HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND CALLINAN JJ

PP CONSULTANTS PTY LIMITED APPELLANT

AND

FINANCE SECTOR UNION OF AUSTRALIA RESPONDENT

PP Consultants Pty Limited v Finance Sector Union [2000] HCA 59
16 November 2000
S104/2000

ORDER

1. *Appeal allowed with costs.*

2. *Orders of the Full Court of the Federal Court made on 10 September 1999 set aside. In lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

D F Jackson QC with H J Dixon for the appellant (instructed by Allen Allen & Hemsley)

R C Kenzie QC with I Taylor and S E J Prince for the respondent (instructed by Turner Freeman)

CATCHWORDS

PP Consultants Pty Limited v Finance Sector Union

Industrial law (Cth) – Bank closed branch and appointed agent to conduct similar activities in conjunction with agent's pharmacy business – Whether award continued to apply to employees – Whether agent was successor, assignee or transmitee of the business or part of the business of the bank within the meaning of s 149(1)(d) of the *Workplace Relations Act* 1996 (Cth) – Whether agent conducting "business" of the bank – Whether agent conducting "business of banking".

Words and phrases – "business", "business of banking".

Workplace Relations Act 1996 (Cth), s 149(1)(d).

1 GLEESON CJ, GAUDRON, McHUGH AND GUMMOW JJ. The appellant, PP Consultants Pty Limited, conducts a pharmacy business at Byron Bay. In conjunction with its pharmacy business, it conducts a branch agency for St George Bank Limited ("the Bank"). The Bank previously had a branch at Byron Bay but the branch was closed shortly before the appellant opened the branch agency. The question in this appeal is whether, for the purposes of s 149(1)(d) of the *Workplace Relations Act* 1996 (Cth) ("the Act"), the appellant is the successor, assignee or transmittee of the business or part of the business of the Bank.

Section 149(1) of the Act

2 So far as is presently relevant, s 149(1) provides:

> " Subject to any order of the Commission, an award determining an industrial dispute is binding on:
>
> ...
>
> (d) any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer;
>
> ...
>
> (f) all members of organisations bound by the award."

Factual background and branch agency agreement

3 Until 12 September 1997, the Bank conducted its banking business in Shop 4B in the Byron Bay Shopping Plaza. The Bank was bound by and its employees, including, presumably, those employed at the Byron Bay branch, were entitled to the benefit of the *Banking Industry – St George Bank Employees – Award* 1995 ("the Award").

4 On the day on which the Bank closed its Byron Bay branch, the appellant, which then conducted its pharmacy business in Shop 5, took an assignment of the Bank's lease of Shop 4B. Building work was carried out over the following days to combine Shops 4B and 5 into a single shop. On Monday, 15 September 1997, the appellant commenced to conduct the branch agency for the Bank in conjunction with its pharmacy in the newly combined premises.

5 Earlier, on 10 September 1997, the appellant had entered into an agreement with the Bank to conduct the branch agency "for and on [its] behalf" ("the agreement"). Pursuant to the agreement, the appellant was required, amongst other things, to collect deposits, transact withdrawals and to open deposit accounts for the Bank's customers and those wishing to become its customers. Initially, the appellant was not entitled to conduct loan interviews or accept loan applications but was required to refer loan applications to the Controlling Branch Manager of the Bank at Ballina. However, the agreement was later varied to enable the appellant to process applications for personal loans.

6 The agreement obliged the appellant not to enter into any similar type of branch agency with any other bank or financial institution during the term of the agreement or for three months after its termination. By contrast, the Bank retained the right to establish and conduct a full branch operation in the area at any time during or after the termination of the agreement. The agreement was terminable by one month's written notice by either party. Subject to immaterial exceptions, the Bank was to pay the appellant $1,000 per month from the date of termination until March 1999 if the Bank terminated the agreement before that date. On termination, the appellant was required to hand over to the Bank "all moneys, brochures, forms and documents ... relating to the conduct of the [branch agency] and the business of [the Bank]".

7 Pursuant to cl 8.1 of the agreement, the appellant was to nominate at least one of its employees to work in the branch agency. In fact, the appellant offered employment to two former employees of the Bank, Mrs Moffatt and Mrs Mort, at the same rate of pay as they had received from the Bank. Both accepted that offer and became "Nominated Employee[s]" for the purposes of the agreement. Thereafter, both did substantially the same work that they had previously performed for the Bank, although they were not involved in processing loan applications until the agreement was varied. Mrs Moffatt also performed some work in the pharmacy business.

