

Before the High Court

Redundancy and Interpretation in Industrial Agreements: *The Amcor Case*

ANDREW FRAZER*

Abstract

The Amcor Case currently before the High Court raises the question of the approach which should be taken to the interpretation of agreements made under the federal system of enterprise-based collective bargaining. The immediate issue is whether employees of a company whose business had been transferred to a related company became entitled to redundancy payments when their employer finally decided to cease employing them, even though the employees were immediately hired by the new business operator with no loss of entitlements. The case is therefore centrally concerned with the understanding of the term 'redundancy' under the certified agreement in question. This issue depends on the method used in determining the meaning of the agreement: whether it should be construed more like a contract or a statutory instrument. The court will be faced with the appellant employer's argument that the agreement should be read according to the generally assumed meaning of redundancy as a form of termination resulting in unemployment. Against this is the respondent union's view (accepted by the Full Federal Court) that the meaning of the agreement is limited to its strict terms, whether or not the employees became unemployed.

* Senior Lecturer, Faculty of Law, University of Wollongong.

1. Introduction

'Yet again it is necessary to determine the proper construction of an industrial agreement.'¹ So wrote Finkelstein J of the Federal Court, with perhaps a touch of weariness, when the redundancy provisions of a certified agreement came before him for interpretation in May 2002. His decision was received by many employment lawyers with surprise, as it appeared to provide that several hundred employees who had simply been transferred between two related companies without losing their jobs had each been made redundant and were accordingly entitled to payments of many thousands of dollars (the first individual applicant was awarded over \$88,000). Did the decision mean that henceforth corporate restructurings which resulted in a change in the direct employer were subject to significant payments for mass redundancies? What exactly was a redundancy if this situation was classed as one, even though the employees continued in employment performing the same tasks?² The surprise continued when the decision was unanimously upheld on appeal in March 2003.³

The matter has now found its way to the High Court.⁴ The specific question at issue is whether Amcor's treatment of the employees in question constituted 'redundancy'. This is not, however, simply to be answered by determining the general usage of a common industrial term. As the dispute revolves around the effect of a clause contained in a certified agreement made under the *Workplace Relations Act* 1996 (Cth) (the *WR Act*), the case provides an opportunity for the court to examine the approach which should be applied to the interpretation of such agreements. Under the award system of industrial regulation, questions of interpretation and application were frequently resolved by the award-making tribunal making a determination or variation which clarified the issue in dispute. The tribunal usually had the benefit of knowing the background to the dispute and, as the framer of the award, the purpose which the award had been designed to achieve. Now that agreements have replaced awards as the predominant form of regulation at the workplace, questions of their interpretation are an increasingly common task for the courts. The functions of drafting and interpretation have become separated, creating a need for consistent principles to be used for determining the meaning of agreements.

1 *Construction, Forestry, Mining and Energy Union v Amcor Ltd* [2002] FCA 610; (2002) 113 IR 112 (hereinafter *Amcor*) at [1].

2 Peter Punch, 'Redundancies Cost Amcor' (2002) 6 *Australian Industrial Law News* (June): 'Clearly the outcome is unfair. The employees had become entitled to a benefit that was designed to compensate them for losses arising out of termination of their employment by reason of redundancy, but those losses had not actually been sustained by them.' See also Joe Catanzariti, 'Who is Liable for Redundancy following Transmission of Business?' (2002) 40(6) *LSJ* (July) 36.

3 *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2002] FCAFC 57 (hereinafter *Amcor FC*); see 'Full Bench Dismisses Amcor Appeal' (2003) 7 *Australian Industrial Law News* (April).

4 *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2003] HCA Trans 529; special leave granted on 12 December 2003 (High Court of Australia Bulletin No 10, 2003).

2. *Background to the Dispute*

Until 1998, Amcor Ltd owned and operated paper manufacturing mills in four locations in New South Wales, Queensland and Tasmania. As a result of a corporate restructuring in June of that year, Amcor sold its two mainland paper mills to a wholly owned subsidiary, Paper Australia Pty Ltd. While Paper Australia owned and operated the mills, Amcor remained the employer of the employees who worked there. Under a subsequent agreement which took effect from the date of the sale, Paper Australia undertook to carry out all Amcor's obligations in relation to the employees.

