCA 145 (Unreported, Lucev FM, 15 February 2007) [41] and [50], citing *ALHMWU & Ors v Cranbourne RSL Sub-Branch Inc* (1999) FCA 1425.

¹⁷⁷ *Ten Talents* [2007] FMCA 145 (Unreported, Lucev FM, 15 February 2007) [48].

¹⁷⁸ *Ibid.*, [49].

¹⁷⁹ *Ibid.*, [53], citing *Schanka & Ors v Employment National (Administration) Pty Ltd* (2001) 112 FCR 101, 139 (Moore J), 139-140.

¹⁸⁰ *Ten Talents*[2007] FMCA 145 (Unreported, Lucev FM, 15 February 2007) [55], citing *Bishop* (2006) 153 FCR 357 (Madgwick J), 363; *Canturi* (2002) 116 FCR 276 (Ryan J), 300.

¹⁸¹ *Ten Talents* [2007] FMCA 145 (Unreported, Lucev FM, 15 February 2007) [57].

¹⁸² Creighton, above n 20, 182.

the common law and extend the protective regime of awards and agreements. In the 1990s, and with the election of the Howard Government, increasing criticism was levelled at these legislative restrictions, which were portrayed as barriers to capital development. In line with this, it was argued that the transmission of business provisions under the pre-reform Act 'had not kept up with the complexities of the modern business environment, nor had they kept up with the shift from industry to enterprise level bargaining.'¹⁸³

In this sense, WorkChoices marks an important juncture, at least in the direct regulation of transmission of business. By imposing a limited lifespan on transmitted instruments and prioritising workplace agreements made with the new employer, WorkChoices has provided greater certainty for business, removed many inconsistencies which plagued the pre-reform regime and provided employers greater freedom and flexibility to replace inherited obligations with arrangements that more closely match their particular business needs. In loosening these restrictions, however, these changes have been seen by many to offend fundamental principles of fairness and equity and further feed the 'race to the bottom'. Indeed, despite the new notification requirements, in the immediate aftermath of WorkChoices, a number of statutory loopholes seemed to invite abuse by unscrupulous employers or those who are facing intense competitive pressure. It is arguable, however, that the new framework for the regulation of transmission of business is part and parcel of a broader evolution, that is, the shift from a system based on conciliation and arbitration to one which has largely dismantled the award system in favour of an entrenched a set of minimum terms and conditions via the AFPCS.

A critical issue, and one which has been highlighted in recent business acquisitions, is how to ensure that a transmission of business does not simply result in the same employees doing the same work, the only difference being that they are doing it for less. In the past, the duress provisions have been predominantly utilised by employees and their unions to resist the individualisation strategies adopted by employers. More recently, these provisions have been used to protect employees in transmission of business. Whilst the *Schanka* litigation made it clear that the duress provisions were broad enough to capture conduct which resulted in 'illusory' bargaining,¹⁸⁴ it was not so apparent, prior to the passage of the Stronger Safety Net amendments, whether the express legislative exemption for 'take it or leave it' AWAs would generate a different outcome. Indeed, the case of *Ten Talents* illustrates that some employers believed that this new exemption meant that AWAs could be made a condition of continued employment in the context of a transmission of business and employees could do little about it. While there is some question as to whether employers were wise to adopt this approach, particularly given the outcome in the *Schanka* litigation, the interlocutory decision of Lucev FM, combined with the insertion of section 400(6A), means that this issue is now put beyond doubt: the statutory prohibition on the application of duress continues to apply in a transmission of business and an employer who seeks to make an AWA a condition of continued employment does so at its peril.

¹⁸³ Peter Reith, the then Minister for Workplace Relations, *Transmission of Business and Workplace Relations Issues*, Ministerial Discussion Paper, Parliament of Australia, Canberra, 2000.

¹⁸⁴ McCrystal and Grossi, above n 154, 44.

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