HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

Matter No M311/2003

AMCOR LIMITED APPELLANT

AND

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION & ORS RESPONDENTS

Matter No M312/2003

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS APPELLANT

AND

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION & ORS RESPONDENTS

Amcor Limited v Construction, Forestry, Mining and Energy Union
Minister for Employment and Workplace Relations v Construction, Forestry, Mining and Energy Union
[2005] HCA 10
9 March 2005
M311/2003 & M312/2003

ORDER

Matter No M311/2003

1. *Appeal allowed.*

2. *Set aside the order of the Full Court of the Federal Court of Australia made on 28 March 2003 and in its place order:*

(a) *the appeal to that Court is allowed;*

(b) *set aside the orders of Finkelstein J made on 12 July 2002 and in their place order that the application is dismissed.*

Matter No M312/2003

Appeal allowed.

On appeal from the Federal Court of Australia

Representation:

A C Archibald QC with R J Buchanan QC and M F Wheelahan for Amcor Limited in both matters (instructed by Allens Arthur Robinson)

S C Rothman SC with S J Howells for the first and second respondents in both matters (instructed by Ryan Carlisle Thomas)

R R S Tracey QC with J L Bourke for the Minister for Employment and Workplace Relations in both matters (instructed by Phillips Fox)

CATCHWORDS

Amcor Ltd v Construction, Forestry, Mining and Energy Union;
Minister for Employment and Workplace Relations v Construction, Forestry, Mining and Energy Union

Industrial law (Cth) – Certified agreement – Corporate demerger – Business transferred to subsidiary and employees immediately re-employed on same terms and conditions – Change in identity of employer though no change in duties of employees – Whether positions in a business had become redundant and employees had been retrenched – Whether employees entitled to redundancy payments under the agreement – Relevance of termination and succession provisions of the *Workplace Relations Act* 1996 (Cth).

Words and phrases – "position", "business", "position in a business", "redundant", "retrench".

Workplace Relations Act 1996 (Cth), Pts VIA, VIB, ss 149(1)(d), 170MB, 170MD.

1 GLEESON CJ AND McHUGH J. The issue in these appeals is whether, following a corporate reorganisation described as a demerger, certain employees became entitled to redundancy payments under the provisions of an industrial agreement. The employees worked in the same jobs, under the same terms and conditions, following the demerger, but, in consequence of the corporate restructuring, their employer changed.

2 The resolution of the issue turns upon the language of the particular agreement, understood in the light of its industrial context and purpose, and the nature of the particular reorganisation. There is nothing inherent in the idea of redundancy that justifies an expectation either that redundancy payments will, or that they will not, become payable in the event of a reconstruction, merger, or takeover[1]. Similarly, there is nothing inherent in the nature of a corporate reconstruction that justifies an expectation either of continuity of a legal entity, or of succession, or of discontinuity. Thus, depending upon the legal regime under which it takes place, a merger between two companies might or might not put an end to the merging entities. The effects upon their pre-existing rights and obligations, and the question of succession to these rights and obligations, will require examination of the relevant legal (usually statutory) framework[2].

3 The demerger in this case was effected by a scheme of arrangement and reduction of capital. An application, pursuant to s 411 of the Corporations Law, was made to the Supreme Court of Victoria for approval[3]. Warren J, who dealt with the application, described what was involved as follows[4]:

> "Amcor conducts both a packaging and a paper business. The paper business is conducted largely through Amcor's wholly-owned subsidiary PaperlinX Ltd (PaperlinX). Amcor is proposing a demerger whereby it will become purely a packaging business. To that end, the board of Amcor has resolved to put before shareholders an arrangement which has become known as the Demerger Proposal. Pursuant to the Demerger Proposal, Amcor proposes to cancel share capital in an amount of $1.22 per share by way of capital reduction and then to appropriate that $1.22 by using it as the consideration for the transfer to each Amcor

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1 *Shop, Distributive & Allied Employees' Association (NSW) v Countdown Stores* (1983) 7 IR 273 at 293.

2 eg *Gold and Resource Developments NL v Australian Stock Exchange Ltd* (1998) 30 ACSR 105.

3 *Re Amcor Ltd* (2000) 34 ACSR 199.

4 (2000) 34 ACSR 199 at 199-200.

> shareholder of one share in PaperlinX for each three shares in Amcor. Thereafter, PaperlinX will cease to be a wholly-owned subsidiary of Amcor. However, after the distribution among Amcor shareholders of those shares in PaperlinX, Amcor will continue to hold approximately 18% of the capital of PaperlinX. Accordingly, Amcor is proposing to sell those shares to the public."

4 Her Honour later pointed out that the proposed arrangements imposed obligations not only upon Amcor and its members but also upon PaperlinX and that, in a document entitled the Implementation Deed, PaperlinX had covenanted to carry out all the obligations which the scheme imposed on it[5].

5 The information supporting the Scheme of Arrangement included the following:

> "All creditors associated with the Paper Operations will be transferred to PaperlinX pursuant to the internal restructuring. This will include the obligations to lenders, trade creditors and employees of the Paper Operations."

Specific provisions were made for PaperlinX to accept obligations to employees who had entitlements under the Amcor group's Employee Share Purchase Plan.

6 The commercial benefits that were expected to flow from the separation of the Amcor group's packaging business and paper operations are presently irrelevant.

7 Before the demerger, a wholly-owned subsidiary of Amcor named Paper Australia Pty Ltd ("Paper Australia") owned and operated paper mills in which the persons the subject of these appeals had been employed. Some years previously Amcor had transferred those businesses to Paper Australia, but Amcor continued to employ the people who worked in the businesses, providing their services to Paper Australia on the basis that Paper Australia agreed with Amcor to meet Amcor's obligations as employer. As part of the demerger, Amcor transferred its shares in Paper Australia to PaperlinX. Amcor terminated the employment of the employees. They were offered identical terms, including continuity of service for all employment-related purposes, including accrued entitlements, by Paper Australia. They went on doing the same work as before, except that their employer was now Paper Australia. Paper Australia became a wholly-owned subsidiary of PaperlinX, which was the holding company of the group conducting the paper operations.

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5 (2000) 34 ACSR 199 at 204.

8 The question is whether, in those circumstances, it is correct to say that, within the meaning of cl 55.1.1 of the Australian Paper/Amcor Fibre Packaging Agreement 1997 ("the agreement"), the positions of the employees became redundant and they were retrenched. If so, they became entitled to redundancy payments as specified in the clause.

9 The terms of the agreement, the facts, and the relevant legislation, are set out in the reasons of Gummow, Hayne and Heydon JJ, and of Callinan J.

10 The key concept upon which the operation of cl 55.1.1 in the present case depends is that of a position becoming redundant. The appellants contend that, in this context, "position" means a position in a business, and that, in the circumstances of the demerger, in which a conglomerate enterprise involving a packaging business and a paper operations business was split into two parts, each of which continued to function as before, with the employees performing the same functions, on the same terms and conditions, those employees' positions did not become redundant. The respondents contend, and the Federal Court accepted, that there was a critical change in the employment situation, namely the identity of the employer. That is, even if it is a case of succession, so that the employees had the protection of s 170MB of the *Workplace Relations Act* 1966 (Cth), at the time of the termination by Amcor of their employment, the employees lost their positions, and they lost them because Amcor no longer needed their services. Accordingly, as between Amcor and the employees, the positions of the employees became redundant, and for that reason the employees were retrenched by Amcor, even though they were immediately re-employed by Paper Australia.

11 It is true that this is a case of succession to a business, but there is more to it than that. What was involved was a particular kind of succession. What had been conducted as a combined business enterprise was divided into two separate business enterprises, conducted by corporations which, immediately following the division, were in substantially common ownership. The shareholders of Amcor held 82% of the shares in PaperlinX and the other 18% were held by Amcor. It is also true to say that there was a change in the identity of the employer, but, again, there is more to it than that. Before the demerger, the business in which the employees worked was owned and operated by Paper Australia, then a wholly owned subsidiary of Amcor, even though the employees were employed by Amcor, which provided their services to its subsidiary. Following the demerger, the employees worked in the same jobs, in the same business, now employed directly by Paper Australia, which had become a wholly owned subsidiary of PaperlinX.

12 There is no logically stringent process of reasoning which requires a construction of cl 55.1.1 that favours either side. The problem arises because the agreement is expressed in general terms that do not distinguish between the

different circumstances which might arise in different cases. There is nothing unusual, or surprising, in that. In the industrial context, redundancy of position is not a concept of clearly defined and inflexible meaning. Whether cases of succession to a business following corporate restructuring are regarded as justifying an award of redundancy payments is dealt with "on the particular merits of the case rather than by way of broad prescription."[6] Here, however, it is necessary to apply an agreement that contains a "broad prescription", and the task is to decide how that broad prescription operates in the particular circumstances.

13 Having regard to the industrial purpose of the agreement, and the commercial and legislative context in which it applies, it seems to us that the appellants have the better of the argument. As Finkelstein J pointed out, if there had been no demerger, but Amcor had simply decided that Paper Australia should employ the paper employees directly, then, on the respondents' case, cl 55.1.1 would come into operation. That seems a very curious result, both industrially and commercially.

14 The argument for the respondents treats "position" as meaning "position in the employment of Amcor", so that any change by which another legal entity became the employer would mean that the positions became redundant, unless Amcor proposed to employ other people to take their place. This approach is too narrow, and allows insufficient flexibility to accommodate the commercial and industrial realities with which the general terms of cl 55.1.1 had to deal. On the other hand, if the words are given the meaning for which the appellants contend, that is to say, position in a business, they are more readily capable of sensible adaptation to the circumstances of particular cases. Redundancy of position is not a legal or industrial term of art, although there are many cases which examine the concept of redundancy, usually for the purpose of distinguishing it from other causes of retrenchment[7]. In the present case, Amcor was originally the parent company of a group that carried on two kinds of business. The group was split up so that each business would in future be conducted separately. The businesses continued and the employees continued to do the same work, on the same terms and conditions, as before, and with their accrued entitlements preserved. Their new employer was the company that had owned and operated the particular business in which they worked before the split. In the circumstances, the positions did not become redundant.

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6 *Shop, Distributive & Allied Employees' Association (NSW) v Countdown Stores* (1983) 7 IR 273 at 293 per Fisher P.

7 eg *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited* (1977) 16 SASR 6; *Re Government Cleaning Service (Privatisation) Award (No 2)* (1994) 55 IR 199; *Termination, Change and Redundancy Case* (1984) 8 IR 34.

We agree with the orders proposed by Gummow, Hayne and Heydon JJ.

16 GUMMOW, HAYNE AND HEYDON JJ. An industrial agreement provided that "[s]hould a position become redundant and an employee subsequently be retrenched" the employee was entitled to certain payments. After the agreement was made, the employer (Amcor Limited – "Amcor") sold several of its businesses and associated plant and equipment to a wholly owned subsidiary. Those who were employed in the businesses remained employees of Amcor. The subsidiary (Paper Australia Pty Ltd – "Paper Australia") agreed with Amcor that it would discharge the obligations which the employer (Amcor) owed to employees working in the businesses but the evidence does not suggest that these arrangements were made known to employees.

17 Subsequently, a demerger was announced. What was described as the Amcor Printing Papers Group was to be floated as a publicly listed company called PaperlinX Ltd. Before the demerger was effected (by scheme of arrangement and reduction of capital) Amcor gave notice terminating the employment, with effect from 31 March 2000, of all employees who worked in the businesses that had been sold to Paper Australia. At the same time, Paper Australia (then still a wholly owned subsidiary of Amcor, but to become a wholly owned subsidiary of PaperlinX Ltd) made a written offer of employment to each of these employees offering employment on the same terms and conditions. The offer said that all benefits would be preserved "including continuity of service for all employment-related purposes, salary/wage, superannuation and accrued leave entitlements". The offer made was to be accepted by reporting for duty on the employee's first normal working day on or after 1 April 2000 and all, or nearly all, employees did so.

