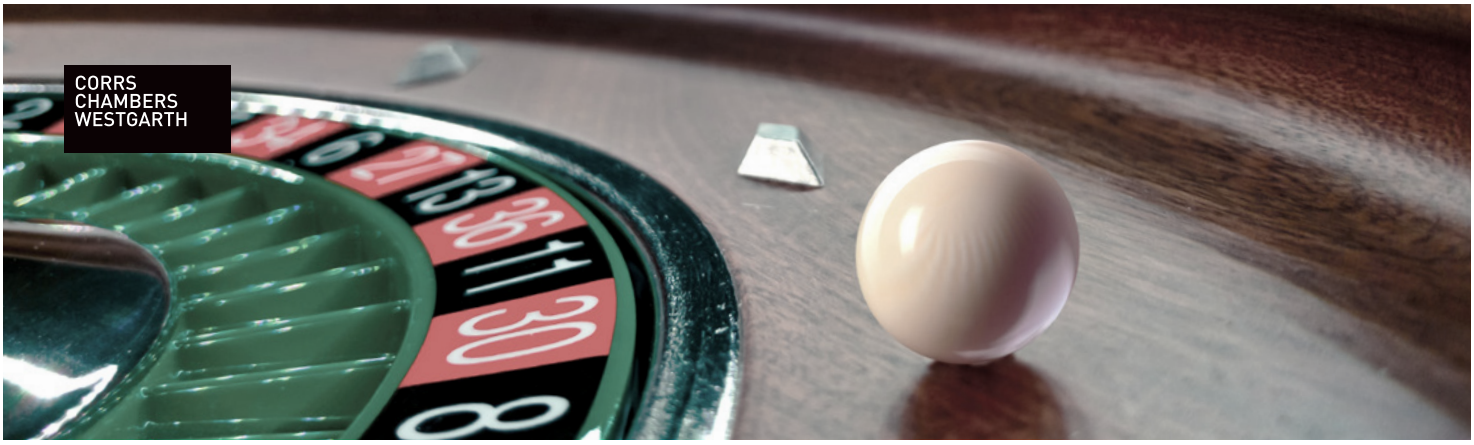

Gambling with transfer of business under the Fair Work Act

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Prior to the enactment of the *Fair Work Act 2009* (**FW Act**), an enterprise agreement (**EA**) could only transmit from the employer who made it, to bind another employer, where all or part of the 'business' of the first employer had transferred to the second.

Despite the fact that Part 2-8 of the FW Act is titled 'Transfer of business', this is a misnomer. That is because an EA now transfers to a new employer where there has been a 'transfer of work' – so long as the work being performed after the change is 'the same, or substantially the same' as before the change.

For this reason, since 2009 the provisions have had a much broader field of operation than was formerly the case. This is borne out by the fact that they are a factor that needs to be taken into account in the context of many kinds of corporate transactions and also in all manner of restructuring and reorganisations – including where employees move between associated entities within a corporate group.

In the recent decision in *Crown Sydney Gaming Pty Limited v United Workers' Union*[1] (***Crown***) the Federal Court found that work performed by employees who transferred from Crown subsidiaries in Melbourne and Perth to another subsidiary in Sydney was not 'the same, or substantially the same' as they had performed in Melbourne and Perth. Accordingly the EA applying at the Melbourne and Perth casinos did not transfer to the operator of the Sydney casino.

The decision is significant because:

- the approach taken to applying the same or substantially the same test is novel. It places significant weight on geography and other organisational matters not previously considered to be relevant to whether work is 'the same, or substantially the same' after a change; and
- applying to the Court for a declaration removed the need for the second operator to apply to the Fair Work Commission (**Commission**) for orders stopping the Melbourne and Perth EAs transferring. This enabled conditional offers of employment to be utilised, so the second operator had certainty that the EA would not transfer with the employees, before they were actually employed by the Sydney entity.

In light of these considerations, the decision could clearly be of assistance to businesses that find themselves in potential transfer of business situations, and as such merits further consideration. To that end, below we provide a brief overview of the legislation before outlining the facts of *Crown* in greater detail and the reasoning of the Court. We then explore some of the potential implications of the Court's decision for Australian business.

