HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, CALLINAN AND HEYDON JJ

Matter No M299/2003

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS — APPELLANT

AND

GRIBBLES RADIOLOGY PTY LTD & ANOR — RESPONDENTS

Matter No M302/2003

GRIBBLES RADIOLOGY PTY LTD — APPELLANT

AND

HEALTH SERVICES UNION OF AUSTRALIA & ANOR — RESPONDENTS

Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd
Gribbles Radiology Pty Ltd v Health Services Union of Australia
[2005] HCA 9
9 March 2005
M299/2003 and M302/2003

ORDER

Matter No M299/2003

Appeal allowed.

Matter No M302/2003

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 Gray J made on 5 July 2002 and in their place order that the application is dismissed.

On appeal from the Federal Court of Australia

Representation:

R R S Tracey QC with M P McDonald for the Minister for Employment and Workplace Relations (instructed by Australian Government Solicitor)

J L Bourke for Gribbles Radiology Pty Ltd (instructed by Clayton Utz)

M Bromberg SC with D C Langmead for Health Services Union of Australia (instructed by Health Services Union of Australia)

Intervener:

K H Bell QC with R M Doyle intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd

Gribbles Radiology Pty Ltd v Health Services Union of Australia

Industrial law (Cth) – Award – Transmission provisions – Binding to award new employer who is successor to or of the business or part of the business of employer party to dispute determined by the award – New employer granted a licence to run a radiology practice at a suburban clinic – New employer stopped providing radiographic services at the clinic and terminated the employment of the radiographers who worked there – Previous licensee of the radiology practice was an employer bound by an industrial award – Whether new employer was bound by the award – Whether new employer a successor to or of the business or part of the business of previous employer.

Constitutional law (Cth) – Powers of Commonwealth Parliament – Conciliation and arbitration – Whether s 51(xxxv) of the Constitution supports a law providing for the declaration of a common rule for an industry.

Words and phrases – "successor", "business".

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

GLEESON CJ, HAYNE, CALLINAN AND HEYDON JJ.

The issue

1 The issue in these appeals is whether an employer (Gribbles Radiology Pty Ltd – "Gribbles") was a "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" determined by the Health Services Union of Australia (Private Radiology – Victoria) Award 1993 ("the Award"). If Gribbles met that description, s 149(1)(d) of the *Workplace Relations Act* 1996 (Cth) ("the Act") provided that, subject to any order of the Industrial Relations Commission, the Award bound Gribbles.

2 The determination of this issue turns on whether Gribbles was a "successor" to or of the business, or part of the business, of Melbourne Diagnostic Imaging Group ("MDIG") which employed radiographers (sometimes called "medical imaging technologists") to take medical images at the Moorabbin Heritage Clinic in suburban Melbourne. It was not contended that Gribbles was an assignee or transmittee of any part of MDIG's business.

3 Region Dell Pty Ltd ("Region Dell") conducted a number of medical clinics under the name "Heritage Clinic". At several of those clinics (including the clinic at Moorabbin), Region Dell licensed the use of part of the clinic's premises by what was called a "radiology practice". Region Dell supplied specified radiology equipment; the radiology practice supplied radiographers, consumables and spares. Most, but not all, of the patients who had X-rays taken at the premises were referred by doctors working in the Heritage Clinic.

4 Until 31 August 1997, Region Dell granted such a licence to Southern Radiology at the Moorabbin Heritage Clinic. Between 1 September 1997 and 31 August 1999 it licensed MDIG. From 1 September 1999 it licensed Gribbles.

5 In 2000, Gribbles stopped providing radiographic services at the Moorabbin Heritage Clinic. It terminated the employment of radiographers who had worked at Moorabbin.

6 Both Southern Radiology and MDIG were respondents to, and parties bound by, the Award. Presumably, each had been a party to the industrial dispute which the Award determined. Argument proceeded on that assumption. Gribbles was not a party to the Award.

7 If bound by the Award, Gribbles was bound to pay severance pay to the radiographers whose employment at Moorabbin it had terminated. That

severance pay was to be calculated by reference to the length of continuous service of the radiographers with employers of which Gribbles was the "transmittee". The Award definition of "transmittee" did not follow the language of s 149(1)(d). Nothing in the courts below was seen as turning on those differences and they need not be noticed here. The issue argued in these appeals focused upon the construction of s 149(1)(d) and it is only the questions about the valid operation of that provision which must be decided.

8 The reasons that follow demonstrate that Gribbles was not a successor to or of any part of the business of MDIG and that Gribbles, therefore, was not bound by the Award. At no time did Gribbles enjoy any asset of MDIG, tangible or intangible, which MDIG had used in the pursuit of its business activities, whether at the Moorabbin Heritage Clinic or elsewhere.

The proceedings below and the appeals to this Court

9 The Health Services Union of Australia ("the HSU") brought proceedings in the Federal Court of Australia against Gribbles claiming the imposition (pursuant to s 178 of the Act) of penalties on Gribbles for breaches of the Award, the payment (pursuant to ss 178 and 179 of the Act) of sums which it alleged were owing to certain employees of Gribbles whose employment had been terminated when Gribbles stopped using Region Dell's premises at the Moorabbin Heritage Clinic, and orders (pursuant to s 356 of the Act) that the penalties be paid to the HSU. On 5 July 2002, Gray J ordered[1] that Gribbles pay a penalty of $50 to the HSU for breach of the Award in failing to pay four named employees severance pay calculated in accordance with cl 37 of the Award. It was further ordered that Gribbles pay those employees amounts specified in the order together with interest.

10 Gribbles appealed to the Full Court of the Federal Court. That Court (Moore, Marshall and Merkel JJ) dismissed[2] the appeal. By special leave, Gribbles, and the Minister for Employment and Workplace Relations ("the Minister") who had intervened in the proceedings below, each appeal to this Court.

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1 *Health Services Union of Australia v Gribbles Radiology Pty Ltd* [2002] FCA 856.

2 *Gribbles Radiology Pty Ltd v Health Services Union of Australia* [2003] FCAFC 56.

11 Gribbles contended in this Court that the construction of s 149(1)(d) of the Act adopted by the Full Court "traverses beyond the permitted scope of the Commonwealth's constitutional powers relating to industrial relations". Accordingly, Gribbles gave notice to the Attorneys-General of the Commonwealth, the States and the Territories, pursuant to s 78B of the *Judiciary Act* 1903 (Cth), that both Gribbles' appeal and the Minister's appeal involved a matter arising under the Constitution or involving its interpretation. The Attorney-General for Victoria intervened in the proceedings in support of the contention by the Minister that, properly construed, s 149(1)(d) of the Act is a valid law of the Commonwealth.

The Act

12 The outcome of these appeals depends upon the proper construction of s 149(1)(d) of the Act. That paragraph takes its place in a provision which identifies those persons who are bound by awards. Subject to any order of the Commission, an award determining an industrial dispute binds the parties to the industrial dispute who appeared or were represented before the Commission (s 149(1)(a)), those who were summoned or notified to appear as parties to the industrial dispute, whether or not they appeared (s 149(1)(b)), and those who, having been notified of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to that dispute (s 149(1)(c)). In addition, an award determining an industrial dispute (subject to any order of the Commission) is binding on all organisations and persons on whom the award is binding as a common rule (s 149(1)(e)), and all members of organisations bound by the award (s 149(1)(f)).

13 The provisions of s 149(1)(d), dealing with successors, assignees and transmittees, derive from s 29(ba) of the *Conciliation and Arbitration Act* 1904 (Cth), a provision introduced into the 1904 Act by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth). Although renumbered by a number of subsequent amendments to the 1904 Act, and amended in some respects, the provision remained in the legislation until the repeal of the 1904 Act in 1988 and the enactment of a similar provision by s 149(d) of the *Industrial Relations Act* 1988 (Cth), the immediate predecessor of the provision now under consideration.

14 The provision introduced in 1914, for awards to bind successors, assignees and transmittees of a business of a party bound by an award, was enacted against a background in which the Court's decisions in *R v Commonwealth Court of*

Conciliation and Arbitration; Ex parte Whybrow & Co[3] and *Australian Boot Trade Employes' Federation v Whybrow & Co*[4] loomed very large. The Court decided in the first *Whybrow* case that the only arbitral power which could validly be conferred on the Commonwealth Court of Conciliation and Arbitration, by a law made under s 51(xxxv) of the Constitution, was a power of judicial determination between the parties to an industrial dispute, and that accordingly those provisions of the 1904 Act which dealt with the regulation of industries generally were invalid. In the second *Whybrow* case, the Court decided[5] that a federal award could not validly prescribe a common rule in any particular industry. (The references now made in s 149(1)(e) of the Act to awards binding as a common rule invite attention to Div 5 of Pt VI of the Act concerning the power of the Commission to declare that a term of an award be a common rule in a Territory for an industry in relation to which the industrial dispute arose. Those provisions seek constitutional support from s 122 of the Constitution.)

15 As originally enacted, the succession provisions provided that a successor, assignee or transmittee of the business of a party bound by the relevant award was also bound. In *Proprietors of the Daily News Ltd v Australian Journalists' Association*[6], it was held that the succession must follow and not precede the award. In 1921, therefore, the 1904 Act was amended to add reference to a successor, assignee or transmittee of a party *to the dispute* to the existing reference to a successor, assignee or transmittee of a party to the award[7].

16 As was pointed out in *George Hudson Ltd v Australian Timber Workers' Union*[8], the legislative solution adopted to the problem revealed by the *Whybrow* cases was to fasten upon the relevant industrial dispute. The succession provisions now found in s 149 (and their legislative predecessors) extended the binding effect of awards made in settlement of an industrial dispute. Without

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3 (1910) 11 CLR 1.

4 (1910) 11 CLR 311.

5 (1910) 11 CLR 311.

6 (1920) 27 CLR 532.

7 *Commonwealth Conciliation and Arbitration Act* 1921 (Cth), s 4; *Monard v H M Leggo & Co Ltd* (1923) 33 CLR 155 at 163 per Isaacs J.

8 (1923) 32 CLR 413 at 435, 437-438 and 440-441 per Isaacs J.

succession provisions of this kind, an award would have bound only those who were the disputants and bound them in respect of the subjects with which the award dealt – typically the terms and conditions of employment in the particular industrial operations then being undertaken by employers who were parties to the dispute.

17 For present purposes, it is convenient to notice three particular aspects of the succession provisions. First, as the text of s 149 reveals, the succession provisions now seek to extend the identity of those who are to be bound by an award beyond those who are positively shown to have been actual parties to the relevant dispute. Section 149(1)(b) and (c) brings in those who were alleged to be parties and who did not show that they were not.

