POST *AMCOR* AND *GRIBBLES*: A NEW ERA FOR SUCCESSION OF BUSINESS AND REDUNDANCY LAW?

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[*On 9 March 2005, the High Court of Australia handed down two decisions of considerable importance for employers. The first decision,* Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd *[2005] HCA 9 concerned the circumstances in which a "succession of business" or a part of a business will occur for the purposes of section 149(1)(d) of the* Workplace Relations Act 1996*. The second decision,* Amcor Limited v Construction, Forestry, Mining and Energy Union; Minister for Employment *[2005] HCA 10, pertained to whether, upon the facts presented to the Court, a group of employees had been rendered redundant with a consequent (and cumulatively significant) entitlement to severance pay.*

Interestingly, the High Court adopted a 'textual' approach to statutory construction in Gribbles *but a 'contextual' approach to the legal interpretation of the relevant clause in the agreement in question in* Amcor. *Notwithstanding these differing approaches, the result in each case is arguably favourable to employers.*]

I INTRODUCTION

The approach taken by the judiciary to the task of statutory construction is often decisive of the outcome of a particular case. On 9 March 2005, the High Court of Australia handed down two decisions of considerable importance for employers. The first decision, *Minister for Employment and Workplace Relations v. Gribbles*

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Radiology Pty Ltd ("*Gribbles*") concerned the circumstances in which a "succession of business" or a part of a business will occur for the purposes of section 149(1)(d) of the *Workplace Relations Act 1996* ("the Act"). The second decision, Amcor Limited v Construction, Forestry, Mining and Energy Union; Minister for Employment ("*Amcor*"), pertained to whether, upon the facts presented to the Court, a group of employees had been rendered redundant with a consequent (and cumulatively significant) entitlement to severance pay.

Interestingly, the High Court adopted a 'textual' approach to statutory construction in *Gribbles* but a 'contextual' approach to *the legal interpretation of the relevant clause in the Agreement in question* in *Amcor*. Notwithstanding these differing approaches, the result in each case is arguably favourable to employers.

This article will briefly recount the facts of each decision before analysing how inconsistent approaches to statutory construction in each decision resulted in outcomes distinctly favourable to employers. In saying that the results were "distinctly favourable to employers", the writer does not mean to imply any bias on the part of the Court. The result in each case was, in the writer's view, a victory for common sense.

II GRIBBLES - A BOON FOR EMPLOYERS

A *Background*

Section 149(1)(d) of the Act provides that "*an award determining an industrial dispute is binding upon...any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute*".

The section forms part of what is collectively referred to as the "Transmission of Business" provisions within the Act and serves to protect employees' rights by overcoming the gaps left in constitutional and contract law.[1] That is, for the purposes of placitum 51(xxxv) ("the Conciliation and Arbitration Power") of the *Commonwealth of Australia Constitution Act* ("the Constitution"), and putting aside other constitutional limitations, only federal awards that bind the parties to industrial disputes are within the scope of the Commonwealth Government's Conciliation and Arbitration Power.[2] Further, it is a fundamental principle of contract law that only parties privy to a contract are bound by the terms contained therein.[3]

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[1] T Sebbens, *Wake, O wake' - Transmission of Business Provisions in Outsourcing and Privatisation*, 16 AUSTRALIAN JOURNAL OF LABOUR LAW 133, 135 (2003).

[2] Sebbens, *supra* note 1, at 136-137. *See* Australian Boot Trade Employees' Federation v Whybrow & Co., (1910) 11 CLR 311,(High Court of Australia, 1910) in which it was held that an award can only bind those party to the industrial dispute, thereby preventing common rule awards that bind all in an industry.

[3] Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd, [1915] AC 847, 853 (Eng. House of Lords, 1915).

Collectively, these principles have the effect that federal awards and employment contracts that apply to an employee of a particular employer would not usually continue to apply to the employee's employment where, as a result of a succession, assignment or transmission of the whole or part of the employer's business, the employee's employment is "transferred" from one employer to another. Unchecked, such a result would be open to abuse from nefarious employers wishing to circumvent minimum standards of employment.