18 Did the events described trigger the obligation to make the payments for which the industrial agreement provided?

19 In proceedings brought in the Federal Court of Australia by the respondent Union (a party to the industrial agreement), both the primary judge (Finkelstein J)[8] and the Full Court (Moore, Marshall and Merkel JJ)[9] answered that question, "Yes". By special leave, both Amcor and the Minister for Employment and Workplace Relations (who intervened in the Full Court) appeal to this Court. Each appeal should be allowed.

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8 *Construction, Forestry, Mining and Energy Union v Amcor Ltd* (2002) 113 IR 112.

9 *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2003] FCAFC 57.

The Agreement

20 The agreement at the heart of this matter was called the Australian Paper/Amcor Fibre Packaging Agreement 1997 ("the Agreement"). It described the parties bound in four sub-paragraphs. The first two sub-paragraphs referred to "Australian Paper Limited as Agent for Amcor Limited" in respect of four named mills and "Amcor Limited trading as Amcor Fibre Packaging" in respect of four other named mills and what was called "the Recycling Group". The parties referred to in those two sub-paragraphs were described in the Agreement as "the Company". The other parties identified in the Agreement were the Union respondent to these appeals, and another union, not a party to the proceedings, whose members are not affected by the issues now under consideration.

21 At the start of the Agreement, in the clause described as "Title", there appeared, after the statement of the name by which the Agreement was to be known, the further statement that "[d]ue to organisational changes which have occurred within the Company since 'in principle' agreement was reached" any reference to Amcor Paper Australia was to be taken to mean Amcor Fibre Packaging in respect of a group of four mills and the Recycling Group. For present purposes, the only significance of this provision is its recognition of, and apparent indifference to, the occurrence of what it called "organisational changes ... within the Company".

22 The Agreement provided (cl 4) that it applied "to employees, members of the unions, engaged in the production functions and ancillary operations, excluding engineering", at specified "sites of the Company". It identified (cl 5) certain awards as providing "the required safety net of minimum wages and conditions of employment underpinning" the Agreement and said that the terms and conditions of the Agreement "constitute the terms and conditions of employment for employees and supersede and replace the provisions" of those awards.

23 Parts 1 to 9 of the Agreement (cll 1-60) were said (cl 7.1) to provide the minimum terms and conditions applying at each of the sites of the Company specified in cl 4. The balance of the Agreement (Pts 10-18) made particular provisions for different work sites.

24 The Agreement was made against the background provided by Pt VIB of the *Workplace Relations Act* 1996 (Cth). The object of that Part was stated[10] to be "to facilitate the making, and certifying by the [Australian Industrial

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10 s 170L.

Relations] Commission, of certain agreements, particularly at the level of a single business or part of a single business". Part VIB provided in Div 3 (ss 170LN-170LS) for the Commission to certify agreements "to settle, further settle or maintain the settlement of, or to prevent, industrial disputes"[11] or "to prevent industrial situations from giving rise to industrial disputes"[12]. To be certified by the Commission, an agreement had to be "approved by a valid majority of the persons employed at the time whose employment will be subject to the agreement"[13].

25 The Agreement was certified by the Commission on 9 June 1998. The application for certification was made under Div 3 of Pt VIB as an agreement about an industrial dispute or industrial situation. The certification described the Agreement as being made between "Australian Paper Limited as agent for Amcor Limited" and the Unions. The Agreement itself provided (cl 8) that it was to come into operation from the date of certification by the Commission.

Clause 55.1.1 of the Agreement

26 The central issue in the matter is whether, in the events that have happened, cl 55.1.1 of the Agreement was engaged. That clause was one of several grouped under the heading "Severance Payments". It provided:

> "Should a position become redundant and an employee subsequently be retrenched, the employee shall be entitled to the following payments:
>
> (a) All accumulated sick leave credits;
>
> (b) All accumulated annual leave credits;
>
> (c) Pro-rata long service leave if the employee concerned has five or more [years'] continuous service with the Company;
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> (d) Three weeks' pay at the employee's ordinary weekly wage rate for each full year of service and pro-rata for part years provided that this amount does not exceed the amount the employee would have received up to nominal retirement age."

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11 s 170LN(a).

12 s 170LN(b).

13 s 170LR(1).

It will be noticed that the clause speaks of a "position becom[ing] redundant" and an "employee subsequently be[ing] retrenched". How are those expressions to be understood?

The competing contentions

27 The Union contended that cl 55.1.1 was engaged if, because the employer no longer had a need for the work that the employee was performing, the employee was no longer required by that employer to do work or perform duties of a particular kind. It followed, so the Union contended, that upon Amcor ceasing to carry on this part of its business, and terminating its contracts of employment with the employees, cl 55.1.1 required Amcor to make the payments for which the clause provided, regardless of whether the employees were offered and at once took up work with another company.

28 Amcor contended that cl 55.1.1 was not engaged unless a "position in the business" was abolished and that the identity of the employer of the person occupying that position was irrelevant. It submitted that the positions in the business remained unaffected by the various transactions that occurred. The Minister's submissions were to generally the same effect.

29 Neither side's contentions attached significance to whether an employee took up the offer made by Paper Australia. The Union on the one hand, and Amcor and the Minister on the other, submitted, for different reasons, that this was irrelevant. The Union submitted that it was irrelevant because all that was material was whether the particular employer any longer required employees to do work or perform duties of the kinds they had undertaken before termination. Amcor and the Minister submitted that it was irrelevant because, regardless of who filled the position, the position in the business remained unaffected by the transactions that had occurred.

30 Clause 55.1.1 must be read in context. It is necessary, therefore, to have regard not only to the text of cl 55.1.1, but also to a number of other matters: first, the other provisions made by cl 55; secondly, the text and operation of the Agreement both as a whole and by reference to other particular provisions made by it; and, thirdly, the legislative background against which the Agreement was made and in which it was to operate.

Other provisions of cl 55

31 Clause 55.1.2 provided for the minimum payment for employees with up to and including one year of service. Clause 55.1.3 defined what was meant by the ordinary weekly wage rate. Clause 55.1.4 then provided that the payments "are subject to the employee concerned continuing in employment to a date

notified by the Company to the Union" and that an individual employee's "special circumstances" might be taken into account "provided this does not prevent production continuing to the agreed date".

32 Clauses 55.2 and 55.5 provided for the cases where an employee became "redundant and [was] transferred to a lower paid job" (cl 55.2) and where an employee accepted "an offer to transfer to another location" (cl 55.5). Both these cases assumed that the employee, or the "position", had become redundant but that the employee's employment continued. No clear distinction was drawn between the *employee* being redundant and the *position* being redundant. Thus, cl 55.2 spoke of "[s]hould an *employee* become redundant" and then said that the employee should "retain the hourly rate applicable to the redundant *position*" (emphasis added).

33 Clause 55.3 used "retrenchment" to refer to termination of employment. An employee who opted for "transfer ... in lieu of retrenchment" was given a time during which to change his or her mind and "accept retrenchment terms". Similarly, cl 55.6 spoke of a "retrenched employee" responding to an offer of "re-employment".

34 Further light is cast on the meaning of "redundancy" and "retrenchment" in cl 55.1.1 by cl 55.7, which stipulated the obligations of the parties to assist "retrenched employees". That clause provided:

> "55.7.1 In terminating the employment of an employee on account of redundancy, the Company will comply with the requirements of Subdivision C of Division 3 of Part VIA of the Act.
>
> 55.7.2 The Company and the union will co-operate:
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> (a) to assist retrenched employees to obtain Government compensation as applicable;
>
> (b) to try to find alternative employment for retrenched employees outside the Company; and
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> (c) to provide retraining for employees."

35 The provisions of the Act to which cl 55.7.1 referred (subdiv C of Div 3 of Pt VIA of the Act) regulated the termination of employment by an employer. They included provisions (s 170CL) obliging the employer to give written notice to the Commonwealth Employment Service of the intention to terminate the employment of 15 or more employees "for reasons of an economic, technological, structural or similar nature". Evidently then, cl 55.7 used the

expression "retrenched employees" to refer to those whose employment had been terminated and terminated "on account of redundancy". Were this not so, the reference to provisions dealing with termination of employment and requiring notice to the Commonwealth Employment Service would not have been apt.

36 Some other provisions of the Agreement should be noted.

Other provisions of the Agreement

37 First, cl 54 of the Agreement dealt with "Employment Security". It said that, providing employees demonstrated a continuing commitment to the Agreement, "no employee will be involuntarily retrenched, except as provided in sub clause 54.2" (a clause that required the parties to enter into negotiation in good faith if there were "major changes in circumstances"). If workforce reductions were required, they were to be "achieved through voluntary terminations in accordance with the Redundancy provisions" of the Agreement.

38 Secondly, as might be expected, provision was made (in Pt 5 of the Agreement) for various forms of leave – including annual leave, sick leave and long service leave. These entitlements, particularly to sick leave and long service leave, accumulated over time.

39 Thirdly, although the provisions of the Agreement concerning superannuation mentioned a fund that appears to have been associated with Amcor (the APM (1987) Superannuation Fund), funds not associated with Amcor could be designated by employees as recipients of superannuation contributions they made or were made on their behalf by their employer.

40 Fourthly, within Pt 4 of the Agreement, dealing with "Wages and Allowances", provision was made (cl 26) for what was called a "gainshare payment". The amount of this payment was to be "based on the Company's profitability measured by Return on Investment". Return on Investment was to be calculated "by expressing the Company's Profit Before Interest and Tax ... as a percentage of the Funds Employed in the business". It was provided that "[t]he average results of the Amcor Printing Papers Group and Amcor Fibre Packaging's Australian operations will be used in this calculation". Plainly, then, these provisions assumed that the business operations conducted by Amcor at the time of making the Agreement would continue uninterrupted by an event like the separation of the paper and packaging businesses, the paper operations of which, after demerger, were to be conducted by PaperlinX Ltd, and the packaging operations of which would continue to be operated by Amcor. But apart from these provisions about gainshare payments, none of the provisions of the Agreement depended for its operation upon the employer being the original employer which was party to the Agreement or even a company which was a part

of the Amcor group of companies. So, for example, neither the provisions for the various forms of leave nor the provisions for superannuation assumed that the employer was a part of the Amcor group. The explanation for that lies in the legislative background against which the Agreement was made and the provisions under which it was certified.

The legislative background

41 Three features of the legislative background to the Agreement must be noticed. First, there is the background provided by the introduction, by the Commission's predecessor (the Australian Conciliation and Arbitration Commission), of awards prescribing the entitlements of employees upon redundancy. Applicable standards were identified in the *Termination, Change and Redundancy Case*[14]. Secondly, some account must be taken of the provisions of Div 3 of Pt VIA of the Act regulating the minimum entitlements of employees on termination of employment. Those provisions evidently reflect general standards of the kind identified in the *Termination, Change and Redundancy Case*. Thirdly, the Act provides[15] that certified agreements made about industrial disputes or industrial situations are to bind not only the particular employer with whom the agreement is made but also successor employers.