18 Secondly, like its legislative predecessors, s 149 binds parties to the dispute (formerly the award) in respect of what Isaacs J called[9] their "present and ... future industrial operations of the nature involved in the dispute". Parties are bound in relation to more than whatever may have been the particular operations in which each was engaged at the time of the dispute. If a party later undertakes similar "industrial operations" it is bound by the award in those new operations.

19 Thirdly, and of most significance in the present matter, since first enacted, the succession provisions have made a further extension to the binding effect of an award by fastening upon the "business" of the employer who was a party to the dispute. An employer who is a successor, assignee or transmittee to or of the business, or a part of the business, of an employer who was a party to the dispute determined by the award is bound by the award. (For present purposes the changes from reference to the business of a "party bound by the *award*", found in the earliest form of the succession provisions, to reference to the business of an "employer who was a party to the industrial *dispute*" may be ignored.)

20 The expression "business of an employer who was a party to the industrial dispute", and its legislative predecessors, expresses a compound conception. The "business" must be the business *of* the person identified in the succession provision. It is that "business" which provides the essential link between the industrial dispute which the award determined and the binding effect of the award upon an employer who was not a party to that dispute. Demonstrating no more than that the two employers engage in identical business activities does not establish that link. It does not do so because it fails to address an important element of what we have identified as a compound conception. It fails to

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9 (1923) 32 CLR 413 at 438.

consider whether the "business", to or of which the new employer is a successor, assignee or transmittee, was the business of the employer who was a party to the relevant industrial dispute.

21 Section 149 must be read in a way that gives effect, so far as possible, to its legislative purpose. Plainly, the purpose of the section and its predecessor succession provisions is, and always has been, to extend the operation of awards beyond those who were parties to the dispute that the award determined. But identifying that purpose does not answer the question that arises in this matter – how far does the extension go? It is only if some a priori assumption is made about the intended reach of the provision that considering its purpose casts light on the question. To reason in that way begs the question. Rather, it is necessary to consider the words of the provision. It is there that the intended reach of the legislation is to be discerned.

22 In particular, it is necessary to notice that s 149(1)(d) provides for three different cases (successor, assignee or transmittee) concerning what, for present purposes, can be seen to be a single subject matter (the business or a part of the business of an employer who was a party to the industrial dispute determined by the award). This observation reveals why the "business of an employer" must be understood as a compound conception and cannot be understood as a reference to no more than a kind of business activity.

23 There can be no assignment or transmission of a *kind* of business activity. There can be an assignment or transmission of the whole or a part of a *particular* business. (The succession provisions fasten upon the business that an identified employer conducted.) It is only if considerable violence is done to the language of the provision that one can read it as providing for a case of succession to a *kind* of business activity. So to read the provision would require at least two steps. First, it would require reading "successor" as meaning simply "a person who follows". Perhaps that reading is open; perhaps the better view is that it refers only to a person who follows *according to applicable legal principle*. It is not necessary to resolve that question. The second step that would have to be taken is to read "the business of an employer who was a party to the industrial dispute" as having a different meaning in cases of succession from the meaning it has in cases of assignment or transmission. That step cannot be taken without violence to the words. There is no reason to give such a differential operation to the expression "business of an employer who was a party to the industrial dispute". Yet, as these reasons later demonstrate, that reading of the provision underpinned much of the argument advanced by the HSU.

24 Was Gribbles a successor to or of any part of the business of MDIG? It was not disputed that MDIG was a party to the industrial dispute determined by

the Award. As noted earlier, it was not submitted that Gribbles was an assignee or transmittee of any part of the business of MDIG. It is necessary to say a little more about the facts.

The facts

25 The arrangements Region Dell made, first with Southern Radiology, then with MDIG, and lastly with Gribbles, were arrangements whereby each of those enterprises, as part of its larger business of providing radiology services, conducted business activities at the Heritage Clinic premises at Moorabbin. The activities each conducted at those premises were not materially different. Each engaged the services of radiographers to use equipment provided by Region Dell to take medical images. Each took any benefit that flowed from operating at the Heritage Clinic, including the benefit of referrals by doctors working there. The four employees whose entitlement to severance pay was in issue in these proceedings had each worked for Southern Radiology, then for MDIG and most recently for Gribbles as radiographers working at the Heritage Clinic premises at Moorabbin.

26 There was evidence in the courts below that Gribbles set out to recruit those radiographers who had been working for MDIG at the Moorabbin Heritage Clinic. (Some reference was made in the course of oral argument to Gribbles offering those radiographers employment on terms that conditions specified in the Award would apply, but the claims made in the proceedings brought by the HSU were not founded in any contractual argument. It follows that it is neither necessary nor appropriate to explore this aspect of the matter further.)

27 There was no evidence of any dealing between MDIG and Gribbles concerning MDIG ceasing to operate at the Moorabbin Heritage Clinic and Gribbles beginning to operate there. In particular, there was no evidence of any sale, transfer, or assignment by MDIG to Gribbles of any tangible or intangible property. Rather, the case in the courts below was conducted on the basis that the licence agreement which Gribbles made with Region Dell was probably very similar to the licence agreement which Region Dell had made with MDIG and that the licence which MDIG had was brought to an end by or with the concurrence of MDIG and Region Dell. (Neither any licence agreement with Southern Radiology nor any licence agreement with MDIG was in evidence.)

Gribbles a successor to the business of MDIG?

28 The HSU submitted that the combination of three facts required the conclusion that Gribbles was the successor to part of MDIG's business. It pointed, first, to the identity of business activity which each conducted at the

Moorabbin Heritage Clinic; secondly, it pointed to the identity of the place at which and equipment by which that activity was conducted; and, thirdly, it pointed to the fact that nine out of the 10 radiographers who worked for MDIG at the Moorabbin Heritage Clinic took up employment with Gribbles. Gribbles, on the other hand, submitted that the absence of any nexus of any kind between MDIG and Gribbles necessarily denied the conclusion that Gribbles was a successor to any part of MDIG's business.

29 These submissions of the parties owed much to statements made in reported cases about the way in which the succession provisions of the Act, or its predecessor provisions, applied to the facts considered in those cases. Thus, Gribbles' submissions built upon what Piddington J had said, as president of the New South Wales Industrial Commission, in *Bransgrove v Ward and Syred*[10], that "[t]o constitute successorship there must be some definite legal nexus or privity between a respondent to the Federal award who is the predecessor, and a successor who then, by virtue of the Commonwealth statute, becomes bound by the award".

30 By contrast, the HSU submissions built upon what was said by the Full Court of the Federal Court in *North Western Health Care Network v Health Services Union of Australia*[11] that:

> "it is not necessary to search for some legal form of succession, assignment, transfer, corporate acquisition or takeover. What is necessary is to determine as a question of fact whether 'the business' understood in the wide sense so found has been transmitted to other hands. That does not require a search for some legal mechanism as a nexus between the pre and post transmission stage."

And both sides sought to draw support for their respective submissions from what was said by this Court in *PP Consultants Pty Ltd v Finance Sector Union of Australia*[12].

31 It is essential, however, to begin the inquiry with the text of the provision rather than with the decided cases. The person who is to be bound must be a

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10 (1931) 30 AR (NSW) 272 at 277.

11 (1999) 92 FCR 477 at 494 [64] per R D Nicholson J, with whom the other members of the Court agreed.

12 (2000) 201 CLR 648.

successor, assignee or transmittee "to or of the business or part of the business of an employer".

"Successor" and "business of ... a party to the industrial dispute"

32 The immediate focus in argument in these appeals was not upon what is meant by the "business" of the former employer. As three members of the Court pointed out in *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation*[13], "the word 'business' is notorious for taking its colour and its content from its surroundings: see *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd*[14]. Its meaning depends upon its context."[15] Accordingly, the Court held in the *Transport Officers* case that the expression a "successor or assignee or transmittee of the business" of an entity could, and in that case did, extend to succession between two statutory authorities, neither of which carried on any commercial undertaking for profit, but both of which discharged governmental functions.

33 By contrast, the immediate focus in the present matters, in the courts below and in argument in this Court, was upon what is meant by "successor". No doubt that was because both MDIG and Gribbles carried on commercial undertakings. Nonetheless, to identify what must be shown to describe Gribbles as the "successor" to or of a part of the business of MDIG requires identification of the "business" of MDIG and of Gribbles. That is necessary because, in this case, s 149(1)(d) requires the identification of a part of the business of MDIG to or of which Gribbles was successor in its operations at the Moorabbin Heritage Clinic.

34 None of the parties to these appeals proffered any general definition of "successor". Nor did any seek to identify any set of general criteria against which the facts of a particular case should be judged. Rather, the HSU and Gribbles each sought to contend that the presence or absence of particular factual features of the case was sufficient to require the result at which it sought to have the Court arrive.

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13 (1990) 171 CLR 216 at 226 per Mason CJ, Gaudron and McHugh JJ.

14 (1982) 150 CLR 355 at 378-379.

15 See also *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648 at 654 [12] per Gleeson CJ, Gaudron, McHugh and Gummow JJ.

35 It is accepted that it would be wrong to attempt any general definition of the term. Whether one employer is the successor to another is a mixed question of fact and law, and "business" is a word that may have application in a wide variety of different circumstances[16]. But to be a "successor" to the business or part of the business of a former employer, the new employer must enjoy some part of the "business" of the former employer. For the reasons given earlier, it will not suffice to show that the new employer pursues the same kind of business activity. If the new employer does not enjoy any part of the business of the former employer, it cannot be said to be a successor to or of that business, or a part of it.

36 At once it can be seen that this presents the difficulties that attend upon the use of the word "business". How is the "business" of the former employer to be identified? What is meant by saying that the new employer "enjoys" part of that "business"?

37 The "business" of an employer may be described in a number of ways. In many contexts it will suffice to describe the kind of activity conducted. A description like "manufacturing", "retailing" or the like may do. In other contexts more detail may be necessary, as, for example, "window frame manufacturing" or "toy retailing". In s 149(1)(d), however, more and different detail is necessary in order to decide whether one employer is the successor to or of the "business" or part of the "business" of another. So much follows inevitably from the need to consider whether the new employer is a successor to a *part* of the former employer's business. But more fundamentally than that, it follows from the fact that s 149(1)(d) focuses upon succession, assignment and transmission to or of a business which is identified as the business *of* an employer. That necessarily directs attention to what it is that the former employer had which is to be described as the "business" of that employer.

38 In many cases the answer to the questions just presented will be provided by looking at some transaction between the two employers. Where there has been some transaction between them, it will be possible to see whether the former employer transferred the whole, or part, of its business to the new employer. But in other cases there may be no transaction between the former employer and the employer alleged to be its successor. So, for example, in cases of inheritance between natural persons, there may be no transaction between the two employers but it may be clear that the new employer is the successor of the

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16 *PP Consultants* (2000) 201 CLR 648 at 655 [14] per Gleeson CJ, Gaudron, McHugh and Gummow JJ.

business of the former employer. Thus, the existence of some transaction between the two employers is not essential in order to show that one is the successor to the business of the other. Further, whether or not there was some transaction between the new employer and the former employer, there may be a real question about whether what the new employer enjoys is the whole or a part of the "business" of the former employer.