Section 149(1)(d), and related Transmission of Business provisions, attempt to ameliorate this potential misuse by preventing employers from divesting themselves of their responsibilities towards their employees by selling off their business or part thereof to another company.[4]

Historically, cases dealing with s149(1)(d) have been sparse.[5] In *Bransgrove v Ward and Syred*,[6] it was held that, for there to be a succession to a business or part thereof, there must be a legal nexus between the previous employer who is a respondent to an award and the succeeding business.[7] By way of contrast, the Full Court of the Federal Court has more recently held that the term "succession" in s 149(1)(d) is to be construed widely, as a question of fact without need to establish the existence of a nexus between the outgoing and incoming employers.[8] The precedents on point are therefore not only sparse but also somewhat inconsistent.

Before *Gribbles*, the most recent High Court consideration of the Transmission of Business provisions was in *PP Consultants Pty Limited v Finance Sector Union of Australia* ("*PP Consultants*").[9] *PP Consultants* went some way to reconciling these inconsistent approaches.[10] Although declining to formulate a general test to determine whether one employer has succeeded to a business or part thereof of another employer (such declination being on the basis that the question is a "mixed one of fact and law"), the High Court narrowed the circumstances in which succession will be held to have occurred.[11] The Court adopted what may be termed a "characterisation" approach to determining whether there has been a succession. A succession, in the non-government sector at least, will occur when, after characterising the business of the first employer and identifying the character of the transferred business activities of the second, they bear substantially the same character.[12]

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[4] Ron McCallum, *Labour Outsourcing and the High Court*, 14 AUSTRALIAN JOURNAL OF LABOUR LAW 97, 98 (2001).
[5] *Id.* at 98.
[6] Bransgrove v Ward and Syred (1931) AR (NSW) 272, 277, (NSW IR Comm, 1931).
[7] Bransgrove v Ward and Syred (1931) AR (NSW) 272, 277.
[8] North Western Health Care Network v Health Services Union of Australia (1999) 92 FCR 477, 494 (Federal Court of Australia, 1999).
[9] PP Consultants Pty Limited v Finance Sector Union of Australia, (2001) 201 CLR 648, (High Court of Australia, 2001)
[10] J Catanzariti and Y Shariff, *Major Tribunal Decisions in 2004*, 47 THE JOURNAL OF INDUSTRIAL RELATIONS 186, 194 (2004).
[11] PP Consultants Pty Limited v Finance Sector Union of Australia (2001) 201 CLR 648, 655 (High Court of Australia, 2001). *See* also Catanzariti and Shariff, *supra* note 10, at 191.
[12] PP Consultants Pty Limited v Finance Sector Union of Australia, (2001) 201 CLR 648, 655 *See* also McCallum, *supra* note 4, at 100.

This test is satisfied less easily than the *North Western* approach. On the *North Western* approach, all that needed to be established was that the business activities of the former employer were carried on by the second employer.[13] In *PP Consultants*, a pharmacy that had entered into an agreement with St George Bank Ltd to collect its deposits, transact withdrawals and open deposit accounts for the Bank's customers, did not succeed to the business of St George. This was because *PP Consultants'* activities were identified as those of an agent carrying on banking activities on behalf of another, as opposed to carrying on the business of banking in its own right.[14] Arguably, application of the *North Western* approach would have led to an alternative finding because *PP Consultants* carried on the activities of the Bank.

B *Facts in the present case*

At issue in *Gribbles* was whether Gribbles Radiology Pty Ltd ("Gribbles") was a successor to the business or part thereof of Melbourne Diagnostic Imaging Group ("MDIG"). Both employed the same radiographers to take medical images at Moorabbin Health Clinic, which was run by Region Dell Pty Ltd ("Region Dell").[15] Region Dell licensed part of its Moorabbin clinic to radiology practices (such as Gribbles and MDIG) that provided medical imaging services. Region Dell supplied the radiology equipment, whereas the radiology practices provided the radiographers, consumables, and spares necessary to conduct the business.[16] From 1 September 1997 to 31 August 1999, MDIG used part of the Moorabbin clinic to conduct a radiology practice. From 1 September 1999 to sometime in 2000, Gribbles did the same.[17] Upon concluding the licence, Gribbles terminated its employees. MDIG was a named respondent to (and therefore bound by) the *Health Services Union (Private Radiology - Victoria) Award 1993* ("the Award").[18] Gribbles was not a named respondent to the Award. However, if Gribbles was a successor to the business or part of the business of MDIG, then it would be bound by the Award and thus liable to make the severance payments stipulated in the Award in respect of the employees it had dismissed.