Then in February 2000, Amcor announced that it would separate its paper making business from its other manufacturing operations. Amcor's shares in Paper Australia were transferred to a new company, Paperlinx Ltd (which was not wholly owned by Amcor). Amcor's two remaining paper mills in Tasmania were sold to Paper Australia, which was by now a wholly owned subsidiary of Paperlinx. In order to complete the transfer, in February Amcor wrote to each of the paper mill employees notifying them that their employment with Amcor would end in six weeks' time, and enclosing a letter offering employment with Paper Australia 'on the same terms and conditions as you currently enjoy.' The letter included a statement that 'all benefits will be preserved, including continuity of service for all employment-related purposes, salary/wage, superannuation and accrued leave entitlements.' The letter stated that the offer could be accepted by the employees turning up for work as normal from 1 April.

In 1997 a certified agreement covering the paper mills had been concluded between Amcor and the Construction, Forestry, Mining and Energy Union (CFMEU). The agreement, made under the *WR Act*, commenced effect on its certification by the Australian Industrial Relations Commission in June 1998, with a nominal expiry date of two years. Under the agreement (clause 55.4), Amcor undertook to give the maximum possible notice to the union of changes which permanently affected employment, and at least one month's notice to each employee whose employment would be affected. Amcor was clearly concerned to minimise disruption and labour turnover which might result after major changes had been announced. While there was no provision for consultation with the union over the implementation of change, Amcor and the CFMEU agreed to co-operate in finding alternative employment and retraining for retrenched workers (clause 55.7).

The relevant provision of the redundancy clause of the agreement provided that 'should a position become redundant and an employee subsequently be retrenched,' the employee would be entitled to payments for accumulated sick leave, annual leave and long service leave, as well as redundancy pay based on the length of the employee's service (clause 55.1). The redundancy clause went on to provide for the situation where an employee became redundant and was transferred to a lower paid job (clause 55.2). There was a further provision for 'an employee who has opted for transfer to another classification in lieu of retrenchment' (clause 55.3). So the agreement seemed to contemplate a two-stage redundancy process: a

position was first declared redundant, and then an employee occupying that position would be retrenched or could alternatively be transferred with their consent to another position (which might be lower-paid than their former position or involve a change of location). There was nothing in the agreement which expressly covered the situation where an employee's engagement with Amcor was terminated yet they continued to work for another employer at the same job with the same pay and conditions as before.

Once it heard of the letters, the union began proceedings to enforce the agreement, claiming that the employees had been made redundant by Amcor and should be paid their entitlements in accordance with the plain meaning of the agreement. At least part of the union's motivation for taking this action seems to have been a concern that it had not been consulted prior to the changes. It claimed that neither the consultation nor the dispute resolution provisions contained in the agreement were used by Amcor in the redundancy process. Amcor's response was that the redundancy provisions were never intended to apply to situations where employees continued in employment with no real change of status or loss of access to their accrued entitlements. It argued that as a matter of reality the positions of the employees were not made redundant: they continued to be required, though not by Amcor.

3. The Decision at First Instance and On Appeal

The matter came before the Federal Court in its original jurisdiction by way of a summons for imposition of a penalty against Amcor for breaching the certified agreement by failing to pay the redundancy entitlements. In his decision, Finkelstein J began by considering the meaning of the word 'redundant'. Based on previous authority, he found that the usual understanding is that an employee becomes redundant when their employer no longer requires their services for reasons unconnected to the individual employee's performance. The formula which has frequently been applied is that 'a job becomes redundant when the employer no longer desires to have it performed by anyone.'⁵ Previous decisions had treated an employee as redundant even where the employment had terminated because of a transfer of the business and the employee had been given assistance in finding a new job or an offer of employment had been made by the new owner of the business.⁶ The crucial issue was whether the employment contract with the existing employer had been terminated. Once the existing relationship had ended for 'economic' rather than performance reasons there was a redundancy. Whether the employee subsequently obtained employment, immediately or not, was irrelevant.

5 *The Queen v Industrial Commission of South Australia; Ex Parte Adelaide Milk Supply Co-Operative Ltd* (1977) 16 SASR 6 at 8 (Bray CJ). This is also the common definition in awards: see, for example Hospitality Industry, Accommodation, Hotels, Resorts and Gaming Award 1998 (Australian Industrial Relations Commission – hereinafter AIRC), AW783479 cl16.1.

6 *Re Government Cleaning Services (Privatisation) Award (No. 2)* (1994) 55 IR 199; *Steppes Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union* (1998) 86 IR 337.