39 The "business" of an employer may be constituted by a number of different assets, both tangible and intangible, that are used in the particular pursuit, whether of profit (if the "business" is a commercial enterprise) or other ends (if the activity is charitable or the "business" of government). In the case of a commercial enterprise, identifying the employer's "business" will usually require identification both of the particular activity that is pursued and of the tangible and intangible assets that are used in that pursuit. The "business" of an employer will be identified as the assets that the employer uses in the pursuit of the particular activity. It is the assets used in that way that can be assigned or transmitted and it is to the assets used in that way that an employer can be a successor.

40 The new employer *may* be a successor, assignee or transmittee to or of the business, or part of the business, of an employer who was a party to the relevant industrial dispute if the new employer, having the beneficial use of assets which the former employer used in the relevant pursuit, uses those assets in the same or a similar pursuit. The means by which the new employer came to have the beneficial use of those assets is not determinative of the question presented by s 149(1)(d). Whether the new employer is a successor, assignee or transmittee, will require examination of whether what the new employer has can be described as a part of the former employer's business. That may present difficult questions of fact and degree.

41 An employer, who has acquired the plant and premises with which, and at which, the former employer conducted part of its business, may well be the successor to that part of the business of the former employer[17]. Yet, in other cases, acquisition of an item of plant used by an employer could not be said to make the acquirer the "successor" to any part of the business of the former employer.

42 A simple example may serve as a basis for illustrating the kinds of question that may arise. The buyer of a second hand motor vehicle sold by an

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17 For example, *Shaw v United Felt Hats Pty Ltd* (1927) 39 CLR 533.

employer would not ordinarily be said to be the successor to a part of that employer's business. More than the bare fact of acquisition of an item of plant used in the former employer's business would have to be shown to warrant the conclusion that one was the successor to a part of the business of the other. Showing that one engages in the same business activities as the other will not always suffice. To pursue the used motor vehicle example a little further, showing that the purchaser used that vehicle for the same kinds of purpose as the employer who sold it, would not, without more, warrant the conclusion that the purchaser was successor to or of a part of the business of the vendor. The purchaser would not enjoy any part of the "business" of the former employer.

43 The conclusion just reached about this example turns upon what is meant by the "business" of the former employer. It understands that word, at least when applied to a commercial venture, as a reference to the combination of the activities pursued in the business and the assets that are used in that business. The conclusion assumes that, either the asset in question (the motor vehicle) is not the sole or principal asset of the business, or that, if it is, it is replaced by another and similar asset which the former employer will use in the same way. That is, the conclusion assumes that the combination of activities and assets which together constitute the former employer's "business" continues largely unaffected by what has happened. There has been no succession because the former employer has not ceased to enjoy any part of its business.

44 The example we have given emphasises the need, when considering the application of s 149(1)(d), to do two things. First, it is necessary to identify exactly what is meant in the context of the particular case, by "the business or part of the business" of the former employer. Secondly, it is necessary to identify what part of that "business" the former employer once had which is now enjoyed by the person allegedly bound by the award.

The application of s 149(1)(d) in this matter

45 The HSU submission was that Gribbles was a successor to that part of MDIG's business constituted by the provision of services at the Moorabbin Heritage Clinic. That submission should be rejected. Gribbles, when operating at the Moorabbin Heritage Clinic, enjoyed no part of the business of MDIG; Gribbles was not a successor to or of any part of the business of MDIG.

46 Gribbles pursued the same business activity as MDIG. Both engaged in the pursuit of profit by conducting a radiology practice. But Gribbles did that at the Moorabbin Heritage Clinic without enjoying any part of the tangible or intangible assets that MDIG had deployed in pursuing its activity as a radiology practice, whether at that place or elsewhere.

47 It is convenient to seek to support that conclusion by considering the features of this case to which the HSU submissions gave chief emphasis – the same business activity conducted in the same place, using the same equipment and the same employees. Both Gribbles and MDIG pursued the same business activity. That activity could be described in a number of different ways. It could be described as providing radiology services or it could be described, with more particularity, as providing radiology services at the Moorabbin Heritage Clinic by employing radiographers to take medical images at that clinic. Nothing turns on the particularity of description. It may be accepted that each pursued the same activity.

48 But what asset of MDIG did Gribbles come to use when it began to pursue that activity at the Moorabbin Heritage Clinic? Both Gribbles and MDIG used the same equipment, but the equipment was Region Dell's. The place where they carried on this activity was not theirs. Each had a separate licence from Region Dell to occupy a part of the clinic premises but MDIG's licence had come to an end and a new licence had been granted to Gribbles. Both employed the same radiographers, but no employee is an asset in the employer's balance sheet to be bought or sold[18].

49 It may be assumed that both Gribbles and MDIG traded at the Moorabbin Heritage Clinic in the hope or expectation that work would come from referrals by doctors working at the clinic or from patients who came to the premises. It may be thought that this hope or expectation could constitute a form of goodwill. If that were so, it may be that the goodwill should have been reflected in the accounts of each. But there was no evidence and no argument advanced about the question of goodwill attaching to this aspect of the business of either MDIG or Gribbles. In particular, it was not suggested in argument, whether in the courts below or in this Court, that Gribbles had succeeded to that part of the business of MDIG which was constituted by MDIG's goodwill at the Moorabbin Heritage Clinic. Indeed, the absence of any dealing between the two (by which MDIG sought to realise some value attaching to such goodwill by exacting a price for it from Gribbles) would suggest very strongly that MDIG had no such goodwill. Be this as it may, the point does not arise.

50 In the end, then, the HSU contention that Gribbles was the successor to a part of the business of MDIG turned upon the bare fact that the business activity which each pursued was identical. For the reasons given earlier, we do not

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18 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.

accept that this suffices to satisfy s 149(1)(d). That conclusion is reinforced when account is taken of the two *Whybrow* cases. Section 51(xxxv) of the Constitution does not support a law providing for the declaration of a common rule for an industry. Yet the HSU contention, if accepted, would read the Act as providing for the Award to operate as a common rule for private radiology practice in Victoria. So much must follow if identity of business activity is all that must be shown to engage the succession provisions of s 149.

51 Neither any party nor the intervener sought to revisit what was decided in the *Whybrow* cases and for so long has been accepted in this field of discourse. As noted earlier, Gribbles submitted that the construction of s 149(1)(d) adopted by the Full Court took the operation of the provision beyond power. That argument proceeded from an acceptance of what was decided in the *Whybrow* cases and it is, therefore, not necessary to examine it further.

Conclusion

52 Each appeal should be allowed. In the appeal by Gribbles, further orders should be made setting aside the order of the Full Court of the Federal Court made on 28 March 2003 and in its place there should be orders that the appeal to that Court is allowed, the orders of Gray J made on 5 July 2002 are set aside and in their place there be an order that the application be dismissed.

53 KIRBY J. Two appeals are before this Court. Each challenges a judgment of the Full Court of the Federal Court of Australia[19]. One appeal is brought by the federal Minister for Employment and Workplace Relations ("the Minister") who had intervened before the Full Court in the appeal from the orders of the primary judge (Gray J)[20]. He is dissatisfied with the outcome of that appeal. In the other appeal, Gribbles Radiology Pty Ltd ("Gribbles") appeals from the judgment of the Full Court, naming Health Services Union of Australia ("HSUA") and the Minister as respondents.

54 Gribbles and the Minister shared a measure of common ground about the interpretation of the provisions of s 149(1)(d) of the *Workplace Relations Act* 1996 (Cth) ("the Act") in issue in the proceedings. However, Gribbles had an additional argument to the effect that, if the interpretation of the contested provision of the Act accepted by the Federal Court were correct, that provision would be invalid as beyond the powers conferred on the Federal Parliament by the Constitution[21]. On the issue of constitutional power, the Minister, supported by HSUA and the Attorney-General for Victoria (intervening), submitted that s 149(1)(d) was constitutionally valid.

55 In my opinion, the construction of s 149(1)(d) of the Act given by the Federal Court was correct. No constitutional invalidity arises on that construction. The appeals should be dismissed.

The facts

56 In December 1993, an industrial dispute which had earlier arisen between HSUA and a number of employers providing radiology services in Victoria was settled, in part, by an award made by the Australian Industrial Relations Commission ("the Commission"). The award was the Health Services Union of Australia (Private Radiology – Victoria) Award 1993 ("the Award"). The schedule of respondents to the Award was extensive. It included "Melbourne Diagnostic Group" which it was agreed at trial was the same business as Melbourne Diagnostic Imaging Group ("MDIG")[22]. It also included "Southern Radiology", identified as having an address in Moorabbin in Victoria. From the wide range of businesses and the designated addresses throughout Victoria, it is

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19 *Gribbles Radiology Pty Ltd v Health Services Union of Australia* [2003] FCAFC 56.

20 *Health Services Union of Australia v Gribbles Radiology Pty Ltd* [2002] FCA 856.

21 Notably by s 51(xxxv) and (xxxix) of the Constitution.

22 [2002] FCA 856 at [17].

apparent on the face of the Award that the industrial dispute so settled included a large number of businesses supplying radiological services throughout the State.

57 By cl 5 of the Award, subject to law, the Award bound employers referred to in cl 48 as respondents in respect of "all their employees whose wages and conditions are determined by this award". It was binding on HSUA and its members. The classifications of employees affected by the Award included various health professionals such as medical imaging technologists, nuclear medicine technologists, radiation therapy technologists and allied employees ("radiographers"). The Award did not extend to radiologists. They are medical practitioners who interpret the radiographic and other images produced by the radiographers whom the Award was principally intended to cover.

58 At the address of Southern Radiology in Moorabbin was an integrated facility operated by Heritage Clinic, the trade name for a number of such facilities operated by Region Dell Pty Ltd ("Region Dell"). Such facilities were operated "to provide, under the one roof, a variety of medical and related services"[23]. Typically, the Moorabbin facility had "a reception area, from which patients could have access to parts of the premises occupied by medical and other practitioners. One part of the premises was devoted to the provision of radiography services."[24]

59 For the lastmentioned purpose, Region Dell equipped the part of the clinic in question with the machinery and furniture necessary for the conduct of such services. Region Dell at no time employed radiographers to work in the clinic. Nor was Region Dell a party to the Award. Over the years, Region Dell entered contractual arrangements with a number of businesses that occupied the relevant portion of its clinic to supply qualified radiographers ("medical imaging technologists")[25] to operate the machinery and to produce images in accordance with written authority given by medical or other healthcare practitioners. Although practitioners outside the clinic could also refer patients for radiographic services, the obvious advantage of the inclusion of the facility in the clinic was that it afforded a prompt specialised service on the premises and a flow of patients to mutual economic advantage.