C *First Instance Decision of the Federal Court*

The Health Services Union ("the HSU") commenced proceedings in the Federal Court, seeking the imposition of penalties on Gribbles for breaching the Award by

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[13] McCallum, *supra* note 4, at 98.
[14] PP Consultants Pty Limited v Finance Sector Union of Australia (2001) 201 CLR 648, 652 and 656.
[15] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 25 (High Court of Australia, 2005).
[16] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24 , 25.
[17] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 25.
[18] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 25.

its failure to make severance payments. The severance payments were also sought.[19]

At first instance, Gray J ordered Gribbles to pay a fine of $50 to the HSU, as well as severance pay to four terminated employees.[20] His Honour held that MDIG had effectively transferred part of its business to Gribbles, making Gribbles a successor of MDIG. Gribbles appealed this finding to the Full Federal Court, in which Moore, Marshall and Merkel JJ, in dismissing the appeal, found that the primary judge had committed no error.[21] Gribbles appealed to the High Court, which reversed both decisions.

D *The High Court Decision*

The judgment of the High Court was delivered by a leading majority[22] with one dissenting judgment.[23] Crucial to the majority's determination of the issue was the proper construction of s 149(1)(d).[24] Their Honours considered that s.149(1)(d) contains a compound notion. That is, "*the 'business'... of the person identified in the succession provision*" is the link between the industrial dispute which the Award determined (thereby binding the previous, or 'outgoing', employer to the Award) and the 'incoming' employer who was not a party to that industrial dispute. It is the commonality of the 'business' of the outgoing and incoming employers that provides the requisite link upon which to base a finding that a succession has occurred such as to bind the incoming employer to an Award made in respect of a dispute to which it was not a party.[25] For the purposes of determining whether the requisite link between the businesses exists, it is not enough that each employer conducts the same *kind* of business. The incoming employer must conduct the *particular* business or part thereof that was previously conducted by the outgoing employer in order for a succession to occur. [26]

A textual approach underpinned the majority's construction of the section. The majority found that the purpose of the section (to extend the binding effect of awards onto employers not party to the immediate dispute which the award determined) was not helpful in determining the matter. Rather, it is the text of the provision that indicates its scope.[27] Owing to the presence of three different scenarios

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[19] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 26.
[20] Health Services Union of Australia v Gribbles Pty Ltd [2002] FCA 856 (Federal Court of Australia, 2002).
[21] Gribbles Radiology Pty Ltd v Health Services Union of Australia [2003] FCAFC 56 (Full Federal Court of Australia, 2003).
[22] Gleeson CJ, Hayne, Callinan and Heydon JJ.
[23] Kirby J.
[24] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 26-27.
[25] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 28.
[26] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 29 .
[27] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 29.

within the provision (succession, assignment or transmission), "succession" could not be construed as meaning succession of a kind of business activity. Since assignment and transmission only applies in relation to particular business activities (and not *kinds* of business activities), the language of the section does not permit there to be a different meaning given to "succession".[28] The majority's insistence on looking to the text of the section to determine its scope is further illustrated in their decision to begin their enquiry with the section's actual text as opposed to considering the precedent value of decided cases.[29]

