

# ClientUpdate

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## ***THE COOGI CASE : EMPLOYEES ARE SERVANTS, NOT SERFS, SAYS FEDERAL COURT - no transfer without consent!***

By Peter Punch and Mick Sheils

The recent decision of Justice Merkel of the Federal Court in the case of *McCluskey v Karagiozis* [2002] FCA 1137; decision 12 September 2002 is another reminder of a point sometimes overlooked by employers intent on corporate restructuring/ redesigning - that is, an employee cannot be transferred from employment with one corporate legal entity to another (even if they are related to each other) without his or her consent. If that consent is not obtained then the transfer is probably ineffective.

In this case the basic facts were that on March 2002 the controllers of the Coogi group of companies decided to restructure the affairs of the group and in that context decided to transfer about 240 employees employed by various companies in the group to various other companies in the group.

The restructure took place and so far as the companies were concerned the employees were in fact transferred - so after 2 March 2002 the companies to which the employees were transferred paid the salaries of the employees so transferred, as well as discharging other employment related obligations on those companies (ie paying taxes and other payments).

However the employees (the vast majority of whom were women from non English speaking backgrounds engaged in performing largely unskilled work) were not informed of their transfer and the only information provided was what was stated on pay slips and group certificates subsequently provided.

In August 2002 all of the companies in the group went into administration and it quickly became clear that the companies to whom these employees were transferred had no assets of substance to meet the employees' entitlements (which were approximately \$2.5million).

The administrators then applied to the Federal Court for guidance on their obligations, in particular, whether the employees were employed by the companies paying their wages, or whether their transfers were ineffective, thus leaving them employed by the companies that employed them prior to the restructure.

His Honour observed that "The substantial body of undisputed evidence filed by the parties revealed that the transferred employees were not informed about the proposal to transfer heir employment nor was their assent to the transfer sought or obtained."

His Honour then ruled, without any real hesitation, that the purported transfer of the employees was ineffective and that (subject to two exceptions not presently relevant) "insofar as their contractual relationship with their employer was concerned, their employment with their pre-restructure employer did not cease and their employment with their post-restructure employer did not commence."

In the course of his judgment Merkel J cited these comments by Lord Atkin in 1940 (in *Nokes v Doncaster Amalgamated Collieries Limited* [1940] AC 1014 at 1026):

*"I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that right of choice constituted the main difference between a servant and a serf".*

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SOLICITORS

... continued page 2

Moreover in the same case, at page 1020, Viscount Simon, the then Lord Chancellor, made the same point with almost equal eloquence:

*"...a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent."*

Peter Punch, head of Carroll and O'Dea's employment and Industrial Relations Group, and Mick Sheils, industrial relations consultant with the Group, make these observations on the Coogi case.

"It will be recalled that one aspect of the voluminous and dramatic Patricks dispute litigation in 1998 was the fact that waterside workers had been transferred in their employment, without their knowledge, from one company to other companies that were mere worthless shells. That of course was but one aspect of that ground breaking dispute, but clearly it was not a successful exercise in that dispute (at least in any immediate or short term sense) and was also not successful in this Coogi "restructure".

But this type of phenomenon, despite its obvious ineffectiveness (obvious to judges anyway), seems to occur more often than one would think - not always as a pure subterfuge to deny employees' practical access to their entitlements, but sometimes because of a failure to remember that a contract of employment is in its essence a contract of personal service. While some types of contractual rights can be assigned to a third party, employment rights cannot be so assigned without specific consent.

Prior to the development of modern company law, the phenomenon that was examined in the Coogi case would probably not have been encountered, as virtually all such contracts would be between natural persons. But with the advent of the corporate entity and the development of corporate "groups" the basic precept that a contract of

employment was personal can sometimes be lost in the maze of corporate structures - and in that context it is relatively easy to fall into the trap of treating an employee as being employed by the whole group (which is not a legal entity anyway) rather than a particular corporation or corporations in the group.

What then are the lessons from cases like the Coogi case?

n Remember that a contract of employment is a contract that is personal to the employee, and that he or she cannot be transferred from one legal entity to another without his or her consent.

n It really is quite fundamental that an employee know the identity of his or her employer - if for no other reason than that if the employing entity breaches the contract between the parties the employee is thus able to practically exercise his or her rights without unnecessary delay. Moreover, if the employee is injured at work the proper and timely enforcement of the employee's workers' compensation rights will often depend on accurate identification of the employing entity.

n "Consent" of the employee to a transfer should be explicit - mere alteration of the name of the employing entity on the pay slip and the group certificate is unlikely to be effective (particularly with an unskilled or semi skilled workforce).

n When a transfer is to occur a letter of offer of employment with the transfer entity should be given to the employee, and an opportunity provided for the employee to seek clarification of what is involved.

n Ensure before embarking on any transfer arrangement that attention is given to the legal consequences of the initiative - eg liability to redundancy pay (as occurred in the Amcor Case) the obligation of the company to whom the employee is concerned to honour existing obligations, and any obligation of the previous company to pay out entitlements such as holiday pay. n