The legislative background – awards and redundancy

42 In 1981, the Australian Council of Trade Unions made claims that led, ultimately, to the making of awards providing terms governing the termination of employment, providing for consultation about major changes likely to have significant effects on employees, and providing for terms governing what was to happen in cases of redundancy. The Commission first published reasons determining issues of principle[16]. Having heard further submissions from the parties, the Commission then published a supplementary decision[17] in which it settled the form of order to be made.

43 The Commission said, in its supplementary decision[18], that it had "some difficulty in finding a suitable expression" to make its intention clear about what

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14 (1984) 8 IR 34.

15 s 170MB.

16 *Termination, Change and Redundancy Case* (1984) 8 IR 34.

17 *Termination, Change & Redundancy Case* (1984) 9 IR 115.

18 (1984) 9 IR 115 at 128.

constituted "redundancy". In its earlier decision, it had referred[19] to a number of definitions of redundancy. Chief among those was the decision by Bray CJ in *R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Ltd*[20] which was understood[21] as emphasising that redundancy refers "to a job becoming redundant and not to a worker becoming redundant".

44 For present purposes, what is important is that the Commission appears to have been seeking a form of words that would accommodate two features. First, as was said in the Commission's supplementary decision[22], it "did not intend the redundancy provisions to apply where an employee is dismissed for reasons relating to his/her performance, or where termination is due to a normal feature of a business". Secondly, the Commission did not intend redundancy provisions to be engaged by the transmission of a business. In its earlier decision, the Commission had emphasised[23] that it did "not envisage severance payments being made in cases of succession, assignment or transmission of a business". That is, the Commission regarded termination of employment by a particular employer as not sufficient to engage the redundancy obligations, even if that employer was ceasing any participation in the particular business. The focus of the provision was upon the work undertaken by the employee (the "job"), not upon the identity of either the employee or the employer. The relevant inquiry was whether employment in a particular kind of work then being undertaken was to come to an end. If that employment was to come to an end, it was necessary to consider why that was to happen. Was it because the employer no longer wanted the job, then being done by the employee, done by anyone? Or was it "due to the ordinary and customary turnover of labour"[24]? And, as the Commission's evident concerns about drafting show, these alternatives were not, and are not to be, understood as exhausting the cases that might have to be considered.

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19 (1984) 8 IR 34 at 55-56.

20 (1977) 16 SASR 6 at 8.

21 (1984) 8 IR 34 at 56.

22 (1984) 9 IR 115 at 128.

23 (1984) 8 IR 34 at 75.

24 (1984) 9 IR 115 at 128.

The legislative background – the Act and termination of employment

45 The provisions of Div 3 of Pt VIA of the Act (ss 170CA-170HC) established procedures for conciliation and arbitration in relation to certain matters relating to the termination or proposed termination of an employee's entitlement in certain circumstances. Many of the provisions were directed to cases where it was alleged that the termination was harsh, unjust or unreasonable and those provisions do not bear upon the issues in these appeals. Two provisions do.

46 First, as has already been noted, s 170CL obliged an employer to notify the Commonwealth Employment Service if it intended to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature. Secondly, s 170CM provided for the required period of notice of termination to be given by an employer. The period of notice depended upon the employee's period of continuous service with the employer. The section provided[25] that regulations might exclude from the operation of the section terminations of employment "occurring in specified circumstances that relate to the succession, assignment or transmission of the business of the employer concerned". Division 1 of Pt 5A of the Workplace Relations Regulations (regs 30A-30CD) included such a provision. Regulation 30CD excluded from the operation of s 170CM a termination of employment that occurred because of the succession, assignment or transmission of the business of an employer if certain conditions were met. The detail of those conditions is not relevant to the present issues. What is important is that the Act provided certain minimum conditions that were to apply where there was a termination of employment. Those conditions could be engaged where there was a termination because the employer no longer wanted the job that an employee was doing to be done by anyone. But the Act also recognised (in s 170CM) that succession cases may require different treatment.

The legislative background – succession provisions

47 As is apparent from what has already been said, the Act provided for cases where a new employer was a successor, transmittee or assignee of the whole or a part of the business of an employer bound by a certified agreement. Section 170MB provided that if the application for certification of the agreement stated that it was made under Div 3 (concerning agreements about industrial disputes and industrial situations) the new employer was bound by the certified

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25 s 170CM(8).

agreement "to the extent that [the agreement] relates to the whole or the part of the business".

48 Amcor did not contend in these appeals that s 170MB applied. It will be necessary later to say something further about this aspect of the matter. What is presently important is that, regardless of the terms of a certified agreement, the agreement binds any new employer who is the successor, transmittee or assignee of the whole or a part of the business concerned. Obviously, if an agreement is drafted (as the gainshare provisions of the Agreement were drafted) in terms that are specific to a particular employer, there may be some question about how provisions of that kind are to be applied if there is a succession. But these are difficulties that would have to be solved. Their existence does not deny the operation of s 170MB.

49 There is a further point that follows from s 170MB. If the section is engaged, and a new employer becomes bound by the certified agreement, those provisions of the agreement which depend for their operation upon the length of an employee's service (like provisions for leave) may well have to be construed as depending upon the combined length of service with both the old and the new employer. That is, it may well be that the certified agreement would be construed, in such circumstances, as neither permitting nor requiring differentiation between service with one employer and service with the other. These, however, are questions which were not pursued in argument and need not be decided.

The construction of cl 55.1.1

50 The expression "[s]hould a position become redundant and an employee subsequently be retrenched" can be construed properly only if due account is taken of each of the matters we have mentioned: the other provisions found in cl 55 and elsewhere in the Agreement, and the matters of legislative background to which we have referred.

51 The succession provisions of the Act show that if an employer sells its business to another, and the former employer no longer carries on that kind of business, a certified agreement will continue to regulate the relations between the new employer and its employees to the extent to which the agreement relates to the whole or part of the business to which the new employer is successor. This requires the conclusion that the reference in cl 55.1.1 to "a position [becoming] redundant" cannot be read, as the Union contended, as requiring no more than that the particular employer no longer has a need for any employee to perform tasks of the kind undertaken by the employee.

52 Reading the phrase as satisfied by those circumstances alone would give no sufficient content to "position". "Position" was not used in the Agreement as a legal term of art. It was used in a colloquial sense. In the collocation of words found in cl 55.1.1 (when understood against the background of the various considerations earlier mentioned) "position" refers to a position in a business – a business to or of which another employer may be successor, transmittee or assignee (whether immediate or not). If, for example, there had been some change in the terms and conditions offered by the new employer from those offered by Amcor, or there had been some change in the tasks to be undertaken by the employee, there may have been some question about whether the "position" continued. Issues of that kind do not arise in the present matter.

53 This conclusion about the meaning of "position" is reinforced by a number of other considerations. First, there is the treatment, in cl 55.1.1, of retrenchment as a further necessary element for it to be engaged, and there are those other provisions of cl 55 which are engaged only if the employee concerned is no longer employed in the business. These provisions suggest that a "position" is to be identified in relation to a business rather than identified by reference to employment by a particular employer.

54 Secondly, reading the provisions as focusing upon a position in a business is consistent with the approach to redundancy taken by the Commission in the *Termination, Change and Redundancy Case*. There, as already noted, the emphasis was upon a "job" becoming redundant rather than a worker becoming redundant. As the Commission pointed out[26], the definition of "redundancy" which it adopted from the *Adelaide Milk Supply Co-operative Case* recognised that "redundancy situations may not necessarily involve dismissals" and emphasised that the job or work had disappeared through no fault on the part of the employee. To find that a position is redundant whenever an employer leaves an industry (regardless of whether another employer continues to operate the business concerned) would give insufficient emphasis to the need to identify whether a "job" had become redundant.

55 No doubt, as the Union submitted, the clause now in question is different from the model clauses which the Commission adopted in its supplementary decision in the *Termination, Change and Redundancy Case*. It follows that what is said in the decisions in that case is not determinative of the present issue. Nonetheless, the clause now in question is informed by considerations similar to those which the Commission sought to reflect in the drafting it adopted. So much follows from the emphasis given, in cl 55.1.1, to the concept of "position".

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26 (1984) 8 IR 34 at 56.

56 The Court's decisions in *PP Consultants Pty Ltd v Finance Sector Union*[27] and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd*[28] deal with some of the difficulties that arise in identifying whether an employer is the successor, assignee or transmittee of the business of another employer. Those decisions, therefore, consider what is meant by the "business of an employer". The issue which arises in this case is related to, but is not identical with, the issues that were decided in those cases. The construction of cl 55.1.1 which we adopt construes "position" as referring to a "position in a business", a "job". That may invite (and in this case requires) some consideration of what is the "business" concerned, but it does not require consideration of a compound expression like the expression considered in *PP Consultants* and in *Gribbles*, "the business or part of the business *of an employer* who was a party to the industrial dispute" (emphasis added).

57 Once Amcor sold its paper business to Paper Australia, Amcor's connection with the business of manufacturing paper was limited to the supply of the labour, which Amcor employed, to the company which owned the manufacturing plant and conducted the business of making and selling paper. It may be assumed that the intervention of this step, before termination of employment, demerger and re-employment, provided the basis for Amcor not relying on the succession provisions of s 170MB. It is, however, not necessary to consider whether the sale of assets by Amcor to Paper Australia is relevant to the application of s 170MB. In particular, it is unnecessary to consider what is meant by the parenthetical expression "whether immediate or not" which qualifies the requirement of s 170MB(1)(c) that "a new employer [become] the successor, transmittee or assignee ... of the whole or a part of the business concerned". None of these issues needs to be addressed because the "positions" with which this case is concerned were positions in a business of making and selling paper. None of those positions became redundant. Neither the sale of assets by Amcor nor the later termination of employment by Amcor meant that the work then being undertaken by the employees was no longer required by the company which conducted the business in which the positions existed. The "job" of no employee was redundant. Clause 55.1.1 was not engaged.

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27 (2000) 201 CLR 648.

28 [2005] HCA 9.

Conclusion and orders

58 For these reasons, each appeal should be allowed. The orders made by the Full Court of the Federal Court of Australia on 28 March 2003 should be set aside. In their place, there should be orders that the appeal to that Court is allowed, the orders of Finkelstein J made on 12 July 2002 are set aside and, in their place, there be orders that the application is dismissed.

59 Although the Union sought an order for costs against the Minister if the Minister's appeal failed, neither the Minister nor Amcor sought costs, either in this Court or the courts below, if the appeals succeeded. It follows that there should be no order for costs.

60 KIRBY J. These appeals, from a judgment of the Full Court of the Federal Court of Australia[29], concern the construction of the Australian Paper/Amcor Fibre Packaging Agreement 1997 ("the Agreement"). The Agreement was certified by the Australian Industrial Relations Commission ("the Commission") in June 1998, in accordance with the *Workplace Relations Act* 1996 (Cth) ("the Act"), Pt VIB.

61 The question before this Court is whether the construction adopted by each of the judges of the Federal Court, both at first instance[30] and in the Full Court, providing that the appellant, Amcor Ltd ("Amcor"), is obliged to pay certain "severance payments"[31] to employees whom it was said to have retrenched, represented the correct or preferable construction of the Agreement in the circumstances.

62 I agree in the orders favoured by the other members of this Court. Amcor's appeal must be allowed. However, the question of construction is not, in my view, clear-cut. To show why this is so, and out of respect for the learned judges of the Federal Court, who reached an opposite conclusion, I will refer in more detail to their reasons. The Federal Court has considerable experience in the interpretation of industrial awards and agreements. The fact that the judges of that Court unanimously concluded in favour of the meaning urged by the Construction, Forestry, Mining and Energy Union ("the Union") and with the individual respondent employee's submissions causes me to pause before expressing my preference for the opposite construction. However, in the end, I favour the interpretation now reached by this Court. I will explain the somewhat different course that brings me to that result.