History of the proceedings

8 On 23 September 1998, the respondent, the Finance Sector Union of Australia ("the FSU"), commenced proceedings against the appellant in the Federal Court of Australia. It sought declarations that the appellant was:

> "(a) A successor, assignee or transmittee of the business or part of the business of [the Bank] within the provisions of Section 149 of [the Act], and

(b) ... bound by [the Award], in respect to [sic] the employment of Ms Patricia Gail Moffatt."

At first instance, Mathews J held that the appellant had not succeeded to the Bank's business so as to attract the operation of s 149(1)(d) of the Act and dismissed the proceedings with costs[1]. The FSU then appealed to the Full Court.

9 The Full Court[2] held that, as the purpose of s 149(1)(d) is "to protect employees against a loss of their award entitlements following a transfer of the business, or ... part of the business", it was "logical to focus on the nature of the activities undertaken by the [Bank and the appellant]" rather than "the detail of the legal arrangements between [them]". On the basis that the Bank had "disposed of an important aspect of operating [its] business in Byron Bay" and "the [appellant] had acquired that right" it was held that "the [B]ank had assigned ... part of its business to the [appellant], and ... the [appellant] was the successor to that part of [it]"[3]. In the result, the appeal was allowed and the matter remitted to Mathews J to determine whether, in respect of Mrs Moffatt, the appellant was bound by the Award. The appellant now appeals to this Court.

The meaning of "business" in s 149(1)(d) of the Act

10 In this Court, as in the Full Court, the FSU relied heavily on the decision in *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation*[4] for the proposition that, in s 149(1)(d) of the Act, the word "business" includes activities undertaken in the course of business. In *Australian Transport Officers Federation*, the question was whether, for the purposes of a union eligibility rule, a statutory body, the Roads and Traffic Authority of New South Wales ("the RTA"), had succeeded to the business of a government authority, the Commissioner for Motor Transport (New South Wales) ("the CMT"). It was noted in that case that "[i]t is common and apt to speak of 'the business of government'"[5] and, in that context, it was held that the question whether the RTA had succeeded to the business of the CMT was to be answered

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1 (1999) 89 IR 161.

2 (1999) 91 FCR 337.

3 (1999) 91 FCR 337 at 351-352.

4 (1990) 171 CLR 216.

5 (1990) 171 CLR 216 at 226, referring to *Conway v Rimmer* [1968] AC 910 at 952 per Lord Reid.

by determining whether there was "a substantial identity between the old activities [of the CMT] and those now carried on by the RTA which correspond with the old activities"[6].

11 Counsel for the FSU acknowledged that the issue in *Australian Transport Officers Federation* arose not in relation to s 149(1)(d) of the Act, but in relation to a union eligibility rule. However, he contended that the same approach was necessary for s 149 of the Act because of the wide range of awards to which s 149 might apply, including awards binding on governments and their agencies, on the one hand, and their employees, on the other. Counsel also referred to s 149(1A) of the Act which provides:

> " For the purposes of subsection (1), the Australian Capital Territory Government Service is taken to be the successor to the business of the Australian Capital Territory in relation to the transitional staff within the meaning of the *ACT Self-Government (Consequential Provisions) Act 1988*."

12 As was pointed out in *Australian Transport Officers Federation*, "the word 'business' is notorious for taking its colour and its content from its surroundings"[7]. Thus, for example, the expression "the business of government" signifies something quite different from the expression "the business of grazing" which was considered in *Hope v Bathurst City Council*[8]. In the latter case, it was held that the expression "carrying on the business of grazing" meant "grazing activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis"[9].

13 Whilst the notions of "profit" and "commercial enterprise" will ordinarily be significant in determining whether the activities of a private individual or

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6 (1990) 171 CLR 216 at 230.

7 (1990) 171 CLR 216 at 226, referring to *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 378-379 per Mason J.

8 (1980) 144 CLR 1.