60 Unfortunately, such economic advantage was not as great as was hoped by the successive licensees of the facility. A lack of sufficient return was the cause

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23 [2002] FCA 856 at [18].

24 [2002] FCA 856 at [18].

25 [2002] FCA 856 at [18].

of the quick succession of three licensees. This succession gives rise to the legal questions now before this Court.

61 On 31 August 1997, Southern Radiology ceased to provide radiographic services in the Moorabbin clinic. The next day, 1 September 1997, MDIG began providing such services in the same facility in the clinic. MDIG did so until 20 August 1999. On 1 September 1999, MDIG ceased business at the Moorabbin clinic. It was at that stage that Gribbles, another provider of radiology services, took over the Moorabbin facility. Gribbles was not named as a respondent to the Award. It was a business in competition with MDIG.

62 Being aware of the approaching termination of the contract with MDIG, Region Dell took steps to facilitate the employment of MDIG's radiographers by Gribbles[26]. On 20 July 1999, Region Dell wrote to the MDIG employees and invited them to send details of their qualifications and current registration to Gribbles. It advised them that Gribbles would contact them to discuss working conditions and offers of employment. Gribbles duly contacted MDIG and asked for permission to approach its staff for the purpose of employing them. MDIG agreed and, by inference, provided Gribbles with the relevant contacts[27]. Telephone conversations ensued in which Gribbles explored offers of employment with the MDIG radiographers. On 20 August 1999, Gribbles wrote to the MDIG radiographers formally offering them part-time employment with Gribbles on the same rostered shifts as they had worked for MDIG[28]. The letter disclosed precise knowledge of the employees' hours of duty and pay rates. It concluded:

> "All other award conditions apply. Looking forward to you joining our team."

Nine of the MDIG radiographers accepted Gribbles's offer. It was common ground that the "award" referred to in Gribbles's letter was the Award in issue in this case.

63 The changeover from MDIG to Gribbles was uneventful. Signage in some public areas of the Moorabbin clinic was altered. However, otherwise the business was conducted by Gribbles at the Moorabbin clinic in the same way as MDIG, using the same equipment and furniture as supplied by Region Dell. The nine continuing radiographers performed the same duties. Like MDIG, Gribbles's "business" was also conducted in other practices. Gribbles had six

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26 [2003] FCAFC 56 at [37].

27 [2003] FCAFC 56 at [19].

28 [2003] FCAFC 56 at [10].

such outlets in Victoria. For ten months the employment went on as before. However, on 1 July 2000, Gribbles gave the radiographers at the Moorabbin clinic a month's notice. It scaled back the activities of that clinic. Soon afterwards it ceased providing services there. It declined to pay severance or redundancy payments to the radiographers in accordance with cl 37 of the Award[29]. Four of the radiographers affected, acting through HSUA, pursued a demand for the redundancy entitlements on the basis of their respective years of service extending to periods which commenced between 1990 and 1993. HSUA commenced proceedings in the Federal Court[30] for the recovery of the Award "underpayment"[31], together with a penalty[32] and interest[33].

64 Various points of past and possible disagreement, not argued in these appeals, can be put to one side. If the Award bound Gribbles, the amounts payable to the claimant radiographers is not contested. Nor has this Court been concerned in an earlier dispute about whether the radiographers were "casual employees" and, as such, fell outside entitlements under cl 37 of the Award[34]. That point was determined against Gribbles by the primary judge. It is not now in contest. Similarly, the promise in Gribbles's letter to the claimant radiographers that "all other award conditions apply" does not foreclose the argument concerning the operation of the Award which Gribbles now advances. This Court is not concerned with any contractual entitlements that the employees may have had pursuant to that promise. Nonetheless, HSUA invoked that undertaking to support its argument that the employment of the radiographers by Gribbles was a continuation of the employment of the previous employees by Southern Radiology and MDIG in the same "business" and on the same "award conditions".

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29 By cl 37, severance pay was calculated by reference to "a continuous period of service". For less than one year: nil; one year but less than two years: four weeks pay; two years but less than three years: six weeks pay; three years but less than four years: seven weeks pay; four years and more: eight weeks pay.

30 Pursuant to the Act, s 178.

31 The Act, s 178(6).

32 The Act, s 178(5)(b).

33 The Act, s 179A.

34 Clause 37(i) of the Award: see [2003] FCA 856 at [55].

The legislation

65 Because Gribbles was not a respondent to the Award, it was necessary for HSUA to rely for its claims upon a provision of the Act extending the operation of the Award to Gribbles, in the foregoing circumstances, as the new employer of the redundant employees. For this purpose, HSUA invoked s 149(1)(d) of the Act. That paragraph of the Act provides:

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

66 Legislation to extend the application of federal awards to employers who were neither parties to the original industrial dispute nor initially bound by an award was first introduced by an amendment to the *Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act") enacted in 1914[35]. In that year, par (ba) was inserted in s 29 of the 1904 Act to provide that:

> "The award of the Court shall be binding on –
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> …
>
> (ba) in the case of employers, any successor, or any assignee or transmittee of the business of a party bound by the award, including any corporation which has acquired or taken over the business of such a party".

67 In 1921, s 29(ba) was amended by the insertion of the words "of a party to the dispute or" after the words "of the business"[36]. Like amendments were made to s 24(1) of the 1904 Act dealing with the binding effect of agreements under that Act[37]. These provisions were unchanged during the life of the 1904 Act until

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35 *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth), s 10. The history is recounted by Callinan J in *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648 at 663-664 [30]-[33].

36 *Commonwealth Conciliation and Arbitration Act* 1921 (Cth), s 4.

37 *Commonwealth Conciliation and Arbitration Act* 1921 (Cth), s 3.

it was repealed by the *Industrial Relations Act* 1988 (Cth) ("the 1988 Act"). That Act reproduced the foregoing provisions, as so amended, in s 149(d). There were some additional amendments. The binding force of the award was made "[s]ubject to any order of the Commission". The words in parentheses "(whether immediate or not)" were added after the phrase "successor, assignee or transmittee". Provision was also made for succession, assignment or transmission of "part of the business" to attract the extended operation of an award. When the 1988 Act was renamed and replaced by the Act as presently in force, s 149 was unaltered[38].

68 The word "business" in s 149(1)(d) is not defined. Nor is there a universal definition of the phrase "part of the business". However, in s 170LB(3) of the Act (appearing in Pt VIB – "Certified agreements") a definition is provided of the expression "a part of a single business" appearing there[39]. For the purposes of that Part, "a *part* of a single business includes:

> (a) a geographically distinct part of the single business; or
>
> (b) a distinct operational or organisational unit within the single business."

The adjective "single" affirms that the "business" there mentioned is one that is ultimately integrated into one economic unit. That adjective does not appear in s 149(1)(d) of the Act. Nevertheless, the definition adopted in s 170LB(3) suggests that the Parliament had in mind, for that Part of the Act, a wide and non-exclusive definition. For a provision such as s 149(1)(d), intended to have a much larger ambit of operation, no narrower view would be taken.

The decisional history

69 *Decision of the primary judge*: At first instance in the Federal Court, the relevant objection by Gribbles to liability under the Award was confined to one based on the interpretation of s 149(1)(d) of the Act. To rebut HSUA's argument that it was the "successor" or "transmittee" of MDIG's "part of" that business, Gribbles relied on the absence of any dealings between itself and MDIG. In support of its argument, Gribbles invoked a decision of the New South Wales Industrial Commission in *Bransgrove v Ward and Syred*[40]. In that case, which

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38 *PP Consultants* (2000) 201 CLR 648 at 651 [2].

39 The Act, s 170LC(1). See also s 170MB of the Act: *Construction Forestry Mining & Energy Union v Henry Walker Eltin Contracting Pty Ltd* (2001) 108 IR 409 at 414 [23].

40 [1931] AR (NSW) 272.

concerned the carrying on of a business of a cinema at a particular address by successive employers, the New South Wales Commission held that the new employer was not the "successor" of the earlier proprietor of the business. In so deciding, it referred to the absence of dealings between the two proprietors[41]:

> "To constitute successorship there must be some definite legal nexus or privity between a respondent … who is the predecessor, and a successor who then, by virtue of the Commonwealth statute, becomes bound by the award. The existence of that nexus or privity must be evidenced either by direct proof of a transaction or by facts from which the conclusion may be drawn of some transference of right to the business from the predecessor to the successor."

70 Various later cases were also cited[42] to support the proposition that mere temporal succession was insufficient to engage statutory or award provisions imposing liability on a "successor, assignee or transmittee". To attract those categories of relationship "a direct, consensual transaction between the two employers is necessary before one can be regarded as the successor, assignee or transmittee of the business, or part of the business, of the other"[43].

71 The primary judge rejected this interpretation. He regarded it as applying a "technical approach"[44] which was inappropriate to the language of the Act, having regard to its context and purpose. Having regard to those considerations, he concluded that the "business" of the radiology practice at the Moorabbin clinic had been "taken over" successively by MDIG from Southern Radiology and by Gribbles from MDIG. The "business" on each occasion was "precisely the same in every relevant respect"[45]. There was no express or implied obligation in the language of s 149(1)(d) for there to be a "definite legal nexus or privity" between the successive employers themselves. A sufficient nexus was afforded by all the facts and circumstances, including the successive arrangements made by Region Dell with the employers concerned. For that reason s 149(1)(d) of the Act operated to bind Gribbles to the Award as a "successor, assignee or transmittee" of "part of the business" of MDIG. The "part of the business" concerned was that

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41 [1931] AR (NSW) 272 at 277.

42 *Barrow v Masonic Catering Co-operative Society Ltd* [1957] AR (NSW) 736 at 739; *Australian Rail Tram and Bus Industry Union v Torrens Transit Services Pty Ltd* (2000) 105 FCR 88 at 100-101 [54].

43 [2002] FCA 856 at [50].

44 [2002] FCA 856 at [50].

45 [2002] FCA 856 at [37].

part of MDIG's business that had formerly been carried on at the Moorabbin clinic. Similarly, the primary judge concluded that, within cl 37(l) of the Award, Gribbles was a "transmittee" of that part of the business of MDIG that involved the provision of radiographic services at the Moorabbin clinic[46]. By force of the Act, read with the Award, this therefore rendered Gribbles liable for the redundancy payments accrued under the Award to the radiographers whom it had "taken over".