The facts, the Agreement and the legislation

63 The background facts are explained in the reasons of Gummow, Hayne and Heydon JJ ("the joint reasons")[32] and, in greater detail, in the reasons of Callinan J[33]. Also set out there are the applicable provisions of the Agreement[34],

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29 *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2003] FCAFC 57 per Moore, Marshall and Merkel JJ.

30 *Construction, Forestry, Mining and Energy Union v Amcor Ltd* (2002) 113 IR 112 per Finkelstein J.

31 So-called in the heading to cl 55.1 of the Agreement.

32 Joint reasons at [16]-[17].

33 Reasons of Callinan J at [118]-[123].

34 Joint reasons at [20]-[26]; reasons of Callinan J at [124].

notably the provisions of cl 55.1.1 upon which the disputed entitlements of the former employees of Amcor depend[35].

64 Also set out in other reasons, or described there, are the provisions of the Act[36] that constitute the legislative background against which the Agreement was made and certified. It was a background that would have been in the minds of both parties (Amcor and its agent on the one side and the Union on the other) who negotiated the Agreement and hammered out its terms. The legislative background is therefore part of the common knowledge attributable to the parties to the Agreement. So far as it is relevant, it would ordinarily be assumed that, in agreeing as they did, the parties intended the Agreement to take its place within the industrial setting created by the Act.

65 To some extent, that industrial setting also incorporates not only the provisions of the Act dealing with the special problem of redundancy in employment under federal awards and certified agreements[37] but also the consideration by courts and industrial tribunals during the past three decades of the issue of redundancy in employment. During that time, as is a matter of common knowledge, rapid advances of technology have presented instances of redundancy in employment (often through no particular fault of employers and no fault at all of employees) that called forth judicial[38], arbitral[39] and legislative responses[40]. As explained elsewhere, some of these developments illustrated the difficulty of defining "redundancy" for the purpose of measures protecting the industrial privileges of those whose employment was affected by such change[41].

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35 Joint reasons at [26]; reasons of Callinan J at [124].

36 Joint reasons at [41]-[49]; reasons of Callinan J at [132]-[133].

37 The Act, Div 3 of Pt VIA, especially ss 170CL, 170CM referred to in the joint reasons at [45]-[46].

38 eg *R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Ltd* (1977) 16 SASR 6 at 8 per Bray CJ; cf *Stones and CEPU v Simplot Australia Pty Ltd* (1997) 42 AILR ¶3-594. See joint reasons at [43]; reasons of Callinan J at [141].

39 *Termination, Change and Redundancy Case* (1984) 8 IR 34; *Termination, Change & Redundancy Case (No 2)* (1984) 9 IR 115. See joint reasons at [42]-[44], [54]-[55].

40 The Act, s 170MB.

41 Joint reasons at [44].

66 All of these are useful details of a background character. All are relevant in the construction of the Agreement's critical clause, the meaning of which is primarily in issue in these appeals (cl 55.1.1). In the interpretation of the Constitution and of legislation, Australian courts have passed beyond the age of the magnifying glass. No longer do courts (or industrial tribunals) seek to give meaning to contested language considered in isolation from the context in which the words are used and the purpose for which the words were apparently chosen. Nowadays, the same insistence on context, as well as text, permeates the approach to interpretation that is taken to legally binding agreements[42]. Indeed, before this approach became normal in the courts, in the interpretation of contested instruments it was often the approach adopted for the construction of industrial texts. This was in keeping with an inclination of such tribunals towards practical, as distinct from purely verbal, constructions in that area of the law's operation[43].

67 In the present case, the Union's submission was that these generalities were all very well, but that in the end, the Court had to give effect to the language of the Agreement. Clearly, this is correct. Interpretation is always a text-based activity. But where does it lead in this instance?

The supposed unfairness of the Union's interpretation

68 One danger of a generalist court, such as this, construing an Agreement designed to have effect in a particular legal environment, is that of ignorance or oversight of considerations that may throw a different light upon the arguments of the parties[44]. This does not mean that special problems in the law are somehow disjoined from the application of broad doctrines which this Court must uphold. But there is a risk that issues will be disconnected from context so

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42 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 at 449 [69]; 186 ALR 289 at 307; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 76 ALJR 246 at 248 [11]; 185 ALR 152 at 155; cf *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227 at 234-235; McLauchlan, "The New Law of Contract Interpretation", (2000) 19 *New Zealand Universities Law Review* 147 at 175-176; Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95 at 96-99.

43 *Geo A Bond & Co Ltd (in liq) v McKenzie* (1929) 28 AR (NSW) 498 at 503-504 per Street J; *Modra Homann Wooltana Fertilisers Ltd v Hatch* (1941) 15 SAIR 253; *In Re Undertakers (Cumberland) Award* (1946) 45 AR (NSW) 192.

44 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 78 ALJR 1231 at 1267 [200]; 209 ALR 116 at 166.

that they are misunderstood by newcomers unfamiliar with the particular legal terrain.

69 Much play was made in argument in this Court by Amcor concerning the suggested unfairness of the industrial outcome for which the Union argued. To impose on Amcor an obligation to pay its former employees severance payments under cl 55.1.1 of the Agreement, when they had not lost a day's employment, when they had been re-engaged by a company associated with Amcor, when this had occurred with their inferred agreement, when some of them, at least, were not pressing to enforce the claim against Amcor[45] and when all that had really happened was an internal rearrangement of the corporate structure of the employer companies, was suggested to be such a horrible industrial outcome that it could not have been what the Agreement provided.

70 Reflections of these submissions are recorded in the reasons of the primary judge in the present case[46], and are referred to in the reasons of Callinan J[47]. However, in describing the outcome (which he later upheld) as a possible "affront to commonsense", the primary judge was merely stating what he described as "one view"[48]. There was, however, another view, as his Honour ultimately explained. As the Federal Court has demonstrated in earlier decisions, it is undesirable to adopt a purely result-oriented approach to the interpretation of such industrial agreements. Ultimately, a court's duty under the Constitution is to give effect to the meaning of each such document as expressed in its words. This is true where the argument is an attempt by a union to secure a "better bargain" than that which was agreed upon and expressed in the instrument[49]. However, a neutral application of legal principles requires that the same outcome should follow where the terms of the subject agreement are such as to result in a "worse bargain" for the employer than, in retrospect, the employer ought to have provided for, might have expected and even might have deserved in an industrial sense.

71 In superintending the interpretation of the agreement in question in the present case, this Court, as the repository of the general law, must keep in mind the dangers that can attend interpretations of written texts based only on intuition.

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45 *Amcor* [2003] FCAFC 57 at [37].

46 (2002) 113 IR 112 at 112, 117.

47 Reasons of Callinan J at [129].

48 (2002) 113 IR 112 at 112.

49 *Commonwealth Bank of Australia v Finance Sector Union of Australia* (2002) 125 FCR 9 at 29 [30].

What cuts one way on one occasion may cut the other on the next. All of this was considered by the Full Court[50]. It is important that this Court should take the same considerations into account in discharging its function.

72 Moreover, the Full Court (presumably in response to anguished complaints on the part of Amcor similar to those that we heard) drew attention to provisions of the Act, easily overlooked, that afforded various solutions to the complaints of unfairness said to arise from the construction urged by the Union[51]. Thus, Marshall and Merkel JJ emphasised that it was the duty of a court[52] to ascertain the proper meaning of the Agreement having regard to any relevant context whilst not offending applicable principles of construction[53]. Their Honours said[54]:

> "It is not to the point that some people may consider it to be unfair to allow employees to receive severance payments whilst they continue to be employed, albeit by another employer. It is equally not to the point that others may consider it not unfair for such payments to be made, given that in the Amcor reconstruction the employees were given no real choice in relation to the cessation of their employment. Further, in some cases, there may be no guarantee of the solvency of the new employer in years to come."

73 This is obviously a valid response to a complaint by any disaffected party to a certified agreement about an outcome, required by the text, that is disappointing and allegedly unjust to it. It was common ground that, notwithstanding the terms of the Agreement[55], Amcor had not consulted the Union or attempted to co-operate with it in any way in devising the outcome for the employees that was to flow from its corporate restructuring. This was hardly a model case of modern industrial relations. It is not entirely surprising to me that the result of it was a consideration by the Union, which had been ignored, of its own rights as a party to the Agreement with Amcor and of the rights of its members who were employees of Amcor and who were retrenched as a result of the unilateral restructuring.

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50 [2003] FCAFC 57 at [51]-[52].

51 [2003] FCAFC 57 at [50].

52 Under the Act, s 178.

53 *Seamen's Union of Australia v Adelaide Steamship Co Ltd* (1976) 46 FLR 444 at 445.

54 [2003] FCAFC 57 at [49].

55 The Agreement, cll 55.7.1, 55.7.2. See joint reasons at [34].

74 I would therefore take the complaints about unfairness, by an employer who proceeded in such an apparently high-handed way, with a pinch of salt. If a party acts in such a fashion, it cannot really complain if those who are on the receiving end look to their legal rights. Ordinarily, it is this Court (including in the context of industrial relations cases[56]) which is foremost in upholding the legal rights of parties, according to the letter. The only difference in this case is that it is the Union that is insisting on what it claims to be its legal rights and those of its members and employees of Amcor. No different standard may be applied in such instances.

75 That is not all. The Full Court pointed to a provision of the Act, known to those familiar with this area of the law, but easily overlooked by generalists[57]. If before the retrenchment of employees by Amcor (that is, prior to 31 March 2000) Amcor and the Union had approached the Commission to vary the Agreement to obviate any need for severance payments to be made upon the termination proposed, such a variation might have been made[58]. Alternatively, as the Full Court also pointed out[59], Amcor had the standing on its own to approach the Commission[60] to remove any ambiguity or uncertainty in the Agreement so as to cover the particularities of this case. Further, the provision of relief to the Union under the Act, in circumstances such as the present, was discretionary[61]. Discretionary considerations were duly pressed by Amcor upon the primary judge[62].

76 Whether, in all of the circumstances, such considerations might properly have afforded relief from the Federal Court to Amcor, or whether some other and different relief might have been afforded by the Commission under its powers, are questions that are not before this Court. It is sufficient to remind ourselves that such avenues of relief from the suggested unfairness were available to

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56 See *Electrolux Home Products Pty Ltd* (2004) 78 ALJR 1231 at 1255 [130]; 209 ALR 116 at 149-150; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9 at [7].

57 [2003] FCAFC 57 at [50].

58 Under the Act, s 170MD.

59 [2003] FCAFC 57 at [50].

60 Under the Act, s 170MD(6).

61 Under the Act, s 178(6).

62 *Construction, Forestry, Mining and Energy Union v Amcor* [2002] FCA 878 at [7].

Amcor in this case. Had they been pursued vigorously, they might have provided a more appropriate setting within which to weigh the competing arguments of industrial fairness than the one presented by the Union, pressed to a legal claim in default of the mutuality that once was customary.

77 As the judges of the Federal Court correctly pointed out, before them the issue was, and was only, the meaning and application of the Agreement, specifically cl 55.1.1. That issue required the identification of the legal rights of the parties under the Agreement. Such rights would not be determined by judges blind-folded to the industrial context. Yet in the end their duty, as in all tasks involving a judicial construction of a text having legal force, was to give effect to that text. The judges of the Federal Court, in my view, were correct in adopting that approach[63].