9 (1980) 144 CLR 1 at 8-9 per Mason J, with whom the other members of the Court agreed.

corporation constitute a business[10], they play little, if any, role in identifying whether one government agency is engaged in the business of government previously undertaken by another government agency. In that situation, it is sufficient to ascertain whether or not the activities of the former are substantially identical to the activities or some part of the activities previously undertaken by the latter. That is because the word "business" takes on a special or particular meaning in the expression "the business of government". It is not because, as a matter of ordinary language, "business" means or includes activities undertaken in the course of business.

14 The question whether one person has taken over or succeeded to the business or part of the business of another is a mixed question of fact and law. For this reason and, also, because "business" is a chameleon-like word, it is not possible to formulate any general test to ascertain whether, for the purposes of s 149(1)(d) of the Act, one employer has succeeded to the business or part of the business of another. Even so it is possible to indicate the manner in which that question should generally be approached, at least when a non-government employer succeeds to the commercial activities of another non-government employer. As already indicated, special considerations apply when one government agency succeeds to the activities of another. And there may well be other considerations where a government contracts with a non-government body for the performance of functions previously carried out by a government authority.

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

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10 See, for example, *Smith v Anderson* (1880) 15 Ch D 247 at 258 per Jessel MR; *White v Federal Commissioner of Taxation* (1968) 120 CLR 191 at 216 per Barwick CJ; *Thomas v Commissioner of Taxation (Cth)* (1972) 46 ALJR 397 at 401 per Walsh J; *Ferguson v Federal Commissioner of Taxation* (1979) 26 ALR 307 at 311 per Bowen CJ and Franki J, 318-319 per Fisher J; cf *Tweddle v Federal Commissioner of Taxation* (1942) 180 CLR 1 at 6 per Williams J.

The business of banking

16 It is not in issue that, through its branch in Byron Bay, the Bank carried on the business of banking and that the activities in which it there engaged were part of its banking business.

17 The essential characteristics of the business of banking are "the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required"[11]. It involves the creation of distinct debtor and creditor relationships between the bank and those who deposit money with it and, also, between the bank and those who borrow from it.

18 Although the appellant has taken over the activities, or at least, a large part of the activities in which the Bank previously engaged in Byron Bay, it has not thereby engaged, for itself, in the business of banking. It does not, in accepting deposits, receive money on loan but instead, it receives, on behalf of the Bank, moneys lent to the Bank. Nor does it, in processing withdrawals, repay money lent to it. Rather, it repays, on behalf of the Bank, money lent to the Bank. And so far as it is involved in processing loans, it is not, itself, lending money, but is handing over money lent by the Bank.

19 It is correct to say that, in conducting the branch agency, the appellant is involved in banking activities. It is not, however, correct to say that it is carrying on banking business. It is carrying on the business of a bank agent. Moreover, the Bank has not disposed of any part of its business. All that has happened is that the Bank has changed the method by which it carried on its banking business in Byron Bay. Thus, no part of the Bank's business has been acquired by the appellant, whether as successor, assignee or transmittee.

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11 *Commissioners of the State Savings Bank of Victoria v Permewan, Wright & Co Ltd* (1914) 19 CLR 457 at 470-471 per Isaacs J. See also *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 63 per Latham CJ, 64-65 per Rich J, 69 per Starke J; *Bank of NSW v The Commonwealth* ("the *Bank Nationalization Case*") (1948) 76 CLR 1 at 194 per Latham CJ; *Australian Independent Distributors Ltd v Winter* (1964) 112 CLR 443 at 454-455; *United Dominions Trust Ltd v Kirkwood* [1966] 2 QB 431 at 447 per Lord Denning MR.

Conclusion

20 The appeal should be allowed with costs, the orders of the Full Court set aside and, in lieu thereof, the appeal to that Court should be dismissed with costs.

21 CALLINAN J. This appeal is concerned with the construction and application of s 149(1)(d) of the *Workplace Relations Act* 1996 (Cth) ("the Act"). Section 149(1) provides as follows:

> "**Persons bound by awards**
>
> (1) Subject to any order of the Commission, an award determining an industrial dispute is binding on:
>
> (a) all parties to the industrial dispute who appeared or were represented before the Commission;
>
> (b) all parties to the industrial dispute who were summoned or notified (either personally or as prescribed) to appear as parties to the industrial dispute (whether or not they appeared);
>
> (c) all parties who, having been notified (either personally or as prescribed) of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to the industrial dispute;
>
> (d) any *successor, assignee or transmittee* (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer;
>
> (e) all organisations and persons on whom the award is binding as a common rule; and
>
> (f) all members of organisations bound by the award." (emphasis added)

22 The Act does not define business but does define in s 4(1) an "industry" as including:

> "(a) any business, trade, manufacture, undertaking or calling of employers;
>
> (b) any calling, service, employment, handicraft, industrial occupation or vocation of employees; and
>
> (c) a branch of an industry and a group of industries".

