

APPENDIX A

CORRS IN BRIEF – TRANSMISSION OF BUSINESS

16 July 2002

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Transmission of Business

A recent decision of the Federal Court in *Health Services Union of Australia v Gribbles Radiology Pty Ltd* [2002] FCA 856 has made it clear that there can be a transmission of industrial instruments from one employer to another even where there was no commercial relationship or transaction between the two employers.

The Facts

Region Dell Pty Ltd ("Region Dell") trading as Heritage Clinics in Melbourne ("the Clinic") provided a variety of medical related services including radiography to the general public. The Clinic owned the equipment and furniture necessary to provide the radiography services. The Clinic did not, however, employ radiographers, but contracted with another entity which provided the services of a number of radiographers.

Over a number of years different businesses had the benefit of the contract to provide radiography services. Since 1997 Medical Diagnostic Imaging Group ("MDIG") had provided the service. Among the people employed by MDIG to work at the clinic were four radiographers who had previously worked at the Clinic as employees of a different company that at that time, held the contract to provide radiography services. MDIG was a named party to the HSUA Private Radiology – Victoria Award 1993 ("the HSUA Award").

In 1999 MDIG ceased providing radiography services to the clinic. The clinic then engaged Gribbles to perform the same services. Gribbles gained the right to carry on the radiography services through a contract made directly with Region Dell. At no time did Gribbles have

commercial dealings with MDIG. On commencing this contract (immediately after the cessation of the contract with MDIS), Gribbles engaged the same four radiographers. Gribbles was not a party to the HSUA Award.

In July 2000, Gribbles terminated the services of the four radiographers. Gribbles did not pay severance pay to the four employees on the basis that it was not a party to and not bound by the HSUA Award which provided for redundancy and severance entitlements.

The four radiographers made application to the Federal Court alleging breaches of the HSUA Award which they argued had transmitted to Gribbles pursuant to the transmission of business provisions of the *Workplace Relations Act 1996* (Cth) ("the Act").

The Issues

Gribbles was not a named party to the HSUA Award. In order to be liable to make the severance payments, it had to be shown that Gribbles, pursuant to section 149 of the Act was a successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of MDIG.

A number of recent transmission of business cases have focused on the meaning of the second element of this provision – that is whether that which transmitted was "a business" or "part of a business" of the previous employer. In this case Gray J found that the commercial activities that Gribbles was undertaking were "part of" the business of MDIG.

Gribbles argued, however, that in the absence of some direct transaction between MDIG and Gribbles, it could not be a successor, assignor or

transmittee of any part of the business of MDIG. Gray J held that a technical interpretation of the words "successor, assignee or transmittee" in the context of the transmission of business provisions was misplaced. Gray J found that it was not necessary for a direct, consensual transaction to take place between two employers before one could be the successor, assignee or transmittee of a business.

On the facts, Gray J found that Region Dell was the party which determined who was to provide the medical imaging services. Its decision to enter into a contract with Gribbles, in place of MDIG had the effect of transferring the business of providing radiography services at the clinic from MDIG to Gribbles.

As a result Gribbles was bound by the HSUA Award and was liable to make severance payments to the four employees.

Lessons for Employers

This case demonstrates the care that employers need to take in any transaction involving not only the sale or purchase of part of a business, but also

where a new contracting party effectively "takes over" an already outsourced part of a business from an existing contractor.

For more information contact

Amanda Coulthard

61 7 3228 9343

amanda_coulthard@corrs.com.au

Breen Creighton

61 3 9672 3173

breen_creighton@corrs.com.au

Val Gostencnik

61 3 9672 3093

val_gostencnik@corrs.com.au

Andrew Ball

61 2 9210 6832

andrew_ball@corrs.com.au

Stephen Price

61 2 9210 6236

stephen_price@corrs.com.au

Nicholas Ellery

61 8 9426 1615

nicholas_ellery@corrs.com.au

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Corrs In Brief provides information about topical legal issues.

Information contained in this brief is intended as an introduction only and should not be relied on in place of legal advice.

APPENDIX B

PORT STATUS / PORT ANALYSIS

	Private port	Shipper controlled port	Shipper dominated port	Consider towage port	Ports at issue	Exclusive licence permitted
Weipa		X				
Cairns						X
Mourilyan			X			
Lucinda			X			
Townsville				X		X
Abbot Point		X		X		
Mackay			X			X
Hay Point		X		X		
Dalrymple Bay		X		X		
Gladstone						X
Bundaberg			X			X
Brisbane				X		
Newcastle						
Port Jackson				X		
Port Botany						
Port Kembla						
Eden			X			
Westernport	X					
Melbourne						
Geelong	X					
Portland	X					
Adelaide	X					
Port Stanvac		X				
Port Pirie	X					
Whyalla	X					
Port Bonython		X				
Wallaroo	X					
Port Giles	X					
Ardrossan		X				
Port Lincoln	X					
Thevenard	X					
Esperance						X
Albany						X
Bunbury						X
Kwinana				X		X
Fremantle				X		X
Geraldton						X
Onslow			X			X
Cape Cuvier		X				X
Dampier		X				X
Port Hedland		X		X		X
Cockatoo Island		X				
Cape Lambert	X			X		
Darwin						
Gove	X					
Groote Eylandt	X					
Hobart / Spring Bay			X			
Bell Bay						
Devonport						
Burnie						
Port Latta			X			

EXPLANATORY NOTE - SHIPPER CONTROLLED PORTS

WEIPA

- All cargo moved out of port is owned by Comalco.
- Tugs are owned by Comalco.
- Tug operating agreement is with Comalco.