1 [2022] FCA 97.

The 'transfer of business' provisions

The provisions of Part 2-8 of the FW Act are intended to ensure that EAs[2] that apply to a given employer (**Old Employer**) 'transfer' to, and become binding upon, another employer (**New Employer**) where the New Employer engages some or all employees of the Old Employer to perform work that is 'the same, or substantially the same' as the work they performed for the Old Employer.

For an EA to 'transfer' in the relevant sense, there are four requirements that must be satisfied:

1. that the employee's **employment with the Old Employer has terminated**;
2. that the employee becomes **employed by the New Employer within three months** of the termination of employment;
3. that the work the employee performs for the New Employer '**is the same, or substantially the same**' as the work they performed for the Old Employer; and
4. that there is a 'connection' between the Old Employer and the New Employer.

A relevant '**connection**' can be established where:

- pursuant to an 'arrangement' between them, the New Employer '**owns or has the beneficial use** of some or all of the assets (whether tangible or intangible) that the Old Employer owned or had the beneficial use of and that 'relate to, or are used in connection with, the transferring work';
- the Old Employer has **outsourced** work to the New Employer;
- work that had formerly been outsourced is **in-sourced**; or
- the New Employer is an '**associated entity**' of the Old Employer.

Where these requirements are met, any transferrable instrument that covered the Old Employer covers the New Employer in relation to the transferring work. Importantly, whilst the transferrable instrument covers the parties in relation to the transferring work 'no other enterprise agreement…that covers the new employer at the transfer time covers the transferring employee in relation to that work'.

Finally, the Commission has power to make a range of orders concerning the transfer of these instruments. They include orders that transferring instruments that would, or would be likely to, cover the New Employer 'does not, or will not' do so, and/or that an EA that already covers the New Employer covers, or will cover, the transferring employee.[3]

The *Crown* Case

Crown Sydney Gaming Pty Limited (**Crown Sydney**) is a subsidiary of Crown Resorts Limited (**Crown Resorts**). This latter entity has two further subsidiaries that operate gaming and hotel facilities in Melbourne (**Crown Melbourne**) and Perth (**Crown Perth**).

Crown Sydney is in the process of starting to operate 'private, "member-only" gaming facilities under a restricted gaming licence' at its Barangaroo facility.

In order to secure experienced staff to operate this facility Crown Sydney made offers of employment to 86 staff at Crown Melbourne and Crown Perth (**Transferring Employees**), all of whom are covered by one of three EAs.

Crown Sydney wished to engage the Transferring Employees on the terms of an agreement that was specific to the Barangaroo operation.

The most obvious way to achieve this would have been to seek an order from the Commission that the three EAs not transfer. Instead, Crown applied to the Federal Court for a declaration to the effect that the employment of the Transferring Employees by Crown Sydney 'will not result in a transfer of business' within the meaning of the FW Act.[4]

Crown Sydney succeeded, with Justice Jagot making the declaration it sought.

Her Honour's key finding[5] was that the work to be performed by the Transferring Employees would not be 'the same, or substantially the same' as the work they performed at Crown Melbourne and Crown Perth.

2 According to section 312(1) transferrable instruments can include enterprise agreements, workplace determinations and 'named employer awards' (as that term is defined in section 312(2).

3 Section 318(2) sets out the parties who may apply for an order under section 318(1), whilst section 318(3) lists the criteria that the Commission must take into account in deciding whether or not to make an order under section 318(1).

4 A declaration is a formal statement of a court of law setting out the rights of the parties in the circumstances of the case. On the capacity to seek declaratory relief in a case such as *Crown* see *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56, and para [8] of the opinion of Justice Jagot in *Crown*.