23 The particular question for decision in this case is whether, by virtue of ss 149(1)(d) and (e) of the Act the appellant is bound to accord to Patricia Gail

Moffatt the benefits and entitlements conferred upon employees by the *Banking Industry – St George Bank Employees – Award* 1995.

24 Before September 1997 a branch of the St George Bank ("the bank") carried on the business of the bank in premises in a shopping centre at Byron Bay. The bank decided to close that branch. There were negotiations with the appellant with a view to the conduct by the latter of an agency, a "bragency" for the bank in the premises occupied by the bank. The negotiations produced an agreement which relevantly contained these provisions:

> "A. St George is desirous of having a Branch Agency office together with Automatic Teller Machine ('ATM') facilities (hereinafter referred to as a 'Bragency') conducted at Byron Bay Plaza Pharmacy, Shop 4, The Plaza, Jonson Street, Byron Bay, New South Wales (the 'Bragency address') and the Bragent is desirous of conducting such Bragency for St George at the Bragency address until such time as St George opens a full branch operation at Byron Bay.
>
> B. The Bragent conducts a Pharmacy business at the Bragency address in conjunction with but not as part of the Bragency.
>
> C. St George agrees at the request of the guarantors to enter into an agreement with the Bragent for it to conduct a Bragency for and on behalf of St George upon the terms and conditions contained in this Agreement.
>
> …
>
> **THE PARTIES AGREE AS FOLLOWS:**
>
> **PREMISES**
>
> 1. The Bragent shall conduct a Bragency and thereby be a Bragent for and on behalf of St George at the Bragency address.
>
> ...
>
> **TERM OF AGREEMENT**
>
> 3.1 The Bragency Agreement will remain in force until such time as it is terminated by either St George or the Bragent upon the expiry of one month's written notice given by one to the other without any reason needing to be provided.
>
> 3.2 In the event the Agreement is terminated by St George prior to March 1999, St George agrees to compensate the Bragent $1000.00

per month from the date of termination up to and including the end of March 1999. No compensation will be paid pursuant to this clause if St George terminates the Agreement pursuant to clause 16 or if at any time during the Agreement the Bragent engages in conduct prejudicial to the provision of the Bragency services.

GENERAL DUTIES

4.1 In conducting the Bragency the Bragent shall:

(a) collect deposits for and on behalf of St George customers;

(b) open deposit accounts for St George customers and persons who wish to become St George customers;

(c) make loan referrals subject to the conditions contained in Clause 5 of this Agreement;

(d) transact withdrawals for St George customers upon their accounts;

(e) perform such other financial transactions and manage such other financial products for and on behalf of St George as St George may reasonably require from time to time in writing;

(f) ensure that the Bragency is open for business from the hours of 9.00 am to 5.00 pm Monday to Friday inclusive (excepting for public holidays); and

(g) monitor the operation of the ATM to ensure that it is operating, including arranging for repair.

4.2 The Bragent shall ensure that continuous and courteous service is provided by the Bragency and that such service is of the highest possible standard, including, but not limited to such standards which are contained in any service standards or other guidelines issued by St George to the Bragent from time to time.

LOAN REFERRALS

…

5.2 The Bragent acknowledges that it is not entitled to conduct loan interviews with or accept loan applications from St George customers and shall not hold itself out as being able to conduct such interviews or accept such applications. The Bragent must not

provide any financial, investment or other advice to St George customers except as permitted by St George guidelines.

…

SECURITY

6.1 St George shall from time to time supply to the Bragent written procedures for the handling of deposits, withdrawals cash. These procedures must be strictly adhered to by the Bragent.

6.2 The Bragent shall ensure that all transactions and operating procedures conducted by the Bragency are strictly and completely in accordance with St George's Branch Manuals, operating instructions and other instructions issued by it in writing from time to time.

6.3 Any shortages of cash incurred by the Bragent or its employees in the course of conducting financial transactions for the Bragency shall be borne by the Bragent and shall be payable by the Bragent to St George upon demand.