ABBOTT POINT

- All product moved ex port is owned/sold by Mount Isa Mines.
- Current towage operation is a 50/50 joint venture between Mount Isa Mines and Adsteam.

HAY POINT

- Hay Point is owned and operated by BHP.
- Tugs are owned and operated by BHP.

DALRYMPLE BAY

- Dalrymple Bay is owned and operated by Ports Corp of Queensland, but recently floated on the stock exchange on a 99 year basis as part of the Prime Infrastructure Trust.
- Tugs are owned by terminal operator and operated by a crew co-operative, Dalrymple Marine Services.

PORT STANVAC

- Refinery owned and operated by Mobil.
- Tugs are utilised at Mobil's request.

PORT BONYTHON

- All product is owned and shipped by Santos.
- All port operations directed by Santos.

ARDROSSAN

- Port is owned by Ausbulk.

CAPE CUVIER

- Port is owned and operated by Dampier Salt Ltd, a subsidiary of Hammersley Iron. Cape Cuvier is a salt loading facility facing the open sea.
- Tugs are owned by Dampier Salt and manned by contract crew. They are moored in protected waters at Carnarvon, approximately 40nm south of Cape Cuvier.

DAMPIER

- Port is operated by the Port of Dampier Port Authority.
- Majority of iron ore cargo is account Hammersley Iron.
- Hammersley Iron operates four tugs which are manned by contract crew.
- Woodside Petroleum owns four tugs manned and managed by Riverwijs.

PORT HEDLAND

- Port is operated by Port Hedland Port Authority.
- Majority of cargo moved through port is account BHP.
- All tugs in the port are owned and operated by BHP.

COCKATOO ISLAND

- All operations are controlled by Portman Mining.
- Tug services provision is under agreement with Portman Mining.

SHIPPER DOMINATED PORTS

MOURILYAN

- 100% of product is account Queensland Sugar.

LUCINDA

- 100% of product is account Queensland Sugar.

MACKAY

- 40% of product is account Queensland Sugar.

BUNDABERG

- 90% of product is account Queensland Sugar.

EDEN

- 94% of revenue generated from Harris Daishowa's export of woodchips.
- Balance from the discharge of petroleum for Mobil Oil.
- Tug operations are provided under contract.

ONSLOW

- All products shipped are controlled by Onslow Salt.

HOBART / SPRING BAY

- Both ports are owned and operated by Hobart Ports Corporation.
- Tug operations are contracted to North Western Shipping & Towage Co.

PORT LATTA

- Port is owned and operated by Australian Minerals Ltd.
- Tug operators are North Western Shipping & Towage Co.
- Danbar Marine Services is the contractor for the port.

PORTS CONSIDERING OWN TOWAGE OPERATIONS

TOWNSVILLE

- Townsville Port Authority is considering own towage operations.

ABBOTT POINT

- Tug operations currently provided by JV, of which exclusive shipper (MIM) is 50% participant.
- Could be considered by Mount Isa Mines (joint venture partner) at the end of the current Agreement.

HAY POINT

- Owner (BHP) currently operates tugs.

DALRYMPLE BAY

- A possibility under the recent change of ownership.

BRISBANE

- Port of Brisbane Corporation has considered owning towage operations in the past and recently confirmed its continuing interest in this option.

PORT JACKSON

- Sydney Port Corporation has considered the commercial provision of its emergency response tug.

KWINANA

- Port is the Fremantle Outer Harbour, owned and operated by Fremantle Ports.
- Kwinana caters for bulk and petroleum cargoes, major controller of own cargo being BP with 22% of vessel movements.
- Tugs owned and operated by Adsteam Harbour.
- Informal comment from FPA that it is considering own service at end of current licence.

FREMANTLE

- Port is the Fremantle Inner Harbour, owned and operated by Fremantle Ports.
- Fremantle caters mainly for container, motor vehicle and livestock movements.
- Tugs owned and operated by Adsteam Harbour.
- As for Kwinana.

PORT HEDLAND

- Port is owned and operated by Port Hedland Port Authority.
- Iron ore and salt are exported with the major principal being BHP.
- BHP owns all six of the harbour tugs.

CAPE LAMBERT

- Cape Lambert is purely an iron ore loading facility owned by Robe River Mining.
- Two tugs are owned and operated by Robe River using contract crews outside union control.