Textual considerations support the Union

78 *Severance payments on retrenchment*: As the judges of the Federal Court demonstrated, there are numerous textual considerations in the Agreement to support the arguments of the Union. The first of these is the general description of the payments provided for in cl 55.1. They are described as "severance payments". There is no doubt that Amcor's former employees had their employment relationship with Amcor "severed" on 31 March 2000. Therefore, it would not be surprising were the Agreement to provide for payments to be made to the employees in such circumstances.

79 One of the two preconditions in cl 55.1.1 of the Agreement for entitlement to severance payments was that the employee be "retrenched". Although the Minister for Employment and Workplace Relations submitted to the contrary, the Full Court concluded[64] that, in the circumstances that had occurred and within the Agreement, Amcor's employees were "retrenched". Where such unilateral termination of employment occurs (as it undoubtedly did in this case), the *prima facie* result is the "retrenchment" of the employees[65]. I agree with the Full Court that a retrenchment by one employer does not cease to be a retrenchment simply because the employee is immediately employed by another employer following such retrenchment. So the starting point of analysis of the terms of cl 55.1.1, for

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63 (2002) 113 IR 112 at 112 per Finkelstein J; [2003] FCAFC 57 at [2] per Moore J, [53] per Marshall and Merkel JJ.

64 [2003] FCAFC 57 at [46] per Marshall and Merkel JJ. See also at [4] per Moore J.

65 *R v Industrial Court (SA); Ex parte General Motors-Holden's Ltd* (1983) 35 SASR 161 at 187; *Hawkins v Commonwealth Bank of Australia (No 2)* (1996) 70 IR 213 at 222.

the judges of the Federal Court, was the fulfilment of one of the two conditions provided in it.

80 *Positions in "particular" employment*: Secondly, whilst "redundancy" is the heading to cl 55 and "redundant" is the word used in cl 55.1.1 in connection with the first precondition to the payments, the words are used in a special way. What must become "redundant" is not an employee but "a position". This notion is given textual emphasis in two ways. In cl 55.2, by way of contrast, the Agreement speaks of the *employee* becoming redundant and being transferred to a lower paid job. As well, cl 55.2(a) repeats the reference to "the redundant position".

81 What is the meaning of "position" in this context? Is it, as Amcor urged, a disembodied notion of the work or "job", disjoined from the particular employer or any specific employer? Or is it the position held by the employee with the employer concerned? Amcor's submissions before this Court urged the disjuncture, under the Agreement, between the work and the specific employer providing the work. I agree with the other members of this Court that the Agreement, viewed as a whole, presumes such a disjuncture. However, it must be acknowledged that there are a number of textual considerations (pointed out by the Federal Court) that appear to indicate a contrary conclusion.

82 Chief amongst these is the fact that the Agreement is not an award addressed to an identified industry. Of its character, it is specific, relevantly, to its parties: the Union and Amcor. In such a context, it would seem odd for the Agreement, being between specific parties, to address itself to a work "position" in the abstract, as distinct from the "position" in the specific employment which was the subject of the Agreement. That was, and was only, the position of an employee in the employment of Amcor.

83 In his reasons, Moore J persuasively explained this point[66]:

> "The employer party to the Agreement is identified in cl 3 as Amcor Ltd ('Amcor') … In that clause, Amcor is identified as 'the Company'. At many points in the Agreement the word 'Company' is used in a context where the 'Company' is obviously a reference to the employer. … The Agreement creates rights and imposes obligations in an employment context on both an employer (or conceivably employers) and its (or conceivably their) employees. However read as a whole, it is tolerably clear that the Agreement confers those rights and imposes those obligations on one employer, Amcor."

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66 [2003] FCAFC 57 at [2].

84 *The employer-specific benefits*: Thirdly, there is additional textual reinforcement for this interpretation of "position" by the employment-specific character of the benefits identified in the sub-paragraphs of cl 55.1.1. It is those benefits that are to constitute the "severance payments". Thus, the benefits include "accumulated sick leave credits", "accumulated annual leave credits" and "pro-rata long service leave". All of these are highly specific to the employment of the employee with a particular employer, namely "the Company", Amcor.

85 This is a further textual point made in the Full Court by Moore J[67]. For his Honour, the express reference to "unrealised benefits the employee may otherwise have enjoyed if employment [with Amcor] had continued" is an indication in the document that "[t]hese unrealised benefits are based on prior service with Amcor". That fact led Moore J to conclude that the express references to the severance payments strongly pointed to the intention of the parties to the Agreement that "the clause would operate when employment with Amcor came to an end with the proviso, of course, that it was when the employee was redundant"[68]. This consideration tended to contradict the submission of Amcor that the clause was concerned with a "position" disjoined from employment with any employer in particular, including with Amcor. For the Federal Court, the disjunctive theory did not fit with the employer-specific nature of the benefits for which the Agreement provided.

86 *The employer no longer needed the positions*: Fourthly, once the view was taken that cl 55.1.1 referred only to "a position" with a particular employer (Amcor) the question whether such position "became redundant" was to be answered solely within the employment structure of that employer. Whatever arguments might exist concerning the non-redundancy of the employees, the restructuring of Amcor witnessed the redundancy of the "position" at least so far as Amcor's future needs were concerned. Amcor had moved out of the employment of employees in such a "position". Its employment establishment no longer needed such employees. The "position" was deleted from Amcor's employment catalogue.

87 The fact that the "position" later reappeared in the employment establishment of other (even associated) employers was irrelevant to the language of cl 55.1.1 of the Agreement between the parties. That fact might give rise to other legal questions. But so far as cl 55.1.1 was concerned, the appearance of a position in the employment of someone else was adventitious. True though it was that such re-employment was the known intention and design of Amcor as part of its corporate restructure, for the purposes of the Agreement viewed *on its*

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67 [2003] FCAFC 57 at [5].

68 [2003] FCAFC 57 at [5].

own, this was irrelevant: it did not affect the liability of Amcor under the instrument which it had negotiated with the Union, and on which the Union relies.

88 *Vulnerability of benefits following retrenchment*: Fifthly, to reinforce this view of the text, the Union was able to point to the purpose of the severance payments, being to protect employees in the specified circumstances by obliging employers to make adequate provision against redundancies and retrenchment for vulnerable employee credits for sick leave, annual leave and long service leave. Apart from the risks of measures expressly designed to avoid such obligations by the simple expedient of terminating employees, engaging them in the employ of a new insolvent company and then asserting that their "positions" were not redundant, the Union stressed that sick leave, annual leave and long service leave were highly employer-specific.

89 The Union expressed scepticism concerning the suggested solutions offered by Amcor to the possible circumvention of the protection of cl 55.1.1 by techniques of retrenchment of employees of the party to such an Agreement and resuscitation of their "positions" with other employers where practical continuity of entitlements and recovery of benefits in the medium or long-run might be doubtful. These considerations were advanced as explanations, in the particular industrial context, of the need to view an employment "position" referred to in cl 55.1.1 as specific to the designated employer and not wholly at large as a theoretical "job" description.

90 *Ignoring fortuitous re-engagements*: Sixthly, the failure of Amcor to notify the Union and negotiate with it over the attempted re-employment of the employees by another (associated) company was another argument deployed by the Union to suggest a breach by Amcor of its own obligations under the Agreement. Arguably, it was put, it amounted to a failure by Amcor to "give the maximum possible notice to the [U]nion of any permanent change affecting employment" as required by cl 55.4.1 of the Agreement and to initiate any "transfer" of employment or re-employment[69] contemplated by the Agreement and the co-operation which the parties to the Agreement (relevantly Amcor and the Union) promised each other when they originally executed it[70].

91 In the event, in this case, the employees were accommodated by another employer related to Amcor. However, the Union made the point that this Court should construe the Agreement bearing in mind that such fortuitous re-engagement might not always be available, especially in circumstances of such

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69 The Agreement, cll 55.5 (transfer to another location), 55.6 (re-employment).

70 The Agreement, cl 55.7.2.

apparent employer unilateralism and high-handedness. The Agreement stood on its own terms. It gave rise to legal rights. If the Union were correct in its submission that "position" in cl 55.1.1 was employer-specific, those legal rights attached to Amcor. As such, the intervention of employment "positions" with other employers was, on this construction of the Agreement, factually accidental and legally irrelevant. It might not arise in other cases. On this footing, the Union urged an interpretation of the Agreement anchored firmly in its text.

92 *Consent a prerequisite to certification*: Seventhly, a consideration lending some support to the employer-specific construction of cl 55.1.1 is the requirement of the Act that, to secure certification of an agreement by the Commission, it is necessary for the proposed agreement to be "approved by a valid majority of the persons employed at the time whose employment will be subject to the agreement"[71]. This requirement adds strength to the notion that the Agreement is specific to the parties to it. It addresses specifically the interests of the employees of Amcor concerned who have the chance to vote on the acceptance and hence, when it refers to "a position", that word is addressed to a position of an employee of the identified employer, not a "position" at large with anyone[72].

Contextual considerations favour Amcor

93 *The imprecision of industrial instruments*: By reference to the reasoning in the Full Court, I hope that I have demonstrated that the Union's arguments are far from weak. On the contrary, I consider that they are strong and I can understand the textual reasons that brought the judges of the Federal Court to the conclusions that they expressed. Nevertheless, I have ultimately come to accept that contextual considerations favour the construction urged by Amcor.

94 I do not say that the contextual considerations are overwhelming. However, certified agreements such as this commonly lack the precise drafting of legislation[73]. As appears from a scrutiny of the provisions of the Agreement, it bears the common hallmarks of colloquial language and a measure of imprecision. Doubtless this is a result of the background of the drafters, the circumstances and possibly the urging of the preparation, the process of negotiation and the omission to hammer out every detail – including possibly

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71 The Act, s 170LR(1).

72 cf the joint reasons at [24].

73 *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 77 ALJR 1806 at 1816 [56]; 201 ALR 271 at 284.

because such an endeavour would endanger the accord necessary to consensus and certification by the Commission[74].

95 An indication that this is so can be seen in the apparently interchangeable references in the Agreement to the redundancy of "a position" and the redundancy of "an employee"[75]. The Agreement does not maintain a strict differentiation between the two notions, a point remarked upon by the Federal Court. Moreover, in providing for various circumstances where an employee or a position may be redundant, the Agreement mentioned four possibilities, although it is conceivable that three of them might overlap[76].

96 The nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it served combine to suggest that the construction to be given to cl 55.1.1 should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement[77]. Approaching the interpretation of the clause in that way accords with the proper way, adopted by this Court[78], of interpreting industrial instruments and especially certified agreements[79]. I agree with the following passage in the reasons of Madgwick J in *Kucks v CSR Ltd*, where his Honour observed[80]:

> "It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely

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74 cf *Australian Communication Exchange Ltd* (2003) 77 ALJR 1806 at 1815-1816 [54], [56]; 201 ALR 271 at 284.

75 For example the Agreement, cll 55.1.1, 55.2.

76 [2003] FCAFC 57 at [3] per Moore J, [41]-[42] per Marshall and Merkel JJ; cf the Agreement, cll 55.1.1, 55.2, 55.3, 55.5.

77 *Australian Communication Exchange Ltd* (2003) 77 ALJR 1806 at 1815-1816 [54], [56]; 201 ALR 271 at 284.

78 See, for example, *Scott v Sun Alliance Australia Ltd* (1993) 178 CLR 1 at 5 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ, on the construction of the words "ordinary time rate of pay".

79 *Australasian Meat Industry Employees Union v Coles Supermarkets Australia* (1998) 80 IR 208 at 212 per Northrop J.

80 (1996) 66 IR 182 at 184 (emphasis added). See reasons of Callinan J at [129]-[130].