E *"Successor"*

Fundamental to the determination of the issue was the meaning of "successor". As in *PP Consultants*, the majority refused to provide a general definition.[30] Rather, whether a business has succeeded to the whole or part of another is a mixed question of fact and law.[31] Nevertheless, in keeping with the spirit of its decision in *PP Consultants*, the majority further narrowed the circumstances in which a succession will be held to have occurred. Succession can only occur when the incoming employer enjoys some part of the particular business of the outgoing employer.[32] In determining this question, the majority reiterated, in slightly different form, the characterisation test originally enunciated in *PP Consultants*. Accordingly, it is necessary, in the particular circumstances of the case, to identify the business or part thereof of the first employer and secondly, identify what part, if any, of that business that is enjoyed by the second employer after the purported succession.[33]

Necessarily, this involves a 'working' or 'practical' definition of business.[34] Often, a transaction between the two parties will establish that a business or part thereof has been transferred.[35] However, this is not determinative as there can be transactions that do not lead to succession and successions without transactions.[36] In a commercial context, according to the majority, identifying the employer's business requires identifying the activity being pursued, as well as the tangible and intangible assets used in that pursuit. The "business", for the purposes of s149(1)(d), is the assets

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[28] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 29.
[29] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 31.
[30] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 31-32.
[31] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 31-32.
[32] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 31-32.
[33] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 33.
[34] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 32.
[35] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 32.
[36] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 32.

used in pursuit of that activity.[37] These assets and their use by the respective employers will determine whether there has been a succession.

F *Application to the Facts*

Prima facie, it seems reasonable to conclude that Gribbles had succeeded the radiology practice of MDIG. Both used radiographers to take medical images of patients at the same clinic.[38] However, the majority's construction led to a different conclusion. Gribbles did not enjoy any part of MDIG's business.[39] Although both undertook the same business activity at the same location, Gribbles did so without recourse to the tangible or intangible assets that MDIG had used in the pursuit of radiology practice.[40] The equipment and location they used in common was Region Dell's. Each was a separate licensee of Region Dell's and employees cannot be considered as a business' assets.[41] Gribbles did not utilise any of MDIG's assets in the pursuit of radiology practice. Any assets that they did use in common were Region Dell's. Consequently, there was no succession.

G *Implications*

Gribbles is a boon for employers. By narrowing the circumstances in which succession will be held to have occurred, employers employing the same employees of a prior employer are less likely to be bound by the awards that bound that prior employer. The stricter test will please those who have advocated for a greater balancing between the interests of employees and capital development.[42] The more flexible test had the potential of imposing prohibitive barriers to business transmission and succession. A narrower construction that limits when award liabilities will be imposed will arguably encourage greater capital development. The stricter test also gives more certainty as to when succession will occur.[43]

Nevertheless, there remains some uncertainty. It is not clear whether the majority's approach will apply to the 'trinity' in its entirety, or alternatively, whether instances of "transmission" and "assignment" of business will be subject to a differently formulated test to instances of "succession". Further, there remains the problematic dichotomy between government agencies and non-governmental bodies and the different methods of determining whether there has been succession in each case. McCallum has criticised this distinction as being untenable, as it hearkens back to

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[37] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 32-33.
[38] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 29-30.
[39] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 33-34.
[40] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 34.
[41] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 34.
[42] Sebbens, *supra* note 1, at 165.
[43] Catanzariti and Shariff, *supra* note 10, at 194.

the capital-labour distinction made in a different era.[44] As Sebbens notes, the public service has becoming increasingly "privatised".[45] In an era of outsourcing, it seems anachronistic to differentiate between governmental and non-governmental business. Further judicial comment will hopefully resolve these issues.

III *AMCOR*: CONTEXTUAL COMMON SENSE

A *Background*

Amcor dealt with the alleged liability of an employer to make severance payments in respect of purported redundancies. "Redundancy" was given its classic formulation by Bray CJ in *R v The Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Limited*.[46] Redundancy occurs when an employee has been dismissed not for any "consideration peculiar" to the employee, such as personal act or default, but because the employer no longer needs the role previously performed by the employee to be performed by anybody. Redundancy, therefore, refers to the termination of a position and not an individual employee.