5 At para [13]

The reasons are set out in just five subparagraphs[6] as follows:

1. The work performed by an employee is not confined to the carrying out of tasks in an abstract sense: rather it can, depending on the circumstances, '**include the location at which the work is performed**' 'and other aspects related to the performance of the tasks comprising the job or work'.
2. If the tasks were 'the same, or substantially the same' as those performed in Melbourne or Perth, they would still be performed 'in Sydney **in a new facility in a new business enterprise**'. Furthermore the existing facilities in Melbourne and Perth **would continue to be operated by Crown Melbourne and Crown Perth respectively**.
3. This was not a case where an employer proposed to transfer employees from one location to another proximate location 'where the employees continue to carry on the same work **in the existing business from the same proximate location**'. In such circumstances the location factor 'may have no bearing upon the characterisation of the work as the same or substantially the same'.
4. Neither Crown Melbourne nor Crown Perth had any **capacity to direct the Transferring Employees to continue to perform their work at the Sydney location**, which supports the characterisation of the work to be performed in Sydney as work that is not 'the same, or substantially the same' as the work they presently perform in Melbourne and Perth.
5. 'The facilities at Crown Sydney will **not be available to the general public** and accordingly, the facilities and tasks to be performed at Crown Sydney will be different from those performed in Melbourne and Perth'.

If should be noted that the trade union that represented the Transferring Employees, the United Workers Union (**UWU**), was party to the proceedings and did not oppose the making of the declaration sought. Whilst that does not alter the duty of the Court to apply the provisions according to law, it means the contrary argument was not put and that will no doubt be a point made by other parties in the future who argue that the reasons should not be followed.

Does the decision alter the existing law?

Despite the apparent centrality of the 'same work' requirement to the Part 2-8 regime, there is surprisingly little authority as to the meaning of that term. The principal case is the decision of Justice Katzmann in *Community and Public Sector Union, NSW Branch v Northcott Supported Living Limited* [2021] FCA 8 (**Northcott**).[7]

Like *Crown*, this case involved an application for declaratory relief. Justice Katzmann undertook a detailed examination of the requirement in the context of a restructuring of the provision of disability health services in NSW following the establishment of the NDIS.

In *Northcott*, Justice Katzmann started from the premise that it would not be appropriate to adopt a 'technical approach' when considering whether an employee was performing substantially the same work as had formerly been the case. The focus should be on whether the 'fundamental nature' of the work had changed, rather than upon a comparison of the particular duties of the two positions.

In practical terms, this means that an employee can be seen to be performing substantially the same work even if:

- the manner in which they perform their duties has changed;
- the new position contains additional duties;
- some duties are no longer required; and
- a typical working day in the new position has a 'different composition'.

Importantly in the present context, the work to be performed by the transferring employees in *Northcott* was to be performed at the same geographical location as it had prior to the putative transfer.

Strangely perhaps, there is no reference to *Northcott* in the judgment of Justice Jagot in *Crown*. Nevertheless, it can credibly be said that Crown identifies a number of substantive factors that can properly be taken into account in determining whether the requirement is met and as such expands the range of factors identified in *Northcott*. In doing so, it seems to give New Employers more to work with in designing arrangements with a view to avoiding the transfer of an EA.

6 At para [14]

7 For analysis of Northcott, see Corrs Chambers Westgarth, *Illuminating the operation of the transfer of business provisions in the Fair Work Act*.

The Court or the Commission?

The decision by Crown Sydney to apply to the Court for a declaration, rather than seeking an order of the Commission that the EAs at Melbourne and Perth not transfer with the employees, was likely motivated by the desire to make offers of employment conditional upon the Melbourne and Perth EAs not transferring.

The conditional offer strategy suits a situation where the New Employer feels that it is unable commercially to accept a scenario where EAs transfer which are not appropriate for the conduct of their business. Making an unconditional offer of employment to the transferring employees involves risk, because at the time of making the offer the New Employer does not know whether the Commission will order that the Old Employers EAs not transfer, or whether the Court will make a declaration to that effect.

The strategy involves the offers of employment being contingent upon the Commission making an order that the Old Employer's EA not transfer. The objective being that if the Commission does not make such an order, the offers will lapse and the employment will never commence – thereby protecting the New Employer from any EA transferring to it. That is an important objective in many cases, including where employees are to transfer between associated entities.