> of a practical bent of mind: they may well have been more concerned with expressing an intention *in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon*. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. *And meanings which avoid inconvenience or injustice may reasonably be strained for*. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand."

97 In the context, therefore, to conceive of a "position" as disjoined from the employment establishment of the particular company party to the Agreement (Amcor) does not occasion offence. In a more precise document, with a different context, history and purpose, the opposite conclusion might be reached. But giving this document the broad interpretation that is appropriate to a certified agreement under the Act, the submission advanced by Amcor is acceptable. But does it represent the preferable construction?

"Redundant" and "retrenched" in context

98 *Reading words in context*: Clause 55.1.1 establishes two requirements for redundancy payments to become due: first, a position must become "redundant" and, secondly, the employee must "subsequently be retrenched". In construing legal documents, courts interpret each phrase used in the context of the entire text[81]. The use of the terms "redundant" and "retrenched" elsewhere in the Agreement cast light on the meaning to be given to cl 55.1.1. I agree with the joint reasons[82] that the manner in which these terms are employed elsewhere in the Agreement suggests that, when its drafters referred to positions becoming "redundant", they meant something more than a mere change of employer. Of itself this would not, under the Agreement, create redundancy.

99 *"Redundant" in the Agreement*: For cl 55.1.1 to be engaged, the first requirement is that a position become "redundant". Clauses 55.2 and 55.5 refer to employees becoming "redundant" in two situations, "transfer to a lower paid job" and "transfer to another location" within the company. Necessarily, the reason such employees are considered "redundant" by the Agreement is that the

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81 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381; see also *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213 per Barwick CJ.

82 Joint reasons at [31]-[35], [50]-[53].

positions in which they were formerly employed have *come to an end*. Otherwise, such a transfer would constitute no more than a demotion or relocation. Reference in cl 55.2 to the effect that an employee "become redundant *and* be transferred to a lower paid job"[83] indicates that something has happened to the original position to cause the transfer to occur. Secondly, although their employment continues, the employees in these situations are *no longer performing the same task*. By definition, were they to continue performing the same task, the position would not have become redundant. Nowhere in the Agreement is there reference to a "redundancy" where the position continues to exist, or where the employee continues to perform the identical function as he or she has previously done.

100 *"Retrenched" in the Agreement*: The only occasions on which the Agreement uses the term "retrenched" are in the context of termination of employment with the effect of rendering the person concerned unemployed. Clause 55.7 obliges the parties to "find alternative employment for retrenched employees outside the Company"; to "assist retrenched employees to obtain Government compensation"; and to comply with the provisions of Div 3 of Pt VIA of the Act (exclusively concerned with termination of employment). It is assumed that a "retrenched employee" may require such help. I agree with the joint reasons[84] that such assistance is only relevant to a person who has been terminated and become unemployed. It would be a curious requirement to impose with respect to an employee who continues working unabated. Indeed, such a construction would render cl 55.7 mischievous in its application.

101 As the joint reasons also point out[85], the "gainshare payment" provisions in cl 26 of the Agreement assume the employee's *ongoing* status within the enterprise, independent of structural change at the level of company ownership. Such arrangements, which are now common to industrial agreements, suggest that the positions in which such entitlements are generated also exist independently of such change.

102 *The objects of the Act*: Certified agreements, such as the one presently under consideration, derive their binding force from the Act. As such, it is useful to consider the principal object of the Act in the light of the result in this case. Although not determinative in so large an Act, frequently amended since its original enactment in 1996, its principal object is a relevant consideration when one of its terms, or the terms of an instrument deriving from it, is in dispute. If

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83 Emphasis added.

84 Joint reasons at [34]-[35].

85 Joint reasons at [40].

possible, a court will construe a disputed clause in a way that is consistent with the purpose and object of the Act in question[86]. As this Court has observed[87], such instruments are construed on the *prima facie* footing that its provisions are intended to give effect to harmonious goals.

103 The principal object of the Act is "to provide a framework for *cooperative workplace relations* which promotes the economic prosperity and welfare of the people of Australia"[88]. That object favours a construction, if available, of industrial agreements that will operate fairly to both sides and foster a co-operative workplace environment. As Callinan J notes in his reasons[89], one of the purposes of an industrial instrument is to promote harmony in the workplace.

104 With this background in mind, a concession by the primary judge in a given case that the result reached by him was potentially "contrary to commonsense", and even "unfair"[90], would suggest that such a result was not that intended by the Act, nor by the Agreement certified under it, for the purpose of bringing to fruition the Act's objective in the Amcor workplace. In such a situation it is proper for this Court to scrutinise the instrument to examine whether there is a misconstruction on the part of the primary judge that has caused the result to miscarry. In this case there has been such a misconstruction. The meaning attributed to "redundant" by the judges of the Federal Court does not accord with the meaning of the word as it is repeatedly used in the Agreement. The positions did not cease to exist. They were therefore not "redundant".

105 *Redundancy under the Act*: The fact that the Agreement was prepared for the certification of the Commission in accordance with the Act reinforces the lastmentioned point. It gives emphasis to the consideration that, where the Agreement talks of "redundancy", as it does in the heading to cl 55 and in the use of the adjective "redundant" throughout that clause, it does so in the special context of the meaning that has gathered around that word in Australia generally and in the industrial relations context in particular.

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86 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423.

87 *Project Blue Sky Inc* (1998) 194 CLR 355 at 381-382 [70] per McHugh, Gummow, Kirby and Hayne JJ.

88 The Act, s 3 (emphasis added).

89 Reasons of Callinan J at [131].

90 (2002) 113 IR 112 at 112, 117 per Finkelstein J.

106 So viewed, judicial and arbitral decisions and statutory provisions suggest that what is essentially of concern in relation to redundancy in this context is the deprivation of long-term employment without fault on the part of the employee[91]. From the earliest considerations of the notion of redundancy by Australian industrial tribunals[92], the concern has been over the specific injustice that results for employees who are retrenched after lengthy service[93] and, as a result, face particular problems of re-employment arising from their past specialised skills, the unavailability of alternative work, the diminished career and security expectations and, in some cases, their age consequent upon long service with the employer who retrenches them for redundancy reasons[94]. In such circumstances, the immediate re-engagement of the relevant employees under identical or closely equivalent conditions would usually be regarded as a circumstance taking the case out of classification as one involving industrial "redundancy"[95].

107 Whilst, therefore, cl 55.1.1 of the Agreement has to be construed according to its terms, those terms, by referring to "a position" that becomes "redundant", must be accepted as referring to the particular problem which has been addressed in industrial relations law and practice in Australia over the past thirty years. This is the problem of employees becoming redundant, that is, being in excess of usefulness, superfluous to the needs of the relevant enterprise. So viewed, the circumstances of the present case, in many ways unique[96], did not

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91 *Australian Federation of Air Pilots v Ansett ANA* (1968) 122 CAR 951; cf *In re Clerks (State) Award* [1976] AR (NSW) 417 at 427-434.

92 *Termination, Change & Redundancy Case (No 2)* (1984) 9 IR 115 at 128; cf Arup, "Redundancy and the Operation of an Employment Termination Law", (1983) 9 *Monash University Law Review* 167; Yerbury and Clark, "Redundancy and the Law: the Position in mid-1983", (1983) 25 *Journal of Industrial Relations* 353; Shaw, Walton and McClelland, "New Dimensions in the Law Governing Termination of Employment", (1988) 1 *Australian Journal of Labour Law* 195.

93 The increase in the number of award provisions relating to redundancy was initially ascribed to the increasing rate of technological change: Mills and Sorrell, *Federal Industrial Law*, 5th ed (1975) at 148 [233].

94 See *Howard Smith Industries Ltd v The Seamen's Union of Australia* (1968) 126 CAR 608; *Merchant Service Guild of Australia v Department of Main Roads (NSW)* (1971) 140 CAR 875; *Brickworks Ltd v Brick Carriers' Association* (1983) 25 AILR ¶53.

95 See *Poon Bros (WA) Pty Ltd v Federated Liquor and Allied Industries Employees' Union* (1983) 25 AILR ¶220.

96 cf joint reasons at [55]; reasons of Callinan J at [144].

enliven the kind of situation to which cl 55.1.1 should be taken to have been addressed.

108 Put another way, cl 55.1 of the Agreement was designed, as the heading indicates ("Redundancy"), to provide remedies for a case of redundancy as ordinarily understood in this context. Redundancy with retrenchment as ordinarily understood in the context does not extend to the circumstances of this case. By reason of its certification, the Agreement was clearly intended to operate in conjunction with the provisions of the Act addressed to problems of termination of employment[97]. This fact reinforces the inference that the Agreement used the notion of redundancy in the ordinary industrial sense.

109 I acknowledge that the language of cl 55.1.1 of the Agreement is in some respects different from the model or template provision originally proposed by the industrial tribunal for cases of redundancy[98]. To that extent, it might suggest that the parties to the Agreement decided to strike out on their own and that they should be held to their Agreement according to its terms. On the other hand, that Agreement had to operate in the environment of the Act with its specific provisions for redundancy[99]. This suggests that the parties would not have intended a meaning of "redundancy" different from the meaning of the notion in the Act under which the Agreement had been certified. The former federal industrial tribunal, in its principal decisions on redundancy, made it clear that "it was not our intention that the redundancy provisions should apply to the 'ordinary and customary turnover of labour'; an expression used by Mr Justice Fisher in his decision related to the *Employment Protection Act* in New South Wales"[100].

110 These contextual considerations lend additional support to Amcor's argument that the words "a position become redundant" in cl 55.1.1 of the Agreement should be given a broad reading and not one that is strictly literal, confining the word "position" only to "a position with Amcor".

111 *Application to employer successors*: There is one further statutory problem for the Union's employer-specific interpretation of "a position". This is

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97 The Act, ss 170CA-170HC. See joint reasons at [45]-[46].

98 *Termination, Change and Redundancy Case* (1984) 8 IR 34 at 76. The Australian Conciliation and Arbitration Commission's model clause was expressed as follows: "an employee whose employment is terminated due to redundancy shall be entitled to the following severance payments …".

99 See, for example, the Act, s 170CL, referred to in the joint reasons at [46].

100 *Termination, Change & Redundancy Case (No 2)* (1984) 9 IR 115 at 128.

presented by the requirement of the Act[101] that a certified agreement under the Act will bind a new employer who is a successor, transmittee or assignee of the whole or a part of the business of a former employer.

112 In a stroke, this statutory provision – which is an important protection for the members of the Union – makes very difficult, if not impossible, the construction of cl 55.1.1 that confines the meaning of "a position", as there provided, solely to "a position" with the original employer, namely the Company (Amcor). Because of the statutory provision for transmission of employer liabilities under a certified agreement, it must be possible to read "a position", in cl 55.1.1 of the Agreement, as relating not only to a position with Amcor but also to a position with a successor, transmittee or assignee of Amcor[102].

113 Once this outcome is acknowledged (as the Act requires), the restriction of "a position" to "a position with Amcor" evaporates. It is not to the point that the present case is not, or may not be, an instance of such transmission under the Act. The mere possibility of such an application of the Act to the Agreement refutes the purist or literal interpretation of cl 55.1.1 urged for by the Union.

Conclusion: the better view of the contested clause

114 The likelihood is that considerations such as the lastmentioned one did not enter into the minds of those who drew cl 55.1.1[103]. However that may be, the task of construction is an objective, not a subjective, one. The Agreement, being certified under the Act, is to be understood in its statutory context. In such a context, the strict textual interpretation urged for by the Union is shown to have flaws. This leads the mind back to the notion of redundancy more generally in the Australian industrial relations setting.