72 *Decision of the Full Court*: The Full Court (Moore, Marshall and Merkel JJ) unanimously affirmed the decision of the primary judge[47]. Like the primary judge, in approaching the meaning of s 149(1)(d) of the Act, the Full Court took as its starting point the decision of this Court in *PP Consultants Pty Ltd v Finance Sector Union of Australia*[48]. However, the Full Court accepted, correctly, that that decision had not addressed the statutory questions raised in the present case. It laid emphasis upon the purpose of s 149(1)(d) as a measure designed to preserve the effective settlement of an industrial dispute "by preventing an employer offering inferior terms and conditions of employment"[49]. By the operation of the provision, and hence of an award made in settlement of the earlier industrial dispute, s 149(1)(d) would "have the effect of lessening the prospects of a further dispute … in which the Union would seek to establish, by the making of another award, similar terms and conditions of employment (to the extent to which that is now permitted under the Act)"[50]. In this way, the Full Court concluded that the primary judge had correctly identified "the role of Region Dell in establishing a sufficient nexus between the two businesses to constitute a succession for the purposes of s 149(1)(d)"[51]. The appeal was dismissed.

73 *Appeal to the High Court*: Now, by special leave, the Minister and Gribbles appeal to this Court. However, their arguments are somewhat different. Gribbles, in its interpretative submissions, laid emphasis on the notions of "succession" and "transmission" of a "business". The Minister laid emphasis on what he said was the error of the Federal Court in appreciating the meaning of the phrase "part of the business". For the first time, Gribbles raised an argument

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46 [2002] FCA 856 at [55].

47 [2003] FCAFC 56.

48 (2000) 201 CLR 648.

49 [2003] FCAFC 56 at [33].

50 [2003] FCAFC 56 at [33].

51 [2003] FCAFC 56 at [39].

concerning the validity of s 149(1)(d) under the Constitution, should the paragraph have the meaning the Federal Court assigned to it. The Minister supported the validity of the section but submitted that constitutional considerations should be kept in mind in deciding the meaning of s 149(1)(d). Where a meaning was available that avoided constitutional invalidation, it should be preferred.

The issues

74 The issues in contest in these appeals may broadly be described as those involving the construction of s 149(1)(d) of the Act in its application to the facts and the constitutional issues raised by Gribbles. However, it is convenient to break these issues down a little further so that the points to be decided are as follows:

(1) *Interpretation – the "succession" issue*: Whether, properly construed, s 149(1)(d) of the Act applied to the facts found on the footing that Gribbles was a "successor, assignee or transmittee" of MDIG. No separate or different issue was said to arise in respect of the application of the counterpart provisions of the Award[52];

(2) *Interpretation – "part of the business"*: Whether, within s 149(1)(d) of the Act, a "succession" or "transmission" had taken place of "part of the business" of MDIG from that entity to Gribbles, in the sense that Gribbles was a "successor … or transmittee" of part of the business of MDIG, an "employer", or had "acquired or taken over the business or part of the business" of such employer;

(3) *Constitution – validity issue*: Whether the resolution of the foregoing issues of interpretation produced a result that rendered the whole or part of s 149(1)(d) of the Act invalid as beyond the power of the Parliament to make a law with respect to conciliation and arbitration so as to bind to the terms of an award an employer who was neither a party to the original industrial dispute or award nor relevantly connected with it; and

(4) *Constitution – interpretative approach*: Whether to avoid constitutional invalidity, an approach should be taken to the meaning of s 149(1)(d) of the Act that narrowed the ambit of that paragraph and excluded any purported application to a subsequent employer such as Gribbles.

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52 The Award, cl 37(l)(i). See [2002] FCA 856 at [15].

75 In accordance with the usual approach of this Court, it is appropriate to start with the questions of interpretation[53]. Depending on the resolution of such questions, it may be possible to avoid any constitutional questions. Thus, if the arguments of Gribbles and the Minister were to succeed, the claims upon Gribbles by HSUA on behalf of the redundant radiographers would fail by virtue of the Act. No constitutional question would then arise.

76 On the other hand, in this area of federal law in particular, it is impossible to deny the impact of the Constitution. From the first enactment of the 1904 Act, the Constitution has permeated and controlled the language of the successive statutes and the approach of the courts and of industrial tribunals to the ambit of the legislation concerned[54].

Interpretation: the "successor" of a "business"

77 *The competing constructions*: HSUA supported the construction of s 149(1)(d) of the Act adopted by the Federal Court. It argued that the section did not lend itself to a narrow or technical interpretation but warranted a purposive construction designed to fulfil the objective of the settlement of the industrial dispute by an award, notwithstanding a change in the legal identity of the employer. It argued that no constitutional consideration invalidated this approach or required that the Act be read down so as to stay within power.

78 Gribbles (with the support of the Minister) repeated its arguments of interpretation that had failed below. It pointed out that the business of MDIG, which had previously employed the radiographers at the Moorabbin clinic, was in direct competition with Gribbles. Both employers previous to Gribbles, Southern Radiology and MDIG, remained integral and undiminished. No equipment or furniture previously belonging to MDIG, still less Southern Radiology, had passed to Gribbles. The respective businesses remained entire and unchanged. All that had happened was that successive arrangements had been made by different employers to engage radiographers with relevant skills, training and availability. There had been no relevant direct dealings between Gribbles and MDIG to sell or assign part of MDIG's business in Moorabbin or

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53 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *R v Hughes* (2000) 202 CLR 535 at 565-566 [66]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81]; *BHP Billiton Ltd v Schultz* (2004) 79 ALJR 348 at 356 [29], 372-373 [134]-[135]; 211 ALR 523 at 532, 555-556.

54 A recent example of the way in which powers under the Constitution may affect the process of statutory construction is *BHP Billiton* (2004) 79 ALJR 348 at 373-377 [136]-[160]; 211 ALR 523 at 556-562.

part of its business in Victoria to Gribbles. Relevantly, the employers were linked only by a temporal connection.

79 According to Gribbles, the words "successor, assignee or transmittee" in s 149(1)(d) of the Act were technical words connoting a legal relationship involving direct dealings and privity between a former employer and a successor assignee or transmittee. Gribbles no more fell within any of those categories than did the successive cinema proprietors in *Bransgrove*[55]. Geographical or temporal connection between businesses was not sufficient to expand the application of a federal industrial award to a new business operating in the same place after the withdrawal of an old business. Something more, in the nature of a relationship of succession, assignment or transmission, was essential to attract that significant legal consequence.

80 Gribbles complained that, were it otherwise, although it had no dealings or arrangement directly with Southern Radiology or MDIG, and although it had employed the radiographers concerned for only ten months, it would be burdened with substantial redundancy obligations under the Award. This would be so, although it was not a respondent to the Award nor had it been a party to the industrial dispute which the Award had settled.

81 The construction urged by Gribbles is a viable one. It gains support from the authority of *Bransgrove* and cases that have followed the same approach. Such an outcome would be compatible with the recent moves, evident in the Act and in its 1988 predecessor, to encourage workplace agreements and to limit the operation of federal awards. However, for a number of reasons I do not consider that it represents the preferable construction of s 149(1)(d). Matters of statutory interpretation before the High Court usually involve the adoption of a preferable construction, given the ambiguity of some legislative language[56]. On this, I agree with the Federal Court. Unless constrained by constitutional considerations, I would adopt the construction which the judges of the Federal Court favoured.

82 *The decision in PP Consultants*: First, it is necessary to consider whether anything said by this Court in *PP Consultants*[57] controls the outcome of these appeals. That was a case concerning s 149(1)(d) of the Act. However, the factual situation was quite different. A bank had closed one of its branches and appointed a pharmacist to carry on a bank agency in conjunction with the

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55 [1931] AR (NSW) 272. See above at [69].

56 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42].

57 (2000) 201 CLR 648.

pharmacy business. The agency was carried on in premises that combined those in which the banking and pharmacy businesses had formerly been conducted. This Court concluded that the pharmacist had acquired no part of the bank's business, whether by way of succession, assignment or transmission. Although the pharmacist was "involved in banking activities"[58], it was not, after the change of arrangements, carrying on "banking business" as this Court characterised that expression[59]. The Court held that the pharmacist was carrying on the business of a *bank agent* and that this was distinct from the "business" formerly carried on in the premises by the *bank* itself. Obviously, the business of a bank agent involved a much narrower range of activities and services. To that extent, it was a different "business", distinct not only in degree but in kind.

83 In the course of arriving at this conclusion, which was sufficient to decide that appeal, the joint reasons of four members of this Court elaborated the meaning of "business" in a context such as s 149(1)(d)[60]:

> "As was pointed out in *Australian Transport Officers Federation*[61], 'the word "business" is notorious for taking its colour and its content from its surroundings'. Thus, for example, the expression 'the business of government' signifies something quite different from the expression 'the business of grazing' which was considered in *Hope v Bathurst City Council*[62]. In the latter case, it was held that the expression 'carrying on the business of grazing' meant 'grazing activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis'[63]."

84 In the same reasons, the approach to be adopted in cases presented by s 149(1)(d) of the Act was described in the following terms[64]:

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58 (2000) 201 CLR 648 at 656 [19].

59 (2000) 201 CLR 648 at 656 [19].

60 (2000) 201 CLR 648 at 654 [12] per Gleeson CJ, Gaudron, McHugh and Gummow JJ.

61 (1990) 171 CLR 216 at 226, referring to *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 378-379 per Mason J.

62 (1980) 144 CLR 1.

63 *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8-9 per Mason J, with whom the other members of the Court agreed.

64 (2000) 201 CLR 648 at 655 [14]-[15].

> "The question whether one person has taken over or succeeded to the business or part of the business of another is a mixed question of fact and law. For this reason and, also, because 'business' is a chameleon-like word, it is not possible to formulate any general test to ascertain whether, for the purposes of s 149(1)(d) of the Act, one employer has succeeded to the business or part of the business of another. Even so it is possible to indicate the manner in which that question should generally be approached, at least when a non-government employer succeeds to the commercial activities of another non-government employer. …
>
> As a general rule, the question whether a non-government employer who has taken over the commercial activities of another non-government employer has succeeded to the business or part of the business of that other employer will require the identification or characterisation of the business or the relevant part of the business of the first employer, as a first step. The second step is the identification of the character of the transferred business activities in the hands of the new employer. The final step is to compare the two. If, in substance, they bear the same character, then it will usually be the case that the new employer has succeeded to the business or part of the business of the previous employer."

85 The judges in the Federal Court both at first instance[65] and on appeal[66] quoted the above passages and approached the application of s 149(1)(d) of the Act in the manner described. The "identification or characterisation" of the business of the first employer (MDIG) was described. Then the second step was taken to identify "the character of the transferred business activities in the hands of the new employer" (Gribbles). The two "business activities" were then compared. Unsurprisingly, they were found to be identical. To that extent, *PP Consultants* indicates that "usually" if the business of the "new employer" is identical, the latter may be described as having "succeeded to the business or part of the business of the previous employer".