6.4 The Bragent and its employees shall maintain strict security at all times in relation to cash and other items of an accountable nature (including but not limited to St George cheques, receipts, etc) which must be held in a locked safe in a compartment exclusively used for the Bragency when not in direct use.

6.5 St George will be responsible for the cleaning, emptying, resetting and replenishing of the ATM.

6.6 The Bragent acknowledges that it will be necessary for St George to access the ATM to empty, reset and replenish it, both in and out of usual business hours.

…

RELATIONSHIP

7.1 The relationship between St George and the Bragent is one of an agency, the scope of which is limited by the terms and conditions of this Agreement, and the relationship is not to be deemed one of employer/employee, joint venture or partnership.

…

7.3 This Agreement is strictly personal with the Bragent and neither the Agreement nor the services provided by the Bragency can be

transferred, assigned or subcontracted in whole or in part by the Bragent.

STAFFING

8.1 The Bragent shall nominate at least one of its employees (called the 'Nominated Employee') to work in the Bragency. Such Nominated Employee will at all relevant times remain the employee of the Bragent and is not in any way deemed to be an employee of St George.

8.2 The Bragent shall ensure that the Nominated Employee attends St George's Staff Training Department in Sydney (or at such other place as St George may direct) for a minimum period of one week or, as St George may reasonably require from time to time. The travel, accommodation and training of the Nominated Employee will be arranged and paid for by St George as set out in the Schedule A annexed to this Agreement. The Bragent will remain responsible for the Nominated Employee's wages during periods of St George's Staff Training Programs.

8.3 St George shall supply to the Bragent from time to time such St George staff to work in the Bragency as St George deems necessary and such St George staff shall remain at all relevant times employees of St George and shall not in any way be deemed to be employees of the Bragent.

8.4 St George shall provide, when in its opinion it is considered necessary and practicable, such relief St George staff as is deemed necessary by St George for the Bragency to cover periods of annual leave taken by the Bragent's Nominated Employee provided that the Bragent shall give the Controlling Branch Manager at Ballina of St George at least four weeks notice of the date of Annual Leave to be taken by the Nominated Employee. St George shall bear the costs of providing the relief St George staff who shall at all relevant times remain employees of St George and shall not in any way be deemed to be employees of the Bragent.

8.5 The Bragent shall ensure that the Nominated Employee presents an image commensurate with that projected by St George and in so doing require the Nominated Employee to wear St George uniform colours of red and white or such other St George corporate wardrobe as may be required by St George during the times which the Bragency is open for business. Any Nominated Employee who wears the corporate wardrobe shall be entitled to such a wardrobe in the same terms and conditions as St George employees.

FITTINGS AND EQUIPMENT

9.1 All fittings and equipment supplied and installed by St George at the Bragency premises and set out in Schedule B to this Agreement shall remain the property of St George (the 'St George Assets') and shall be delivered up to St George in a good state of repair (reasonable wear and tear only excepted) upon termination of this Agreement.

…

COMPETITION

12.1 The Bragent shall not enter into any similar type of branch agency agreements with any other bank, credit union, building society or other financial institution during the term of this Agreement or for a period of three (3) months from the termination of this Agreement.

12.2 The Bragent acknowledges that St George has the absolute and unfettered right at anytime during the term of or after the termination of this Agreement to establish and conduct a full branch operation of St George at any location notwithstanding its proximity to the Bragency and that such full branch operation of St George shall be under the independent exclusive control of St George.

…

REMUNERATION CALCULATION

Remuneration will be calculated annually by the Bank in June of each year.

Calculation for the Bragent's remuneration will be the sum of:

(a) Average monthly deposits held by 'Business Branch' by the Bragent during the (March to May) period annualised, and multiplied by 0.025% (paid monthly).

(b) $0.60 for each successfully completed financial counter transaction processed by the Bragent during the same period as described above, (paid monthly).

(c) $0.40 for each successfully completed St George on St George ATM financial transaction processed at the ATM installed at the Bragency.

> The Bank has the discretion to vary the parameters of the remuneration from time to time."