115 Viewing cl 55.1.1 of the Agreement in that way, the better view of its meaning is that, in the events that happened, the employees' "positions" did not become redundant. They continued to exist and were taken over by a company related to Amcor as part of its restructuring. The first condition for the operation of cl 55.1.1 was not fulfilled. This conclusion requires that the appeals be allowed.

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101 The Act, s 170MB.

102 cf joint reasons at [47]-[49].

103 *Australian Communication Exchange Ltd* (2003) 77 ALJR 1806 at 1816 [56]; 201 ALR 271 at 284.

Orders

116 I agree in the orders proposed in the joint reasons.

CALLINAN J.

Issue

117 The question in this case is whether some former employees of a company became entitled to redundancy payments upon the cessation of their employment, even though they were subsequently engaged by the transmittee of the company's business, on the same terms and conditions, and with no loss of entitlements. The answer depends upon the construction of a certified agreement binding upon the parties to the appeal.

Facts

118 Until 1998, the appellant owned and operated four paper manufacturing mills in New South Wales, Queensland and Tasmania. The terms and conditions of employment of the appellant's employees were governed by an agreement ("the Agreement") certified by the Australian Industrial Relations Commission on 9 June 1998. The parties to the Agreement included, among others, the appellant and the first respondent, the Construction, Forestry, Mining and Energy Union. No employees were named as parties to the Agreement, although nothing turns on that in this appeal. There were also nine other agreements, the "satellite agreements", between the appellant and the first respondent, the purpose of which was to make provision for circumstances peculiar to each of the nine plants operated by the appellant. The clauses of the Agreement with which this appeal is concerned are unaffected by those satellite agreements.

119 As a result of a corporate restructuring in June 1998, the appellant disposed of two of its paper mills (Shoalhaven and Maryvale) to a wholly owned subsidiary, Paper Australia Pty Ltd ("Paper Australia"). The assets of its other two mills (Burnie and Wesley Vale) were leased to Paper Australia and then sold to that company on 12 April 2000. Although it commenced operating the mills, upon its acquisition and leasing of them, Paper Australia did not engage the employees who worked in them. According to the terms of an agreement dated 14 December 1998 but deemed to have been effective from 1 July 1998, made between the appellant and Paper Australia, the employees continued to be employed by the appellant. That agreement provided that Paper Australia would discharge all of the appellant's obligations in respect of those employees.

120 In February 2000, the appellant announced that it proposed to separate its packaging business from its fine paper manufacturing business. The separation was effected by a reduction of capital and a scheme of arrangement involving a demerger. The appellant's shares in Paper Australia were transferred to PaperlinX Ltd, another of its wholly owned subsidiaries. In the result the packaging business remained that of the appellant and the fine paper manufacturing business came to be owned by a company that was now a subsidiary of PaperlinX which was floated as a public company. To complete

the separation, it was necessary for the appellant to make arrangements for the employees who worked at the four paper mills to be employed by Paper Australia. The proposal was that the appellant terminate their employment and Paper Australia offer to engage them. Accordingly, the appellant wrote to the employees of the four paper mills on 21 February 2000 notifying them that their employment by the appellant would end on 31 March 2000. The letter stated:

> "For your understanding and reassurance:
>
> - your employment will continue within the PaperlinX companies under the same terms and conditions; and
>
> - all your current benefits including continuity of service, salary/wage, superannuation and leave entitlements will remain unchanged.
>
> In relation to superannuation, arrangements are in place for all staff and employees who are members of the Amcor Superannuation Fund to continue in that fund. Employees who are members of the Pulp and Paper Workers' Superannuation Fund will also continue in that fund. There is no effect on superannuation benefits.
>
> Please accept this letter as notice that your employment with Amcor Limited will cease on 31st March 2000. Also enclosed is a letter of offer of employment from Paper Australia Pty Ltd, commencing 1st April 2000."

121 Enclosed with the letter of termination was a letter of offer of employment from Paper Australia. The relevant part of the letter read:

> "I am writing to offer you employment with the operating company of your business, Paper Australia Pty Ltd (trading as Australian Paper), on the same terms and conditions as you currently enjoy. All benefits will be preserved, including continuity of service for all employment-related purposes, salary/wage, superannuation and accrued leave entitlements.
>
> We encourage you to accept this offer of employment effective 1st April 2000. Your acceptance of this offer will be confirmed by you reporting for duty at your usual workplace on your first normal working day on or after 1st April 2000 or, if you are on approved leave, on the first working day following the end of that leave."

122 Employees accepted the offer by attending work on 1 April 2000. They continued to perform the same tasks as they had previously. The terms and conditions of their employment, including rates of pay and entitlements to leave were unaltered.

123 At no stage did the appellant consult either the first respondent or its employees to inform them of its intentions with respect to the latter's employment before making the arrangements that it did.

124 On 15 June 2000, the first respondent filed an application and statement of claim in the Federal Court. The first respondent sought orders pursuant to s 178[104] of the *Workplace Relations Act* 1996 (Cth) (the "Act") imposing penalties upon the appellant for an alleged breach of cl 55 of the Agreement. The first respondent also sought orders that the appellant pay outstanding amounts owing to employees and interest thereon being amounts in respect of annual leave, long service leave and sick leave. Clause 55 is as follows:

"**REDUNDANCY**

55.1 **Severance Payments**

55.1.1 Should a position become redundant and an employee subsequently be retrenched, the employee shall be entitled to the following payments:

(a) All accumulated sick leave credits;

(b) All accumulated annual leave credits;

(c) Pro-rata long service leave if the employee concerned has five or more years' continuous service with the Company;

(d) Three weeks' pay at the employee's ordinary weekly wage rate for each full year of service and pro-rata for part years provided that this amount does not exceed the amount the employee would have received up to nominal retirement age.

55.1.2 The minimum payment for an employee with up to and including one year of service shall be three weeks' pay and the minimum payment for an employee with more than one year and up to and including two years' of service shall be six weeks' pay.

55.1.3 The ordinary weekly wage rate is defined as the rate paid for the employee's normal classification, excluding overtime,

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104 Although s 178 is a penalty provision, it also provides for the payment to employees of any unpaid entitlements, including superannuation, see s 178(6)-(7).

but including (as applicable) shift allowance, skill and supervisory allowances, personal rates and all-purpose over-award payments.

55.1.4 These payments are subject to the employee concerned continuing in employment to a date notified by the Company to the union. An individual employee's special circumstances may be taken into account provided this does not prevent production continuing to the agreed date.

55.2 **Transfer to Lower Paid Job**

Should an employee become redundant and be transferred to a lower paid job, the employee concerned shall:

(a) retain the hourly rate applicable to the redundant position on the basis of five weeks for each year of service and pro-rata for part years, up to a maximum of twelve months. Except for National Wage Case decisions or other increases based on the maintenance of the real value of wages, increases which occur after transfer will be absorbed up to the extent of the make-up.

(b) forfeit the right to retain the higher hourly rate of a redundant position if they refuse appointment to a higher paid position.

(c) shall have accrued entitlements for long service leave, annual leave and sick leave up to the date of transfer calculated at the higher hourly rate applicable to the particular employee's classification immediately prior to transfer, and a letter detailing the calculation and guaranteeing the amount calculated as a minimum payment if they subsequently become eligible for such a payment will be given to the employee concerned.

55.3 **General Option**

An employee who has opted for transfer to another classification in lieu of retrenchment shall have three months in which to change their mind and accept retrenchment terms which were available at the time of transfer.

55.4 **Undertakings By The Parties**

55.4.1 The Company undertakes to give the maximum possible notice to the union of any permanent change affecting employment, and not less than one month to each person whose employment is to be affected. It is understood by the parties that:

(a) the aim is to ensure that one month's notice does not become the standard period of notice;

(b) long term notice may create unnecessary concern unless there is a high degree of certainty that an individual will be affected by the change.

55.4.2 The union and employees on their part, in the light of undertakings by the Company, undertake to ensure that:

(a) During the period of notice given by the Company, operations will continue as normal;

(b) With the aim of minimising retrenchments, they will accept employment of fixed-term labour and the working of overtime after consultation with management to avoid replacement of people voluntarily leaving during the notice period.

55.5 **Transfer to Another Location**

Where an employee accepts an offer to transfer to another location, and this necessitates selling their home and buying a home in another locality, they will be reimbursed the selling and legal costs for the two transactions, including removal costs and fares for themselves and their family, plus two weeks pay toward incidental expenses. In such cases no redundancy payments will apply to the employee.

55.6 **Re-employment**

In the event that the retrenched employee responds within fourteen days to an offer of re-employment, it is understood that the Company will maintain continuous service and preserve benefits relating to accumulated long service leave at the date of retrenchment.

55.7 **General**

55.7.1 In terminating the employment of an employee on account of redundancy, the Company will comply with the requirements of Subdivision C of Division 3 of Part VIA of the Act.

55.7.2 The Company and the union will co-operate:

(a) to assist retrenched employees to obtain Government compensation as applicable;

(b) to try to find alternative employment for retrenched employees outside the Company; and

(c) to provide retraining for employees.

55.8 **Exclusion**

These retrenchment conditions do not apply where an employee retires due to age or ill-health or elects to retire early for personal reasons."

Decision at first instance

125 The trial in the Federal Court commenced on 20 March 2002 before Finkelstein J. The first respondent contended that the employees who were given notice by the appellant that their employment was terminated, had been made redundant within the meaning of cl 55 and had accordingly become entitled to severance payments. The first respondent claimed that the fact that most of the appellant's employees took up employment with Paper Australia did not deny the proposition that they had been made redundant. The appellant contended that no redundancy had occurred because the employees had continued to do the same work for the same remuneration at the same places with no diminution of their rights. Finkelstein J, on 13 May 2002 held that the appellant was liable to make the payments to the employees under cl 55.1 of the Agreement. His Honour's journey to that conclusion was an uneasy one. At the beginning of his reasons for judgment he said this[105]:

> "On the last occasion upon which I was required to construe an industrial instrument, I could apply the rule that the words mean what they say. But things are not always so easy. If the same rule were to be applied in this case then, on one view, the result may be an affront to commonsense."

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105 (2002) 113 IR 112 at 112.

And later, he said that it was "both contrary to commonsense and unfair" that the outcome of this case should be the opposite of what had been held in the leading industrial test case *Termination, Change and Redundancy Case*[106] (the "TCR case"). In that case the Australian Conciliation and Arbitration Commission, as it then was, observed that it was not envisaged that severance payments would be made in cases of succession, assignment or transmission of a business[107].

126 On 27 June 2002, a notice of motion was filed by the second respondent, Mr Anderson, an employee of the appellant, seeking orders that he be added as a respondent to the proceeding on his own account, and as representing a number of other employees identified in his application. On 12 July 2002, Finkelstein J allowed this application and made an order for the payment of $88,677.30 to the second respondent on the same basis as the other orders that he had made.

Decision of the Full Court

127 The appellant appealed to the Full Court of the Federal Court (Moore, Marshall and Merkel JJ). The Minister for Employment and Workplace Relations intervened there, pursuant to s 471 of the Act, to support the appellant in its appeal. In dismissing the appeal, Marshall and Merkel JJ held that the trigger for the operation of cl 55, and the appellant's obligation to make severance payments, was its decision that it no longer required any of its employees to perform the work for it that they had formerly carried out. Their Honours were of the view that the hiring of the employees by a new employer was irrelevant to the question whether those employees had been retrenched within the meaning of cl 55 of the Agreement. Their Honours said[108]:

> "We agree with the primary judge that, properly interpreted, the word 'position' in cl 55 should be construed as referable to 'a job that an employee is performing for a particular employer'. When cl 55 is considered as a whole it is apparent that the expressions 'should a position become redundant' and 'should an employee become redundant' are used interchangeably. In that regard cl 55.1.1 which refers to a position becoming redundant, may be compared to cl 55.2, which refers to an employee becoming redundant."