86 Correctly, the Federal Court appreciated that *PP Consultants* was not determinative of the issues of construction presented by this case, where the factual situation was different. But in so far as the three-stage process described in *PP Consultants* addresses in a practical and commonsense way the "mixed question of fact and law" presented by the Act – looking at the facts before and after – it lends support to the approach that HSUA urged upon this Court for the resolution of the construction issues argued in these appeals.

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65 [2002] FCA 856 at [36], [40].

66 [2003] FCAFC 56 at [28].

87 *Analysis of s 149(1)(d) of the Act*: There are several additional indications in s 149(1)(d) of the Act that provide support for the approach that the Federal Court took to its meaning and intended operation.

88 First, there is the context and purpose of the section. Adopting a purposive construction to legislation is now the usual approach of this Court, as of other courts in contested issues of statutory construction[67]. Subject to the Constitution, that is the approach that should be taken to a facultative provision such as s 149(1)(d) of the Act. The purpose of that paragraph, as the Full Court correctly recognised, was to ensure the successful attainment of the power in the industrial tribunal "to settle industrial disputes effective[ly] by extending the instrument of settlement to 'the ever changing body of persons within the area of such disturbances'"[68].

89 If the aim of s 149(1)(d) of the Act were, so far as the constitutional power over conciliation and arbitration permitted, to allow industrial awards to play their part in quelling industrial disputes in the real world of a changing workforce composition and changing employer identity and description, a purposive interpretation of the paragraph would support the view adopted by the Federal Court. A literal or "technical" interpretation of the concepts of succession, assignment or transmission of a business would restrict the effectiveness of the paragraph to achieve its legitimate practical industrial purposes[69].

90 Secondly, there are internal indications in s 149(1)(d) which reinforce the conclusion that the paragraph is meant to have a broad operation. It has endured in the legislation for ninety years, in terms basically unchanged. Such amendments to the provision as have been enacted have reinforced the original impression about its ambit. Thus, the introduction of the phrase "[s]ubject to any order of the Commission" in the opening words of s 149(1) reserves to the industrial tribunal a large power to adjust the operation of s 149 where a proper

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67 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585 at 588 [11]; 205 ALR 1 at 4.

68 *North Western Health Care Network v Health Services Union of Australia* (1999) 92 FCR 477 at 485 [28] per R D Nicholson J, citing *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 455 per Starke J.

69 *North Western Health Care Network* (1999) 92 FCR 477 at 502 [97]-[98].

case can be made for such adjustment. Instead of addressing to the Commission any complaints it had concerning the alleged unfairness of the application to it in respect of the radiographers whom it took over from MDIG, Gribbles sought to avoid liability on legal grounds. Perhaps this course was adopted because Gribbles promised employees of MDIG who joined "our team" that "[a]ll other award conditions apply". The prospect of a special order in such a case (assuming it to be available otherwise) would have been negligible.

91 Other amendments to the paragraph indicate the purpose of successive Parliaments to expand, rather than to contract, its ambit. Thus the inclusion of the words "whether immediate or not" clearly has that effect. Similarly, the inclusion of reference to "part of the business" of an employer and the addition of the last phrase "including a corporation that has acquired or taken over the business or part of the business of the employer" show a purpose of extending the operation of s 149(1)(d) by invoking an additional constitutional support found in the corporations power[70].

92 Thirdly, the use of the chameleon-like word "business" must be considered. This is not a technical word of fixed legal connotation. It is not given a particular meaning for the purpose of s 149(1)(d). As R D Nicholson J pointed out in *North Western Health Care Network v Health Services Union of Australia*[71], the expression "the business" in s 149(1)(d), particularly by reference to the definite article ("the") in the context of succession, assignment and transmission:

> "requires an asset or property capable of such disposition and not an activity. A succession occurs when there is at law a devolution of property on a person's death. An assignment occurs when there is a transfer of property, particularly personal property. A transmission involves the transfer of a right from one person to another, generally involuntarily, as on death or bankruptcy[72] … Strictly speaking there cannot be a succession, assignment or transmission of a business or part of a business. For something to occur to that effect it is necessary that it occur in relation to the component parts of the business such as the leasehold or other realty interests; the plant and equipment; or the

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70 Constitution, s 51(xx).

71 (1999) 92 FCR 477 at 485-486 [29].

72 See *Wolfson v Registrar-General (NSW)* (1934) 51 CLR 300 at 311-312 per Starke J.

goodwill. In my view this points to the language in the paragraph being used broadly, not strictly[73]."

93 *Consistency in purposive interpretation*: Good answers are available to the suggested obstacle presented by the line of authority starting with *Bransgrove* and the holding that "successorship" requires evidence of "nexus or privity" between the business of the predecessor and the successor. Like the judges of the Federal Court, I do not consider that the approach taken by the Industrial Commission in 1931 is one that should be followed today for the application of s 149(1)(d) of the Act.

94 In 1931, the approach to statutory construction was usually a literal one, even where (as was often the case) it produced an outcome that, in Lord Diplock's words, obviously caused legislation to misfire[74]. In the approach to statutory construction since those days, this Court has made progress. It should give effect to that progress consistently and not pick and choose the occasions for its application. Differential application of the purposive approach to statutory construction suggests that some other, possibly undisclosed, premise is controlling the judicial construction in the given case. Especially in giving effect to legislation in the sensitive field of industrial relations, it is essential to judicial neutrality to apply the purposive approach followed elsewhere, and not to return to a narrow, 1930s textualism.

95 The decision in *Bransgrove* was complicated (as the present case is not) by the competition in that case between a federal and a State award applicable to the successive employers and the resolution of the application of the federal award by the State industrial tribunal. The amendments to s 149(1)(d) of the Act (and its predecessors) since 1931 have indicated a consistent parliamentary purpose to expand the ambit of the paragraph[75]. In this context, confining "successor" to the person upon whom property devolves on the death of a human being would seriously limit the utility of s 149(1)(d), as re-enacted in 1988 and further re-enacted in 1996 in the Act. Given the context and purpose of these re-enactments, it can scarcely be imagined that the paragraph was intended to operate, for the primary class, solely for such a limited category of "successors".

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73 cf *Re Theatre Managers Award* (1953) 77 CAR 291 at 295.

74 Diplock, "The Courts as Legislators", in Harvey (ed), *The Lawyer and Justice*, (1978) 263 at 274, cited in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424 per McHugh JA; *Project Blue Sky* (1998) 194 CLR 355 at 381-382 [69]-[72]. See also *Rich v Australian Securities and Investments Commission* (2004) 78 ALJR 1354 at 1378-1379 [117] of my reasons; 209 ALR 271 at 305-306.

75 Described above at [66]-[67]; see also *PP Consultants* (2000) 201 CLR 648 at 663-664 [31]-[34] per Callinan J.

96 Moreover, the concatenation of words ("successor, assignee or transmittee") lends force to the submission of HSUA that the expression is used in a broad and non-technical way. Thus, in this context, "successor" simply means an employer that comes later, that is, "succeeds" another. That meaning helps to achieve the purpose of s 149(1)(d). It removes the necessity (possibly apart from cases of assignment) of establishing privity or direct connection between the "successor" and the "predecessor". Even in the limited case of succession on death, it may be noticed that the beneficiary on succession may have had no contact with the deceased. The idea of "nexus or privity" introduced into the reasoning in *Bransgrove* is another instance of judicial words, possibly apt to the resolution of the dispute under consideration, thereafter being given the authority and precision of a legislative text. That is inappropriate at the best of times. It is especially inappropriate in the interpretation of a different statutory provision enacted by a different Parliament sixty years after the judicial words were written.

97 A direct connection between the predecessor and successor in business will often be the case. The fact and terms of the connection will commonly be a consideration relevant to the application of s 149(1)(d) of the Act where the question is whether a later employer is a "successor, assignee or transmittee" to or of the business or part of the business of an earlier employer. However, nexus or privity between the successive employers is not essential. It is not spelt out by the Parliament and should not be read in by judges. A court applying s 149(1)(d) must ask whether, in all of the factual circumstances proved by the evidence, the "new employer" answers to the description of a "successor, assignee or transmittee" within the paragraph. If it does, s 149(1)(d) applies.

98 *Conclusion: new employer is "successor"*: When this approach is taken, no error is demonstrated in the decision of the Federal Court that Gribbles was a "successor" or "transmittee" of the business or part of the business of MDIG, "an employer who was a party to the industrial dispute". Gribbles followed MDIG into the radiology facility at the Moorabbin clinic. No more than a weekend separated the conduct of the two "businesses" in the same place. Indeed, the businesses "were precisely the same in every relevant respect"[76]. Essentially, all that was changed was the signage, the new employment arrangements with the continuing radiographers and the reportage on the radiographs and other images thereafter by Gribbles's radiologists.

99 As it happens, there was direct contact between Gribbles and MDIG, as evidenced in the correspondence between Gribbles and MDIG and between Gribbles and MDIG's then employees. This is not a case of purely coincidental

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76 [2002] FCA 856 at [37].

commencement of an entirely new business in premises that happened to have earlier housed a similar business. Furthermore, both MDIG and Gribbles had direct dealings with Region Dell. And their "business" was relevantly the exact same. In such circumstances, there was no error on the part of the Federal Court in deciding that the Award was binding on Gribbles as a "successor" or "transmittee"[77]. To that extent (and subject to the remaining construction argument and the constitutional arguments) the Federal Court was correct to conclude that s 149(1)(d) of the Act applied to the circumstances of this case.

Interpretation: successor to "part of the business"

100 *The competing constructions*: HSUA supported the approach adopted by the Federal Court concerning the meaning and application of the phrase "part of the business" in s 149(1)(d) of the Act. However, the Minister (supported by Gribbles) argued that the Federal Court had wrongly approached the meaning of the expression "part of the business of an employer" in the paragraph. This argument should also be rejected.

101 The submission was that an analysis of the evidence did not sustain the conclusion that the Moorabbin clinic constituted a discrete "part" of MDIG's "business" for economic purposes. Hence, it was erroneous to conclude that there was any such "part of the business", still less that Gribbles was a "successor" or "transmittee" of such part. It was not argued for HSUA that Gribbles had succeeded to the whole of MDIG's "business". It was submitted that (as the Federal Court had found) it had succeeded to that "part" which, until the preceding week, had been carried on by MDIG in Moorabbin.