However, controversy still surrounds whether redundancy refers to instances where a position with a particular employer has been terminated or whether the redundancy pertains to a position within a particular business. Arguably, the former construction is more logical because the policy reasons for severance pay (to compensate for the loss of non-transferable credits, as well as for the inconvenience and hardship that arises from a loss of employment)[47] do not arise in circumstances where a transmission of business involves continuation of employment and maintenance of accrued benefits with the successor, assignee or transmittee. Non-transferable credits are preserved and there is no, or at least negligible, inconvenience and hardship in circumstances where the position pre and post transmission is identical, albeit in the service of a new employer. However, it is important to note that the approach adopted will depend upon the particular circumstances of the case. In *Amcor*, the High Court placed primacy upon an employee's "position in a business" as opposed to an employee's "position in the employment" of an employer. Consequently, the redundancy provisions in the relevant Certified Agreement were not invoked in circumstances where accrued benefits were maintained and identical work was performed pre and post transmission, with the only change being in the identity of the employer.

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[44] McCallum, *supra* note 4, at 103.
[45] Sebbens, *supra* note 1, at 162.
[46] D Chin, *Servant or Serf? Severance Pay on Transmission of Business and the Right to Choose an Employer*, 16(2) AUSTRALIAN JOURNAL OF LABOUR LAW 173 (2003).
[47] *Id.*, at 179.

B *Facts*

Amcor Limited ("Amcor") operated both a packaging and a fine-paper manufacturing business. The terms and conditions of employment of all employees working at the paper mills were regulated by the Certified Agreement.[48]

In mid-1998, Amcor commenced a restructure of its operations, which resulted in the sale of its paper manufacturing business to a wholly owned subsidiary, Paper Australia Pty Ltd ("Paper Australia").[49] In order to complete the separation of the packaging business, Amcor purported to transfer all of its employees who worked at the paper mills to Paper Australia.[50]

Amcor subsequently wrote to all employees employed at the mills advising them that their employment would be terminated. Enclosed in the termination letter was an offer of employment from Paper Australia on "the same terms and conditions as you currently enjoy". The letter continued, "[a]ll benefits will be preserved, including continuity of service for all employment-related purposes."[51]

Almost all of the employees accepted the offer and began working for Paper Australia, performing identical tasks on the same terms and conditions as they had done with Amcor.[52]

C *Litigation*

The CFMEU ("the Union") made an application to the Federal Court, claiming that the employees whose employment had been terminated had been made redundant pursuant to clause 55 of the Certified Agreement and were thereby entitled to severance payments.[53]

Clause 55 of the Agreement, entitled 'Redundancy', stated:

> *"55.1 Severance payments*
>
> *55.1.1 Should a position become redundant and an employee subsequently be retrenched, the employee shall be entitled to [a redundancy payment]"*.[54]

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[48] Amcor Ltd v CFMEU, [2003] FCAFC 57, [12] (Full Court of Federal Court, 2003).
[49] Amcor Ltd v CFMEU, [2003] FCAFC 57, [13].
[50] Amcor Ltd v CFMEU, [2003] FCAFC 57, [15].
[51] Amcor Ltd v CFMEU, [2003] FCAFC 57, [15] .
[52] Amcor Ltd v CFMEU, [2003] FCAFC 57, [16].
[53] Amcor Ltd v CFMEU, [2003] FCAFC 57, [20].
[54] Amcor Ltd v CFMEU, [2003] FCAFC 57, [18].

At first instance, Finkelstein J held that the employer was liable to make redundancy payments.[55] This first instance decision was upheld by the Full Federal Court.[56]

The employer appealed to the High Court. It argued that clause 55.1.1 of the Certified Agreement was not triggered unless the "position in the business" was abolished, and that the identity of the employer was irrelevant. Amcor submitted that the positions in the paper manufacturing business were not affected by the sale of the business.[57]

C *Decision of the High Court*

In the leading judgment,[58] their Honours interpreted the word "position" in clause 51.1.1 to mean "position in a business" or a "job", as opposed to a "position with the employer".[59] In the present case, the court was concerned with the "positions" in the paper manufacturing business.[60]

The majority held that the work being done by the employees was still required by the company running the business, namely, Paper Australia, after the sale of the assets[61] and the termination of the employees' employment by and with Amcor. It followed that no "job" was made redundant.[62]

