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No transmission of business in outsourcing, Federal Court finds

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A former electricity meter reader has had his claim for underpayment rejected after the Federal Court ruled there was no transmission of business between his employer and the utility that outsourced the work.

In a decision that clarifies the law on transmission of business when work is outsourced, Justice Susan Kenny found that the meter reading company, Automated Meter Reading Services (Aust) Pty Ltd (AMRS), was not bound by the industrial instruments that applied to the electricity distributor.

The former employee of the meter reading contractor brought the claim seeking compensation for an alleged failure by the company to pay him the amount required under the relevant award and certified agreement.

He claimed the utility, Powercor Australia Ltd, transmitted part if its business to AMRS when it engaged it to perform meter reading services and that the industrial instruments that applied to it also applied to the new company.

Powercor was established when Electricity Services Victoria was split into five businesses and privatised during the Kennett years, and for a period of time directly employed its own meter readers.

Three years later, in 1997, the company first outsourced its meter reading function to an external operator, retaining only some of the employees that had carried out the work to perform "special" meter reading tasks.

The employee worked for Powercor until 1999, when he accepted a redundancy package and went to work for the company that was then contracted to perform the meter reading services.

AMRS won the contract in 2002 and hired the employee on a casual basis, a position he held until 2004.

He argued that AMRS failed to pay him the amounts required under a 1998 award and two subsequent certified agreements in 1999 and 2002 between Powercor and the ASU (his union).

The question for the court was whether AMRS was bound by these instruments under the old transmission of business provisions (s149(1) and s170MB) of the Workplace Relations Act.

Was meter reading a part of Powercor's business?

The first issue Justice Kenny dealt with was whether meter reading formed a part of Powercor's business and therefore could be transferred.

Applying the tests set down by the High Court in PP Consultants Pty Ltd v Finance Sector Union of Australia and Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd, she found that Powercor's business was "using significant assets to distribute electricity to western Victoria and western metropolitan Melbourne," not the meter reading function performed by AMRS.

This was established by the regulatory framework and licensing regime that governed the

company's operations as well as evidence from company managers that the great bulk of its assets and revenues related to electricity distribution.

Meter reading was only an ancillary function necessary to support Powercor's core business, even though it was required to measure customers' electricity under a Victorian Metering Code.

Justice Kenny ruled that meter reading was not a part of Powercor's business, and therefore could not have been transmitted to AMRS under the Workplace Relations Act.

Was there a transmission of the metering business to AMRS?

Justice Kenny went on to find that, even if meter reading was a part of Powercor's business, it had not been transferred to AMRS through the outsourcing process.

Again relying on the High Court's *PP Consultants* and *Gribbles* decisions, she said the test she was required to apply was whether "Powercor disposed of a meter reading business that is now enjoyed by AMRS".

She found that, rather than a transmission of business occuring, AMRS was carrying on a new business of meter reading for Powercor under the contract.

This conclusion was supported by the fact that the equipment used by AMRS employees for reading meters, such as PDE devices, sealing tongs and seals, and magnetic logos, were owned by Powercor and that AMRS had no exclusive right to perform meter reading under the contract.

It was also relevant that Powercor remained subject to significant penalties under state laws and the Metering Code in relation to meter reading, Justice Kenny found.

Does the law enable employers to contract out of their award obligations too easily?

Justice Kenny acknowledged that some might argue the law she had applied meant it was a straightforward matter for employers to contract out of their obligations under agreements and awards.

While declining to take a position– she said she was required to apply the law as set down by the High Court in any event – she noted relevant academic and judicial commentary on the issue, including the judgement of former High Court Justice Ian Callinan in *PP Consultants* and the Federal Court's decision in North Western Health Care Network v Health Services Union of Australia.

The difficulties involved with transmission of business cases is also reflected in the string of cases that have now considered the entitlements of meter readers since the privatisation of power utilities in Victoria – see, for example, Automated Meter Reading Services/ASU v Automated Meter Reading Services and Australian Services Union v Electrix Pty Ltd

Urquhart v Automated Meter Reading Services (Aust) Pty Ltd [2008] FCA 1447 (23 September 2008)

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