102 In support of this argument, the Minister relied on judicial *dicta* suggesting that, to constitute a "part of the business", the activities in question

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77 This conclusion on the construction argument arrives at a result under Australian federal legislation similar to that reached under European Union law, including in the United Kingdom. See the decisions on the Transfer of Undertakings (Protection of Employment) Regulations 1981 (UK), reg 3(1) made pursuant to the Acquired Rights Directive (Council Directive 77/187/EEC) considered in *Fairhurst Ward Abbotts Ltd v Botes Building Ltd* [2004] ICR 919 and *Cheesman v R Brewer Contracts Ltd* [2001] IRLR 144 at 148 [11] per Lindsay P, referring to *Sanchez Hidalgo v Asociacion de Servicios Aser* [1999] IRLR 136 (ECJ). In *Sanchez Hidalgo* at 138 [22] it was held that "[w]hilst the absence of any contractual link between the transferor and the transferee ... may be evidence that no transfer within the meaning of the Directive has occurred, it is certainly not conclusive". *A fortiori* in Australia where, under the Act, "transfer" is not required but simply that the new "business" is, in the result, a "successor, assignee or transmittee".

had to comprise a severable part of the entire business as earlier constituted[78]. On this footing, it was submitted that MDIG's radiology "business" remained "intact" after the cessation of the provision of radiography services at the Moorabbin clinic on 1 September 1999. The correct interpretation of events was simply that MDIG had ceased conducting "the business" at the clinic. Gribbles had continued operating its own "business", just as it had done before 1 September 1999. MDIG had one less branch. Gribbles had one more branch. But the respective "businesses" were the same. They were not subdivided into "parts".

103 *The meaning of "part"*: It can be conceded that a narrow interpretation of s 149(1)(d) would sustain this submission. However, in my view, the construction proposed is not the preferable one. The view adopted by the Federal Court represents the better interpretation of "part of the business" in this context.

104 First, regard must be had once again to the purposive interpretation of the statutory words and to the beneficial or remedial character of s 149(1)(d) of the Act. It is true that "part of the business" may be a distinct and separate unit of the business enterprise, conducted on its own and then acquired or taken over by another "business". There is no difficulty in adopting that approach. The question is whether it is the *only* possible meaning of the expression "part of the business".

105 Experience shows that it is not uncommon for businesses to shut down parts of their enterprise in certain geographical areas in order to permit the business to concentrate on other parts. This happens not infrequently in transnational businesses that dispose of, or close, branches of their businesses in one country because of economies that they perceive in expanding or developing branches in other countries. Similarly, in a nation of continental size, such as Australia, the same can happen with parts of national businesses.

106 The Act is clearly intended to have application to federal awards operating in different parts of Australia. Branches of a business enterprise may be fully integrated within "the business". Yet, for the purpose of succession, assignment or transmission, the "part of the business" in question may be excised. This may happen so that it can be "acquired or taken over" by another "business". There is no reason why s 149(1)(d) should not apply to such a case. There is every reason why it should. The words are wide enough. More importantly, the remedial object of the paragraph, to maintain the settlement of a past industrial dispute, is best achieved if "part of the business of an employer" is given a meaning that includes a geographical part of an integrated "business".

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78 *Crosilla v Challenge Property Services* (1982) 2 IR 448 at 457; *Finance Sector Union of Australia v PP Consultants Pty Ltd* (1999) 89 IR 161 at 170 [35].

107 Secondly, in *PP Consultants*, the joint reasons of Gleeson CJ, Gaudron, McHugh and Gummow JJ proceeded on the basis that, for the bank involved in that case, the activities of its branch at Byron Bay were "part of its banking business"[79]. That designation does not stand with the suggestion advanced by the appellants in these appeals that "part of the business" must be entirely separate and a severable part of the "business" itself. In *PP Consultants*, in the passage quoted and elsewhere, this Court did not adopt such a narrow approach to the phrase. It preferred a broad and commonsense application of the words in keeping with their purpose.

108 Even if, as the Minister argued, MDIG's "business" at the Moorabbin clinic was a "branch" integrated with the whole of MDIG's "business", it was also "part of" that business with distinct local or geographic features that permitted its identity, as such, to be clearly perceived. In the current circumstances of corporate arrangements within and beyond nations, "there is something artificial about the concept of a free standing, commercially viable part of a business; everything depends on the way the business structures its accounts"[80]. Moreover, because the structuring of such accounts is wholly within the power of employers, it would defeat the object of s 149(1)(d) of the Act to give it a meaning that permitted employers, by unilateral action, to take themselves out of the reach of the paragraph, although its object was to ensure practical outcomes in the settlement of industrial disputes.

109 Thirdly, it is that context that lends force to the adoption of a meaning of "the business or part of the business" extending to a case such as the present. It supports a construction of the phrase that will apply to whatever it is that an employer, party to the industrial dispute, has been conducting in order to fulfil its role of employer[81]. Some industrial disputes arise in relation to parts only of businesses. The eligibility and extent of coverage of registered organisations of employees affect the ambit of the industrial disputes that can be created. Such considerations would have been known to those who drafted the Act. They argue strongly against the interpretation of "part of the business" urged by the Minister and Gribbles. They support the construction adopted by the Federal Court.

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79 (2000) 201 CLR 648 at 655 [16].

80 *Community and Public Sector Union v Stellar Call Centres Pty Ltd* (1999) 92 IR 224 at 236 [50] per Wilcox J.

81 *North Western Health Care Network* (1999) 92 FCR 477 at 485 [29] per R D Nicholson J.

110 As stated in *PP Consultants*, the question before this Court is a mixed one of fact and law. Not only does "business" take its meaning from the context; so also does the phrase "part of the business". It is sufficient to attract s 149(1)(d) of the Act that a successor, assignee or transmittee of part of the business of an employer is identified[82]. The submission for the appellants that "part of the business" must be economically free-standing attempts, effectively, to repeal or constrict the critical phrase that was inserted in 1988 to expand the operation of s 149(1)(d). Essentially, it seeks to render a "part of the business" equivalent to a "business" in and of itself. This Court should reject such a needlessly narrow reading of the paragraph, as it has been enlarged by amendment. In so far as, elsewhere in the Act[83], the Parliament has given an indication of what it has in mind when addressing "a part of a single business", the approach there adopted contradicts the narrow one urged by the Minister and Gribbles in this case.

111 *Conclusion: s 149(1)(d) applies*: I accept that the meanings urged by the Minister and Gribbles are arguable. However, they are needlessly narrow and literalistic. They would frustrate the achievement of the object of s 149(1)(d). That paragraph is not confined to preventing deceptive arrangements within the corporate structure of an employer of the type identified and defeated by the predecessor to s 149(1)(d) in *George Hudson Ltd v Australian Timber Workers' Union*[84]. That was not the sole intended operation of such provisions. Nor do the words and purposes of s 149(1)(d) support the contention that the succession provisions apply only where the "business" of the second employer is sold, leased or given to that employer by the first employer. In its context, and against the background of its long operation, the Federal Court was correct to give s 149(1)(d) of the Act the interpretation which it preferred. Subject to the constitutional arguments raised for the first time in this Court, the appeals should therefore be dismissed. I turn immediately to the constitutional contentions.

Constitutional argument: s 149(1)(d) of the Act is valid

112 *Gribbles's argument*: Gribbles accepted that the Parliament could make laws extending the legal effect of an award in settlement of an industrial dispute. However, it submitted that, where the award was purportedly extended to parties who were not participants in the original industrial dispute, the power of extension was limited by the fundamental concept of "arbitration" in s 51(xxxv) of the Constitution and the procedures that that process of dispute resolution implies.

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82 *PP Consultants* (2000) 201 CLR 648 at 663-664 [33] per Callinan J.

83 The Act, s 170LB(3).

84 (1923) 32 CLR 413.

113 Under s 51(xxxv) of the Constitution, the Federal Parliament is not empowered to settle an industrial dispute by legislation expressed in general terms or by a law purporting to state a common rule for the parties or their industry[85]. This approach to federal legislative powers under s 51(xxxv) of the Constitution has roots deep in the early decisions of this Court[86]. From time to time, suggestions have been made that the view embraced in those early decisions was unduly narrow and paid insufficient attention to the constitutional words "conciliation" (as distinct from "arbitration") and "prevention" (as distinct from "settlement")[87]. However, this is not the occasion to explore such questions. To some extent, the supposed limitations on the legislative powers of the Parliament under s 51(xxxv) of the Constitution have been remedied by the reliance in more recent years upon the corporations and external affairs powers[88] to support federal industrial regulation. An indication of the invocation of the corporations power may be found in the closing words of s 149(1)(d) of the Act as it now stands.

114 Because it is possible to resolve both of the constitutional issues on the basis of the arguments advanced relying on s 51(xxxv) of the Constitution invoked by Gribbles, that is the course that I will adopt. Since the events giving rise to these proceedings, the Parliament of Victoria, acting pursuant to s 51(xxxvii) of the Constitution, has referred to the Federal Parliament legislative powers previously belonging to the State Parliament to make laws on defined industrial matters[89]. By Pt XV of the Act, effect has been given to such reference of constitutional powers. Although the events concerning Gribbles and HSUA arose wholly within the State of Victoria, it was properly agreed by all parties,

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85 For example, *Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311 at 316, 322, 325, 342; *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 at 405; *R v Kelly; Ex parte State of Victoria* (1950) 81 CLR 64 at 82.

86 *Whybrow* (1910) 11 CLR 311 at 330 per Isaacs J, 340 per Higgins J; *Merchant Service Guild of Australasia v Newcastle and Hunter River Steamship Co Ltd [No 1]* (1913) 16 CLR 591 at 643 per Higgins J, see also at 633 per Isaacs J; cf at 616 per Barton ACJ.

87 See *R v Heagney; Ex parte ACT Employers Federation* (1976) 137 CLR 86 at 105 per Murphy J; cf at 90 per Barwick CJ; *R v Turbet; Ex parte Australian Building Construction Employees and Building Labourers' Federation* (1980) 144 CLR 335 at 354.

88 Constitution, s 51(xx), (xxix).

89 *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic), s 4(2).

including the Minister and the Attorney-General for Victoria, that the enlarged powers of the Commonwealth now found in the Act had no application to the present proceedings. The appeals must therefore be decided in terms of federal legislative powers under the Constitution, as those powers stood before the reference of Victorian State powers[90].

115 Gribbles's complaint was that, if (as the Federal Court had held) it could be roped retrospectively into the operation of the Award made in settlement of an industrial dispute between other parties, in which it was not involved and to which it was not a party, that course would amount, in effect, to the imposition of liability upon it divorced from the constitutional power limited to "arbitration". It would extend the Award to a business such as Gribbles's not in the settlement of an industrial dispute involving Gribbles but merely by the application of a federal enactment applying that consequence to an employer which happened to be the physical successor of an earlier employer, operating its "business" at the same location. It would do so without any direct dealings between the two employers such as might involve proper adjustments between them for goodwill and, specifically, for the liability which Gribbles was thereby assuming although such liability had accumulated during the earlier employment of the radiographers by Southern Radiology and MDIG[91].

116 To the extent that s 149(1)(d) of the Act purported to extend the legal effect of the Award to a subsequent non-respondent employer, such as Gribbles, this was said to be beyond the legislative competence of the Parliament. It amounted to the imposition of industrial liabilities on a subsequent employer by reference to a consideration of locality and time of operations not by reference to the settlement by arbitration of the earlier industrial dispute between different parties having no relevant relationship with Gribbles[92].