25 The appellant took an assignment of the lease of the bank's premises. On Friday, 12 September 1997 the bank ceased to conduct its business at those premises. Reconstruction work was completed over the ensuing weekend. The "bragency" opened and began to carry out its obligations under the agreement from those premises. Ms Moffatt, who had formerly worked for the bank became a "Nominated Employee" of the appellant pursuant to cl 8 of the agreement. She worked on a part-time basis. Ms Moffatt was paid the same hourly rate as she had been paid by the bank. The nature of the banking work she did remained largely unchanged although she also sold cosmetics and did some other office work.

26 At first instance in the Federal Court of Australia, Mathews J, in finding for the appellant was influenced by these matters[12]: the appellant had no direct interest in any of the transactions conducted on the premises; the appellant had no discretion as to how the business was to be conducted; the appellant had virtually no control over any of the activities of the bank; and, it was the appellant which occupied the combined "bragency" and pharmacy premises and employed the staff[13]. Her Honour adverted to some other matters: no goodwill changed hands; the agreement was terminable on notice of one month; and the bank preserved its power to carry on the same or similar activities elsewhere in Byron Bay. Her Honour concluded[14]:

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

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12 *Finance Sector Union of Australia v PP Consultants Pty Ltd* (1999) 89 IR 161.

13 (1999) 89 IR 161 at 170-172 [36]-[41].

14 (1999) 89 IR 161 at 172 [42].

27 The respondent successfully appealed to the Full Court of the Federal Court (Wilcox, Ryan and Madgwick JJ)[15]. Their Honours summed up their conclusions in this way[16]:

> "We see no basis for the suggestion that a 'part of a business' must be a discrete profit centre or that, to use the words of *Hayman*[17], 'the part must itself constitute a business'. Nothing in the Act imposes that limitation on the very general words used in s 149(1)(d). A benevolent construction of the word 'business' in the predecessor of s 149, *without* the express reference to 'part of a business', would treat part of a larger business that was itself a business as a 'business' within the meaning of the section. The words 'part of a business' mean something more. They denote a particular bundle of activities that constitute an identifiable portion of the total activities that constitute a business. Sometimes the part will be a discrete profit centre, sometimes it will not. That does not necessarily mean that everything done in the course of conducting a business is a 'part of a business'. … It is undoubtedly the case here that conduct of banking transactions with bank customers at specified premises and the functions engaged in by the employees themselves, were constituent, indeed 'core', functions of a bank. Further, both the volume of those transactions, it may readily be inferred, and the amount of work necessary to perform those functions were not insubstantial. There is no reason to think that the conduct of those transactions and the performance of those functions were not an apt and sufficient bundle of business activities to constitute 'part of a business'. But we disagree with the stipulation in *Hayman* that the part must itself constitute a business in the sense of being economically viable if conducted independently of any other commercial activity." (emphasis in original)

The Appeal to this Court

28 The appellant appeals to this Court on these grounds:

> "(a) The Full Court erred in holding that the question whether an award of the Australian Industrial Relations Commission was binding by operation of s 149(1)(d) of the *Workplace Relations Act* 1996 was to be determined only by the degree of identity between the activities of the two employers concerned.

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15 *Finance Sector Union v PP Consultants Pty Ltd* (1999) 91 FCR 337.

16 (1999) 91 FCR 337 at 350 [28].

17 *Hayman v Neill* [1960] AR (NSW) 363 at 370.

(b) The Full Court erred in holding that the words 'part of a business' in s 149(1)(d) denote 'a particular bundle of activities that constitute an identifiable portion of the total activities that constitute a business' previously carried out by the successor, assignor or transmittor.

(c) The Full Court erred in failing to hold that for the purposes of s 149(1)(d) the part of a business under consideration must itself constitute a business.

(d) The Full Court erred in holding that the [appellant] was, within the meaning of s 149(1)(d), a successor, assignee or transmittee to or of the business or part of the business of St George Bank Limited."

29 Decisions on other factual situations are of little assistance[18]. The same may, I think, be said of decisions as to the meaning of "successor", "assignee" or "transmittee" in other legislation, deeds and documents[19].

30 There is no doubt that the intention of s 149(1)(d) of the Act is to extend the operation of an award beyond the parties to the relevant dispute but there is nothing otherwise in the legislative history of the provision to indicate any particular operation in a case of this kind. The extended application of awards to employers not parties to the industrial dispute or bound by an award was introduced by amendments to the *Conciliation and Arbitration Act* 1904 (Cth) as early as 1914.