Callinan J best stated the position:

> It is not possible, I think, to hold that a position has become redundant when the person filling it, continues to fill it, albeit with a different employer, and continues to do exactly the same work, at the same place for the same remuneration (except perhaps for a share of profits) during the same hours of work.[63]

The majority stated that there may have been a question about whether the "position" continued if there were changes in the terms or conditions, or the tasks the employees were required to perform. However, such issues did not arise in the present case.[64]

The Court held that its construction was consistent with the way in which the courts and industrial tribunals have construed and conceptualised "redundancy" in the past.[65] Indeed, in the seminal redundancy decision, the *Termination, Change and*

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[55] CFMEU v Amcor Ltd, (2002) 113 IR 112 (NSW Industrial Relations Commission, 2002)
[56] Amcor Ltd v CFMEU, [2003] FCAFC ,[57].
[57] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 62 (High Court of Australia, 2005).
[58] Gummow, Hayne and Heydon JJ.
[59] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 67-68 per Gummow, Hayne and Heydon JJ.
[60] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 68.
[61] This occurred prior to the termination of the employees' employment by Amcor.
[62] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 68.
[63] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 88- 89.
[64] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 67.
[65] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 67-68 per Gummow, Hayne and Heydon JJ; at 80-81 per Kirby J; and at [141] per Callinan J .

Redundancy Case[66], the Commission explicitly stated that it did not envisage severance payments being made in cases where there had been a transmission of business.[67] The focus in that decision was whether the "position within the business" had been made redundant.[68] In the present case, Kirby J commented that in former decisions of industrial tribunals the concern has been about the injustice to employees who are retrenched after a long period of service, and as a result, find it difficult to obtain a new job.[69] However, his Honour noted that employees that are immediately re-engaged under identical conditions do not suffer such injustice.[70]

The majority held that another factor supporting its construction of clause 55.1.1 of the Certified Agreement was the succession provisions contained in the Act.[71] Kirby J also noted that, in light of s 170MB, which makes provision for the transmission of employer liabilities under a certified agreement from the outgoing to the incoming employer, it must be possible to interpret "a position" as relating not only to a position with Amcor, but also to a position with the incoming employer.[72]

The High Court concluded that the first condition in clause 55.1.1 was not satisfied. That is, there was no redundancy and therefore the employees were not entitled to severance payments.[73]

D *Implications*

Amcor does not provide a blanket exemption from severance liabilities for employers in situations where its employees have been able to obtain post-termination employment. Each of the decisions, from first instance to the ultimately successful appeal to the High Court, were decided upon the peculiar construction of the relevant Certified Agreement. It therefore remains to be seen whether the *Amcor* decision has implications and significance beyond the immediate issues which it determined. In the present case, the employees were engaged on the same conditions, with all their benefits preserved. If, however, there were changes in the employees' terms or conditions or the tasks they were required to perform, there may have been a question about whether their "position(s)" with the successor were sufficiently altered as to give rise to a redundancy on the basis that the position "within the business" was no longer required.

What may be said with certainty is that *Amcor* highlights the importance of including provisions in awards and certified agreements (or varying current certified

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[66] Termination, Change and Redundancy Case, (1984) 8 IR 34 (NSW Industrial Relations Commission, 1984)
[67] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 65-66.
[68] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 65-66.
[69] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 79.
[70] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 80.
[71] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 67 per Gummow, Hayne and Heydon JJ; at 90 per Callinan J; and at 26 per Kirby J.
[72] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 90
[73] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 68-69 per Gummow, Hayne and Heydon JJ; at 59-60 per Gleeson CJ and McHugh JJ; at 82 per Kirby J; and at 88-89 per Callinan J.

agreements where no such provisions exist),[74] to the effect that employers will not be liable to make severance payments in cases of transmission of business accompanied by continuing employment with the incoming employer and maintenance of accrued benefits. Such clauses can easily be modelled on the draft clauses set out in the Termination, Change and Redundancy Case.