117 To the extent that it was impossible or inappropriate to give s 149(1)(d) of the Act a more limited interpretation so as to avoid the consequence upheld by the Federal Court[93], Gribbles submitted that the paragraph was beyond power. It was therefore of no effect to afford the means of imposing obligations under the Award upon it[94].

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90 Constitution, s 51(xxxvii).

91 cf *George Hudson* (1923) 32 CLR 413 at 440-441.

92 *Whybrow* (1910) 11 CLR 311 at 318 per Griffith CJ, 322 per Barton J, 327-329 per O'Connor J, 330-335 per Isaacs J.

93 *Acts Interpretation Act* 1901 (Cth), s 15A; the Act, s 7A.

94 *George Hudson* (1923) 32 CLR 413 at 440-441.

118 *Constitutional invalidity rejected*: Gribbles's first constitutional argument should be rejected. It represents an endeavour to resuscitate a narrow view concerning the ambit of the power afforded to the Parliament to make laws for the prevention and settlement of industrial disputes, relevantly, by arbitration. In effect, the argument attempts to restore a conception of the scope of "arbitration" under the Constitution, as expressed in the earliest days of this Court[95].

119 Later decisions of the Court have modified that view which had at first suggested that an award could extend only to the *actual* disputants. The inconvenience of such a view was obvious given the constantly changing nature of the real industrial setting to which the Act (and the constitutional power that supports it) is addressed. It was the recognition of this reality that led a majority of this Court to uphold the constitutional validity of s 24 of the 1904 Act (now s 149) when it was challenged in *George Hudson*[96]. In that case, Isaacs J explained why a broader view should be adopted[97]:

> "The very nature of an 'industrial dispute', as distinguished from an individual dispute, is to obtain new industrial conditions, not merely for the specific individuals then working from the specific individuals then employing them, and not for the moment only, but for the class of employees from the class of employers limited by the ambit of disturbance or dislocation of public services which has arisen or which might arise if the demand were not acceded to and observed *for a period really indefinite*. The concept looks entirely beyond the individuals who are actually fighting the battle. It is a battle by the claimants, not for themselves alone and not as against the respondents alone, but by the claimants so far as they represent their class, against the respondents so far as they represent their class. … *If Parliament therefore chooses to include 'successors', it may*."

120 In the same case, Higgins J, with years of experience as President of the Commonwealth Court of Conciliation and Arbitration, added still further practical insights[98]:

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95 *Australian Boot Trade Employés Federation v Whybrow & Co* (1910) 10 CLR 266 at 281 per Griffith CJ, 301, 303 per O'Connor J.

96 (1923) 32 CLR 413.

97 (1923) 32 CLR 413 at 441 (emphasis in original).

98 (1923) 32 CLR 413 at 451-452.

> "[N]othing would be so likely to prevent agreements as the knowledge, on the part of the unions, that the employer could get rid at any time of his obligations under [the award] by assigning his business – even by assigning it to a new company having the same shareholders holding shares in the same proportions as in the former company. It is only by some such provision as the present that the agreement – or the award – can be made effective. In my opinion the provision that assignees of the business shall be bound is 'incidental' to the power to make laws for conciliation and arbitration; just as a provision that executors of a party to the dispute should be bound would be 'incidental' to that power. … [T]he provision for binding assignees, etc, is directly aimed … so as to make the provisions for conciliation or arbitration effective. It is a provision directly conducive to the exercise of the power granted by s 51(xxxv) of the Constitution. Men are not so likely to submit to peaceful methods of settling their disputes, by agreement (conciliation) or award (arbitration) if they feel that those with whom they dispute can evade the obligations imposed by transferring their business to their sons, or by assigning it to a company having a new name and the same shareholders."

121 None of the small number of cases that have considered s 149 and its predecessors since *George Hudson* has cast doubt on this larger view of the ambit of the constitutional power with respect to "arbitration". Thus in the *Metal Trades Case*[99], Latham CJ remarked:

> "An agreement between two persons may produce an effect upon third persons, but it can impose duties or confer rights only upon those who make the agreement. Similarly an award may produce an effect upon third persons, but it can directly affect the legal relations only of those who were parties to the arbitration proceedings of which it is the result. In industrial arbitration the concept of 'parties' is extended by a doctrine of representation which is in itself associated with the idea of 'industrial disputes'. Industrial disputes are essentially group contests – there is always an industrial group on at least one side."

122 To the same effect was the decision in *R v Kelly; Ex parte State of Victoria*[100] where *George Hudson* was reaffirmed and explained:

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99 *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 at 403.

100 (1950) 81 CLR 64 at 81, citing *George Hudson* (1923) 32 CLR 413 at 440-441 per Isaacs J (emphasis of Isaacs J).

> "The provision in question simply made the award effective 'throughout the whole period of its operation for and against those who during that period are or voluntarily *come within the area of the dispute*'."

123 As a result of this analysis, the early decisions of this Court, expressing a more limited view about the ambit of the power to extend the application of awards (and agreements) by legislation, must now be accepted as having been overruled. The approach expressed in *George Hudson* involves a reflection of the way conciliation and arbitration for the prevention and settlement of industrial disputes had actually taken place before and after federation in Australia, between parties representative of contesting group interests. To confine the arbitration power solely to the actual parties to the original arbitration would ignore that reality. This did not mean that the Parliament was empowered under s 51(xxxv) to enact a common rule for industries. That much of the early decisions on the scope of "conciliation" and "arbitration" remains. But it did mean that provisions such as s 149(1)(d) of the Act and its predecessors were upheld as within power. This was so because they addressed the industrial realities to which the constitutional power was directed and in respect of which it authorised the Federal Parliament to make relevant laws.

124 The result of this approach has been an acceptance that the Act may give binding effect to awards and specify the circumstances in which awards may be made, the subject matters with which awards may deal, how such awards may be varied or have their period of operation extended and in what circumstances they may be enforced. Thus, by federal legislation, awards may be extended in their term or period of operation[101]. Variations may be made to the provisions of such awards once they come into force[102]. This Court has held that, although an award be made in settlement of a comprehensive dispute, the Parliament might later restrict the legal effect of the provisions of the award to "allowable matters". Notwithstanding such a legislative intrusion into the balances and content of an arbitrated award, the federal law for that purpose was upheld in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining & Energy Union* as one that "bears the character of a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes"[103]. Although this conclusion attracted dissenting opinions in this Court, the views so stated about the ambit of

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101 *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1920) 28 CLR 209. See now the Act, s 148.

102 *R v Commonwealth Court of Conciliation and Arbitration and Australian Railways Union; Ex parte Victorian Railways Commissioners* (1935) 53 CLR 113 at 141-142.

103 (2000) 203 CLR 346 at 359 [27]-[28] per Gleeson CJ, 417 [221], 418-419 [225] per Gummow and Hayne JJ.

federal legislative power are now established by authority. No narrower view should be taken in the present case of the ambit of legislative power to extend the application of an award to a successor or transmittee of part of a business.

125 To the complaint of Gribbles that this conclusion extended to it the coercive operation of an award reached in settlement of a dispute between other parties, the same answer should be given as was offered eighty years ago by Starke J in *George Hudson*[104]:

> "[I]nsistence upon absolute definiteness of parties ignores very largely the known character of industrial disturbances. They are not confined to the actual participators; historically, the great industrial fights have been waged by unions, for the benefit of all their members, employed and unemployed, present and future."

126 On the facts of the present case, there are several circumstances that sustain this Court's conclusions as to the large ambit of the power under s 51(xxxv) to alter, vary, extend and diminish an award made in settlement of an industrial dispute between particular parties. Gribbles moved into an area of business operations that was the subject of an industrial dispute that had resulted in an award. Gribbles knew of the Award. It showed this by promising that the Award conditions would apply to the continuing radiographers. It set out to recruit trained employees who could suit its economic interests by moving quickly (indeed immediately with only a weekend between) into exactly the same work, using the same equipment, in the same clinic, operating the same shifts, performing the same duties, under the same conditions.

127 With Gribbles having voluntarily entered into the area of "business" the subject of an earlier award, the notion that the Parliament lacked the power to uphold the settlement achieved by the Award by extending its provisions to an employer such as Gribbles is completely unconvincing. It is a conclusion that could not stand with this Court's most recent pronouncements on the ambit of the constitutional power to legislate expressed in *Re Pacific Coal*.

128 There is therefore no invalidity of s 149(1)(d) of the Act, any more today than in 1923 when *George Hudson* was decided in respect of its predecessor. The paragraph is valid. There is no need to invoke the *Acts Interpretation Act* 1901 (Cth) or any other provision to restrict its operation further in this case.

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104 (1923) 32 CLR 413 at 453.

Constitutional argument: reading down is unnecessary

129 It follows that neither is there any need to "read down" s 149(1)(d) of the Act in order to ensure that the Act, and the Award of the industrial tribunal to which it attaches, did not apply beyond the limits of the federal legislative power under s 51(xxxv) of the Constitution[105].

130 This conclusion does not deny that a borderland exists where the restrictions inherent in the notion of an award arrived at in the discharge of the constitutional function of preventing or settling an "industrial dispute" by "conciliation and arbitration" will have consequences for the operation of s 149(1)(d) of the Act. If, for example, the successor "employer" was truly no more than a coincidental occupant of the same premises, perhaps after an interval and performing functions somewhat different from the first employer, questions might well arise both under s 149(1)(d) of the Act and under the Constitution[106]. But the present is far from such a case.

131 As this Court said in *PP Consultants*[107], the question in each instance is "a mixed question of fact and law". Judgments are required because of the "chameleon-like" words of the statute. Outside the more recent reliance upon new heads of power for federal industrial regulation[108], the limits involved in the ambit of constitutional arbitration continue to cast a shadow. But the shadow was partially lifted following the decision of this Court in *George Hudson*. The attempt of Gribbles to restore it in this case fails. There is no constitutional problem in the application of s 149(1)(d) of the Act to the facts of the present case. And there is no need to read the Act down to avoid any such problem.

Conclusions

132 Both appeals therefore fail. The appeal by Gribbles should be dismissed. As agreed between the parties to that appeal, there should be no order as to costs. The Minister's appeal should be dismissed. The Minister should pay the costs of HSUA.

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105 The Act, s 7A.

106 cf *Torrens Transit Services* (2000) 105 FCR 88 at 100-101 [54].

107 (2000) 201 CLR 648 at 655 [14].

108 Such as s 51(xx) (corporations power) (see s 298G of the Act), s 51(xxix) (external affairs power) (see ss 3(f), 170CK(1) and Scheds 10 and 12) and s 122 (territories power) (see s 5(3)(a)(iii)).

43.