128 Moore J whilst adding some comments of his own generally agreed with the reasons of Marshall and Merkel JJ.

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106 (1984) 8 IR 34 at 102-103.

107 (1984) 8 IR 34 at 75.

108 *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2003] FCAFC 57 at [39]

Appeal to this Court

129 The appellant argues in this Court that its liability to make severance payments to its employees under cl 55.1.1 was contingent upon the satisfaction of two conditions: that "positions" had become redundant; and, in consequence of that, the employees were retrenched. It argued that such liability never arose because, although the employees may have been dismissed by the appellant, their positions of employment had not been made redundant. It contended that redundancy was to be determined, not by whether there was a change of employer, but rather, by whether there was a discontinuity of employment in a particular position: that is, a cessation of employment to do the same work in the same place in unchanged conditions of employment. As the employees had enjoyed continuity of employment in their same positions, albeit with a new employer, the cessation of their employment with the appellant did not, of itself, therefore constitute a redundancy of position for the purpose of cl 55.1.1. The submissions of the Minister were to a similar effect. He did however call in aid of the construction advanced by him a statement by Madgwick J in *Kucks v CSR Ltd*[109]:

> "It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand."

130 There is substance in the observations of Madgwick J in *Kucks* which I have quoted although it is not with any jargon of the workplace or a particular industry that the Court is concerned in this case.

131 An industrial agreement has a number of purposes, to settle disputes, to anticipate and make provision for the resolution of future disputes, to ensure fair

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109 (1996) 66 IR 182 at 184. See also Northrop J in *Australasian Meat Industry Employees Union v Coles Supermarkets Australia* (1998) 80 IR 208 at 212.

and just treatment of both employer and employees, and generally to promote harmony in the workplace. It is with the third of these that cl 55 of the Agreement is particularly concerned. It is important to keep in mind therefore the desirability of a construction, if it is reasonably available, that will operate fairly towards both parties. In this connexion it is not without significance that the primary judge adopted a construction which he thought to be not only arguably absurd, but also potentially unjust to the appellant.

132 There is no doubt that there are repeated references in the Agreement to the appellant as the employer. On the other hand there are clauses in it and the satellite agreements binding on the parties specific to particular work sites and actual tasks to be performed, and the positions of those employees who were to perform them (eg cll 4 and 7). Clause 26 should also be noticed. It makes provision for profit sharing by the employees, and relates employees' annual entitlements to the return on investment of funds employed "in the business" and the average results of the "appellant group". Despite s 170MB[110] of the Act, this

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110 At the relevant time, s 170MB provided:

"**Successor employers bound**

(1) If:

(a) an employer is bound by a certified agreement; and

(b) at a later time:

(i) if the application for certification of the agreement stated that it was made under Division 2 – a new employer that is a constitutional corporation or the Commonwealth; or

(ii) if the application stated that it was made under Division 3 – a new employer;

becomes the successor, transmittee or assignee (whether immediate or not) of the whole or a part of the business concerned, then, from the later time:

(c) the new employer is bound by the certified agreement, to the extent that it relates to the whole or the part of the business; and

(d) the previous employer ceases to be bound by the certified agreement, to the extent that it relates to the whole or the part of the business; and

(e) a reference in this Part to the employer includes a reference to the new employer, and ceases to refer to the previous employer, to the extent that the context relates to the whole or the part of the business.

(Footnote continues on next page)

provision does not sit entirely comfortably with a proposition that the employees are employed in the same employment in the same positions because their entitlements do have the appearance of benefits unique to a particular relationship between employees and a particular employer of them.

133 Other provisions of the Act which provide a framework for the certification and interpretation of the Agreement are of little assistance in construing the Agreement. Sections 170LB and 170LC of the Act do deal with the concept of a business but they also refer to "an employer". They accordingly give no indication of the preferable construction of the Agreement. Nor is it possible to obtain any assistance from ss 170MC and 170MD which contemplate an extension or variation of a certified Agreement. These provisions could perhaps have been sought to be invoked by the first respondent but it chose not to do so, leaving it for the Federal Court and this Court rather than the certifying tribunal to resolve the dispute the subject of the proceedings. Nothing however turns on that.

134 In the event I have formed the opinion that the preferable of the available constructions is that the conditions stated in cl 55.1 have not been satisfied for these reasons.

135 It is relevant, but alone, would not be decisive, that the employees here have suffered and will suffer no disadvantage. The result which the primary judge thought himself bound to pronounce was one that he thought could fairly be described as an affront to commonsense and unfair. That observation which is a correct one at least suggests that it is a result that the parties would not have intended when they made the Agreement.

136 It is a duality of conditions that cl 55.1 requires to be satisfied: first, redundancy of a position, that is of a particular position of an employee, and secondly, retrenchment of the employee. Let it be accepted, as I think it must be, that the appellant's termination of the employees' employment constituted retrenchment of them, the question remains whether the *positions* of the employees became redundant.

137 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. And as for the share of profits, it may be – I express no concluded opinion on this because it was the Court that drew the parties' attention to the matter, and

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(2) Subsection (1) does not affect the rights and obligations of the previous employer that arose before the later time."

the parties' advanced no considered arguments in relation to it – that the entitlement to it remains even though the two bases for its calculation are the amount of capital employed, and the profits made by a corporation, or the group of which it forms part, that is no longer their employer and has no other relevance to them.

138 The internal indications in cl 55 certainly do not point one way. Clause 55.1.4 refers to the "Company", meaning thereby the appellant. So too, cl 55.4 requires the Company, that is the appellant, to give the maximum possible notice to the union of any permanent change affecting employment. It is likely that the demerger was a permanent change affecting the employees' employment. The requirement of notice by the appellant again suggests that the position of an employee, is a position as an employee of the particular employer, the appellant.

139 On the other hand, cl 55.4.2 states one of the purposes of the requirement of notice is the minimisation of retrenchments, and cl 55.7.2 requires that the parties co-operate to assist "retrenched employees" to obtain Government compensation and to find alternative employment, and to be retrained. In the events that happened here no occasion arose for the seeking of alternative employment, compensation or retraining, a matter which implies not only that the employees have not been made redundant but also that they may not have even been retrenched within the meaning of cl 55.1.1 of the Agreement.

140 The construction which I prefer is generally consistent with statements made in industrial tribunals in which industrial arrangements, awards and agreements have been considered.

141 In the TCR case[111], the Australian Conciliation and Arbitration Commission considered that the purpose of severance pay was to compensate employees for the loss of non-transferable credits, such as accrued sick leave and long-service leave, as well as the inconvenience and hardship occasioned by redundancy[112]. The Commission said[113]:

> "However, we would make it clear that we do not envisage severance payments being made in cases of succession, assignment or transmission of a business."

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111 (1984) 8 IR 34.

112 (1984) 8 IR 34 at 73.

113 (1984) 8 IR 34 at 75.

These comments were cited with approval by Ryan J in *Stones & CEPU v Simplot Australia Pty Ltd*[114] and the Industrial Relations Commission in *AMWU v United Milk Tasmania Limited*[115]. In the former case, his Honour was required to construe a redundancy provision in an agreement that had no terms dealing with a transmission of business. Ryan J was of the view that the agreement should be read in light of the TCR case[116] and did not contemplate the allowance of severance pay in circumstances in which there was a transmission of business[117]. In the other case that I have cited, the Commission dismissed an appeal from a decision of Commissioner Leary that five employees had not been made redundant upon a transmission of their employer's business to another company, which had offered to employ them, albeit at a lesser rate of pay. The Commission said[118]:

> "It would be unusual, bearing in mind the decision in the [TCR case], for an employer to be ordered to pay severance pay where there was a transmission of business and the employees continued their employment with the transmittee with their accrued entitlements maintained."

142 The construction which I prefer has the advantage also, that it gives better effect to the primary meaning of the word "redundant" which the Oxford English Dictionary (2nd ed) 1989 gives as "abundant" and "superfluous, excessive, unnecessary; having some additional or unneeded feature or part". Although the employees here may have become superfluous to the requirements of the appellant, their positions did not.

143 Section 170MB of the Act as it then stood has no direct bearing on this case but its presence and the presence of s 149(1)(d)[119] are not irrelevant. What

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114 (1997) 42 AILR ¶3-594.

115 Industrial Relations Commission, Print No S7351, 23 June 2000.

116 (1997) 42 AILR ¶3-594 at 3,494.

117 (1997) 42 AILR ¶3-594 at 3,494.

118 Industrial Relations Commission, Print No S7351, 23 June 2000 at [13].

119 "Persons bound by awards

(1) Subject to any order of the Commission, an award determining an industrial dispute is binding on:

...

(Footnote continues on next page)

these sections are concerned with is the transmission of a "business" and their purpose is to ensure that when that occurs[120], the transmittee be bound by a relevant certified agreement or award. There can be little doubt that Paper Australia, the new employer, was a transmittee of the business in which the employees were employed. To give cl 55 of the Agreement the meaning and operation that the Federal Court would give it would be to produce in the nature of disconformity between s 170MB of the Act and it in the sense that it would give the latter little or no relevant application to Paper Australia as a transmittee of a business in relation to the benefits in question. The result which I would hold to be the correct one is at least consistent with the ends that both of the sections seek to achieve.

144 It was not argued by the appellant, and nor could it be for reasons which I shortly mention, that any claims on behalf of the employees were estopped by their continuing to do the work that they did after receipt of the letter offering them employment with their new employer, or that as a consequence of a tripartite contract between the appellant, their new employer and them, they had accepted, and were now contractually bound to accept, that they should look only to their new employer for their relevant entitlements because the offer that they accepted, both to cease work for the appellant and take up employment with Paper Australia, was an offer to substitute the latter as their employer, and the party obliged to confer the relevant benefits. This is so because certified agreements exist independently of contract, and it has been held by this Court that they operate with statutory force[121]. Employers and employees are bound by their terms and are incapable of contracting out of them, or derogating from them although employers may confer additional benefits on their employees by contract[122].

(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."

120 See *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648.

121 *Josephson v Walker* (1914) 18 CLR 691 at 700 per Isaacs J; *Ex parte McLean* (1930) 43 CLR 472 at 479 per Isaacs CJ and Starke J; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 421 per Brennan CJ, Dawson and Toohey JJ.

122 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 421 per Brennan CJ, Dawson and Toohey JJ.

145 I do not overlook that care needs to be exercised for the protection of employees against their termination and denial to them of benefits, by unscrupulous employers, by, for example their transmission of mere shells of business enterprises, and the evasion of their obligations by putting their assets beyond the reach of employees otherwise entitled to recourse to them to gain their entitlements. It is likely that in that situation, a proper analysis of the true facts will show that employees' "positions" have in fact become, or will soon be redundant, and that therefore both of the relevant conditions have been satisfied. Every case will depend on its own specific facts.

146 Nothing turns in my view however upon the fact that before the restructure was fully implemented, the appellant ceased to be the operator of the business or businesses in which the employees were employed. During this period, their work, their workplace, their remuneration, and the way in which their other entitlements accumulated were unchanged. They were not made redundant then anymore than they were when the transmittee of the appellant's business became their employer.

147 It follows that the appeals must be allowed, the orders of the Full Court of the Federal Court of Australia be set aside, and that it be ordered that the respondents' applications be dismissed.