31 By amending Act No 18 of 1914 the 1904 Act was amended by the insertion, into s 29, of the following par (ba) to read:

"The award of the Court shall be binding on –

…

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18 See, for example, *Yzquierdo v Clydebank Engineering and Shipbuilding Co* [1902] AC 524 at 530; *Hayman v Neill* [1960] AR (NSW) 363 at 368, 370; *Kenmir Ltd v Frizzell* [1968] 1 WLR 329; [1968] 1 All ER 414; *Crosilla v Challenge Property Services* (1982) 2 IR 448 (SA) at 456-458; *Woodbridge v Yarralumla Auto Accessories Pty Ltd* (1984) 54 ACTR 8; *ECM (Vehicle Delivery Service) Ltd v Cox* [1999] 4 All ER 669.

19 See *Ex parte Vicar of Castle Bytham; Ex parte Midland Railway Co* [1895] 1 Ch 348; *Hinkins v Alder* (1906) 50 Sol Jo 258; *Wolfson v Registrar-General (NSW)* (1934) 51 CLR 300; *Kestrel Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* unreported, Supreme Court of Queensland, 11 November 1999 per Muir J; *Silkdale Pty Ltd v Long Leys Co Pty Ltd* (1995) 7 BPR 14,414.

(ba) in the case of employers, any successor, or any assignee or transmittee 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".

32 Section 29(ba) was amended by Act No 29 of 1921 to insert after the words "of the business", the words "of a party to the dispute or". Similar amendments were made to s 24(1) of the *Conciliation and Arbitration Act* dealing with the binding effect of agreements[20].

33 These provisions remained unchanged in the *Conciliation and Arbitration Act* until its repeal by the *Industrial Relations Act* 1988 (Cth). That Act reproduced the provisions with the following changes in s 149(1)(d)[21]: the binding nature of an award was made "[s]ubject to any order of the Commission"; there was added after the words "successor, assignee or transmittee" the words "(whether immediate or not)"; a succession or transmission of part of the business of an employer would suffice to attract the operation of the paragraph; and, there was deleted a reference to a party bound by an award (leaving only transmission or succession in respect of a party to the industrial dispute).

34 The effect of the last-mentioned amendment was that awards would no longer be binding, by reason of the transmission provisions on an employer bound by an award, but not a party to the industrial dispute underpinning the award (as would be the case where the award was binding, by operation of s 149(1)(f), on members of an organisation a party to a dispute). Although the *Industrial Relations Act* was repealed by the *Workplace Relations Act*, s 149 was re-enacted in an unaltered form.

35 The appellant submits that the important considerations are these. The business formerly carried on was an unqualified business of full-scale banking. It was carried on by the bank itself. The bank disposed of no part of its business to anyone. The appellant carried on its own, an agency business, and a business therefore of a quite different kind from that formerly carried on by the bank. That the appellant did so at the same premises as the bank was merely fortuitous, and in this case without legal significance. No power to deal with or dispose of, a part of the "business" to which the appellant is said to have succeeded, has accrued to it. The terms of the agreement which evidence the relationship

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20 See s 3 of amending Act No 29 of 1921.

21 Section 149 became s 149(1) by Act No 109 of 1992 but there was no substantive change to the provision.

between, and the different identities, roles, activities and business of the bank, and the appellant, must be given effect.

36 The matter may also be tested, in my opinion, by asking this question: what "business", to which the appellant is said by the respondent to have succeeded, could the appellant sell or otherwise pass on to someone else? The answer is, "no business", for cl 7.3 of the agreement makes plain that the agreement is a strictly personal one.

> "7.3 This Agreement is strictly personal with the Bragent and neither the Agreement nor the services provided by the Bragency can be transferred, assigned or subcontracted in whole or in part by the Bragent."

37 I would accept the submissions to which I have referred. Furthermore, the Full Court was in error in holding that after the agreement the bank did not have "the right to conduct its business, including the part now conducted by the respondent, at the subject premises"[22]. Clause 12.2 of the agreement gave the bank the right to conduct an agency anywhere it chose however proximate or otherwise it might be to the appellant's premises. Nor did the appellant have the right which the Full Court attributed to it, "to conduct … part of the business only as the agent of the bank", because as the Full Court said, "that right … had passed notwithstanding that it might be reclaimed"[23]. The business of the bank had not "passed". A new form of business was created (by the agreement) and was to be carried on by a new operator as an agent.