It is worth noting that such an objective is at least contemplated by the FW Act. The General Protections provisions, amongst other things, protect employees (and prospective employees) from being adversely affected because they are entitled to the benefit of an EA. But interestingly, there is an exception which enables New Employers adversely to affect prospective employees by not offering them employment because they will bring a transferring EA with them which will bind the New Employer.

Some individual members of the Commission have been prepared to make orders over the years that EAs not transfer where conditional offers of employment have been made. However, in *Transport Workers' Union of Australia v Viva Energy Australia Ltd,*[8] in a majority decision, a Full Bench of the Commission determined that the making of orders in such circumstances was not permissible.

The reason for this was that because the offer was conditional, the Commission could not find that a 'transfer of business' was 'likely'.

It is significant, therefore, that in *Crown*, and indeed in *Northcott* before it, the Federal Court was prepared to make a judicial declaration as an alternative to any order of the Commission. It is important to appreciate, however, that a declaration is a discretionary remedy. This means that it would have been open to the Court to decline to grant the relief - for example on the basis that the issues are more appropriately determined in the Commission.

That said, *Crown* lends helpful support to the proposition that employers have the capacity to have these questions determined in the Court, rather than the Commission – for example, where they wish to utilise a conditional offer approach.

In that respect, if for no other reason, the decision in *Crown* will be welcome by potential New Employers.

Implications?

Whilst recognising that there is relatively little authority as to their meaning and effect, the decision in *Crown* clearly indicates that 'work' for purposes of the transfer of business provisions is susceptible of a broader interpretation than has commonly been assumed. The specific source of flexibility in this instance was that the work to be performed by the Transferring Employees was at a location that was geographically remote from their former place of work. Conceivably other factors could also be relevant in this context – for example, use of different technology to perform the work post-transfer or all manner of different contexts.

It perhaps also significant that, as noted earlier, the relevant trade union did not oppose the grant of declaratory relief.

That said, it must be recognised that the reasoning of the Court in *Crown* is not as full as might have been anticipated for a case that potentially breaks new ground in the interpretation of an important part of the FW Act. This suggests that businesses that subsequently seek to rely on the decision may encounter rigorous opposition – for example where a trade union considers that the interests of its members would be adversely impacted by the making of a declaration (or, indeed, a Section 318 order of the Commission).

As one example, it may be said that it is hard to see why the fact that the Old Employer did or did not have the capacity to direct the Transferring Employees to continue to perform their work for the New Employer at a new location has any bearing on whether the work to be performed at the new location is 'the same, or substantially the same' as the work performed at the old location.

8 [2019] FWCFB 6212

Furthermore, questions may be raised as to the relevance of the fact that the existing facilities in Melbourne and Perth will continue to operate after the projected commencement of operations at Barangaroo, and the Old Employer still required the same work to be performed, presumably in exactly the same way, and with no discernible reduction in demand. On the other hand, the fact that this factor was considered to be of relevance in Crown might enable businesses that are engaged in planning transactions, restructures and reorganisations in the future to rely upon it as evidence that the work to be performed for the New Employer was not the same or substantially the same in the relevant sense

It may also be queried whether the fact that, unlike the operations in Melbourne and Perth, the facilities at Barangaroo are not 'available to the general public' has any relevant bearing upon whether the work to be performed at the new facility is 'the same, or substantially the same' as work performed in Melbourne and Perth. As against that, it is possible that in some situations dealing with the general public would involve materially different risks and require different conduct than a more private environment where prospective members were subject to some form of vetting and had agreed to observe certain rules of conduct would indeed constitute a relevant difference between the work performed for the Old Employer and for the New Employer.

Whatever its limitations, the decision in *Crown* clearly shows that the physical distance between the old location and the new one can be relevant in applying the same work test, and that in some cases location may be determinative. It also leaves open the possibility that a broader range of factors may be relevant in this context than has conventionally been assumed.

The decision is also to be welcomed as confirmation the Court can, in appropriate circumstances, exercise its discretion to grant declaratory relief as an alternative to going to the Commission – particularly in the context of internal restructures. As such, the possibilities opened up by the decision may be of real assistance to businesses in circumstances where they may otherwise be forced to live with EAs that are not well-suited to their operations.

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