IV CONCLUSION: INCONSISTENCY IN APPROACH OR THE PATH OF LEAST RESISTANCE TO A COMMON SENSE RESULT?

The "textual" approach adopted by the High Court in *Gribbles* is best illustrated by the following passage of the majority judgment:

> ...it is necessary to consider the words of the provision. It is there that the intended reach of the legislation is to be discerned.[75]

This strictly textual approach differs from that adopted by Gray J at first instance, who had regard of course to "the language of the Act", but also to its context and purpose.[76] These differing approaches to statutory construction are seemingly the basis upon which the High Court was able to reach the common sense result which the Federal Court judges were unable to reach.

Similarly, the High Court reached what would generally be regarded as a common sense result in *Amcor*, although it did so by adopting a different approach to construction than that which it applied in *Gribbles*. The contextual approach adopted by the High Court in *Amcor* was concisely summarised by Gleeson CJ and McHugh J, who resolved the issues before the Court by reference to "the language of the particular agreement, understood in the light of its industrial context and purpose, and the nature of the particular reorganisation".[77]

Similarly, the leading judgment in *Amcor* was predicated upon a contextual approach to the interpretation of the relevant Agreement provision. Consideration was given to the other clauses within the Certified Agreement, the text and operation of the whole Certified Agreement, as well as the legislative background in which the Certified Agreement was formed.[78] Indeed, for Kirby J, the legislative background was considered to be common knowledge that can properly be assumed as being in the minds of the parties and assumed as the context in which the relevant clause of the Certified Agreement was to operate.[79]

It is apparent that there is some inconsistency between the methods of construction applied by the High Court. The majority in *Gribbles* explicitly pushed decided

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[74] Workplace Relations Act, 1996. s 170MD (Australia).
[75] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 29.
[76] Minister for Employment and Workplace Relations v Gribbles Radiation Pty Ltd and Another, (2005) 214 ALR 24, 40 per Kirby J.
[77] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 57 per Gleeson CJ and McHugh J.
[78] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56,63 .
[79] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 70.

cases and the purpose of the legislation to the background.[80] By way of contrast, the industrial context of the Certified Agreement in *Amcor* was central to reaching the conclusion that "position" in the clause referred to "position in a business" and not a position "with the employer". That said, it must be acknowledged that the Court was construing different types of provisions in different contexts; one legislative, in which there is little outside guidance as to the preferred construction of the provision, and the other a Certified Agreement which is by its very nature a creature of statute arising from a particular industrial environment.

Two consistent features are evident in the *Gribbles* and *Amcor* decisions. The first is that the result in each case sits well with ordinary common sense. It is difficult to conceptualise a "Transmission of Business" occurring between two parties who have no, and have had no, legal relationship. It is also illogical to impose liability upon a "successor" employer for severance payments in respect of employees whose employment remains effectively uninterrupted and whose accrued entitlements remain intact. Accordingly, it is clear that the High Court has sought a common sense result in each case and, owing to the different circumstances of each case, has had to take different paths to arrive at that result.

The second consistent feature is that the decisions of the High Court in both *Amcor* and *Gribbles* are favourable to employers. It will now be more difficult for trade unions to argue successfully that there has been a succession by one employer to the whole or part of another employer's business. Further, in instances where clauses in certified agreements are similar to those the subject of proceedings in *Amcor* or where the relevant agreement fails to specifically preclude severance liabilities in instances of transmission of business with attendant continuity of service and maintenance of accrued entitlements, redundancy may be interpreted to mean the redundancy of the employee's position in the business and not with the employer. Consequently, employers will be less likely to be held liable to make severance payments when the employee finds identical employment in the same business, even if their position with a particular employer has been made redundant.

These results point to potentially more flexible capital development and a less stringent labour market. The *Gribbles* and *Amcor* decisions have provided a greater degree of certainty in relation to transmission of business and redundancy and it is hoped that the judiciary as a whole picks up upon the High Court's common sense approach to construction with a view to providing even greater certainty in the future.

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[80] Amcor Ltd v CFMEU and Others, (2005) 214 ALR 56, 61 and 63.