38 The Full Court purported to apply *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation*[24], a case concerned with the construction of a union eligibility rule, and *North Western*

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22 (1999) 91 FCR 337 at 351 [32]. The full passage reads: "After the agreement, the bank did not have the right so to conduct that part of the business; unless it terminated the agreement on notice, the respondent had acquired that right. Plainly the right was not of merely negligible value. In the ordinary use of the terms, one could therefore say that the bank had assigned that part of its business to the respondent, and that the respondent was the successor to that part of the business. It is not to the point that, by agreement between the bank and the respondent, the respondent had the right to conduct that part of the business only as the agent of the bank: the right had passed. Neither does it matter that the bank could readily recover that right: the right had passed notwithstanding that it might be reclaimed."

23 (1999) 91 FCR 337 at 351 [32].

24 (1990) 171 CLR 216 ("*ATOF*").

Health Care Network v Health Services Union of Australia[25]. But those cases were concerned with the transfer of governmental activities from (in *ATOF*) one branch of government to another or (in *North Western Health Care*) from government to the private sector. The courts were not therefore required to identify or analyse the nature and components of a "business" in the orthodox sense of the word and in the context of a conventional business environment[26].

39 In *George Hudson Ltd v Australian Timber Workers' Union*[27] there was no detailed analysis of the phrase "any successor, or any assignee or transmittee of the business". That case was a clear one and quite distinguishable from this one. The only difference between George Hudson Ltd, which by assignment, had become the owner of the business formerly carried on by George Hudson & Son Ltd some weeks after an industrial agreement was entered into by it, and the latter, was a "mere change in name"[28].

40 The respondent submits that to interpret the section otherwise than in the way that the Full Court did, would allow employers to avoid their legal obligations under awards, and so frustrate the settlement of industrial disputes. But such a submission obscures the task of the Court, which is to identify to what part, if any, of the business of the bank the appellant succeeded. Whilst it may be accepted that a purpose of the provision is to prevent evasion of obligations by employers who do succeed to a business or part thereof, there is another policy consideration which bears on this case. The legislation, it may be inferred requires a common identity of a business or part thereof, into whosever hands it falls, on the assumption that a successor will have the same and continuing capacity to meet the obligations arising under an award as the former operator of the business. No such assumption may safely be made about a different business. How, it may be asked, could it safely be assumed here that the "bragency", the business of the appellant, had the same capacity to meet its obligations as the bank carrying on a banking business on its own account as a principal.

41 The respondent contended that five factual matters justified the conclusion of the Full Court. The appellant took an assignment of the lease of the banking

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25 (1999) 92 FCR 477.

26 See *ATOF* (1990) 171 CLR 216 at 225-226, 228, 229 and 230-231; *North Western Health Care* (1999) 92 FCR 477 at 480 [9], 483-484 [19]-[21], 485-486 [29], 487-488 [38], 489 [41], 493-495[61]-[64] and [68].

27 (1923) 32 CLR 413.

28 (1923) 32 CLR 413 at 438.

premises of the bank[29]. The appellant was remunerated by the bank on an incentive basis and on the basis of services provided. The appellant was paid by the bank a "Total calculated fee" in 1998/99 of $86,656. The appellant made a profit on the arrangement with the bank. In undertaking to provide the activities previously provided by the bank at those premises the appellant carried the risk arising from the costs of providing the premises and the employees needed to provide those services.

42 But some of these factors highlight the differences between the business of the bank and the appellant rather than associate the business of the bank with the business of the agency. The appellant became solely responsible for the lessee's obligations under the lease. There was no profit sharing. The appellant was paid a "fee" for services provided. Any profit that was made by the appellant fell to be calculated after the appellant discharged its financial obligations, for wages, for rent and other overheads. These were its overheads and the profits were its profits and not those of the bank.

43 In my opinion the appellant was not therefore a successor, assignee or transmittee of the business or part of the business of the bank within the meaning of s 149(1)(d) of the Act.

44 I would allow the appeal with costs and order that the respondent pay the appellant's costs in the Federal Court and the Full Court of the Federal Court.

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29 The assignment of a right to property has been considered to be one of the factors pointing to a transmission of business in other statutory contexts: see, for example, *Kenmir Ltd v Frizzell* [1968] 1 WLR 329; [1968] 1 All ER 414.