Looking at the redundancy provisions of the agreement itself, Finkelstein J saw the two-stage process as involving two separate conditions: first, a determination by the employer that the employee's position was redundant, and secondly the retrenchment of the employee because of the redundancy. If the act of retrenchment or termination occurred by reason of redundancy, both these conditions were met, so the employee became entitled to a redundancy payment including accrued leave entitlements. According to Finkelstein J this process indicated that the question of redundancy was to be determined at the time of the termination of the employee's existing employment.⁷ Presumably this was because the drafting of the redundancy provisions in this way indicated that the intentions of the drafters was to focus on the situation at a particular time, the time of dismissal. This approach gained further support, according to Finkelstein J, from the fact that retrenchment was envisaged as meaning termination of employment with the particular employer who was party to the agreement, namely Amcor. This was clear from the agreement's use of employment as meaning employment with 'the Company', ie Amcor, as well as the use of 'position' as referring specifically to employment with Amcor.⁸

Finkelstein J agreed that a decision in favour of the employees and the CFMEU might be regarded as unfair and 'an affront to commonsense,' since in practical terms the situation of the employees was unchanged.⁹ Nevertheless his Honour felt bound to make it. The terms of the agreement itself, considered as a whole, impelled him to conclude that a redundancy had occurred and the employees were entitled to claim their payments. In a case like this, when the circumstances giving rise to the dispute seem not to have been contemplated by the drafting parties, the court was limited in the extent to which it could provide the missing piece to the puzzle. The judge noted that when it comes to the interpretation of statutes, it is nowadays accepted that courts have some scope to remedy an omission provided that the legislature's intention is clear.¹⁰ However a similar power to fix a hiatus in an agreement could not be applied in this case as Finkelstein J considered it by no means certain what the parties to the agreement would have agreed to if they had turned their minds to the issue at hand.

Amcor's appeal against the decision was dismissed unanimously by the Full Court consisting of Moore, Marshall and Merkel JJ. All judges agreed that the proper interpretation of the agreement led to the conclusion that it was the termination of employment with Amcor which caused the employees to be considered redundant under the agreement, entitling them to be paid their accrued benefits and severance pay. In the words of Marshall and Merkel JJ, Amcor's obligations to its employees under the agreement 'crystallised upon their dismissal.'¹¹

7 *Amcor*, above n1 at [16] (Finkelstein J).

8 *Ibid.*

9 *Id* at [1], [17] (Finkelstein J).

10 The extent and justifiability of such a power remain controversial: see Derek Auchie, 'The Undignified Death of the Casus Omissus Rule' (2004) 25 *Statute LR* 40.

11 *Amcor FC*, above n3 at [33].

The joint judgment of Marshall and Merkel JJ (with whom Moore J agreed) advanced several clear reasons supporting the appropriateness of the employees being entitled to the redundancy payments, and challenging the argument that such a result was unfair. Firstly, the employees were not claiming entitlements which they had given up. In choosing to take up employment with Paper Australia, the employees had not waived their redundancy entitlements under the agreement with Amcor. Such an approach was inconsistent with the status of a certified agreement, which obtains its force from statute, independent of any individual agreement.¹² Employees cannot consent to receive less than their entitlements under an award or certified agreement, a principle recently reinforced by the *Metropolitan Health Service Board Case*.¹³

Furthermore, in taking up their entitlements the employees were not gaining a benefit unjustly, as there was no possibility of ‘double dipping.’ Employees who obtained payment for accrued long service and sick leave from Amcor could not later claim exactly the same entitlements from their new employer, Paper Australia, under that company’s promise to preserve employees’ benefits. In their Honours’ opinion, the benefits which were preserved would only include outstanding entitlements not already paid by Amcor.¹⁴ No doubt any later claim for benefits already paid by the previous employer would be defeated by the argument that the entitlements had been discharged by payment. Under this approach, by invoking the redundancy provisions the employees were simply obtaining accelerated access to their accrued entitlements, and obtaining them from the employer in whose service they earned them.

On the meaning of ‘redundancy,’ Marshall and Merkel JJ considered the crucial issue to be whether Amcor as employer had decided that particular work was no longer required to be done for it by any of its employees.¹⁵ If the work was subsequently required by another employer, this was irrelevant to the operation of the agreement. Their Honours treated the employment relationships regulated by the agreement as entirely separate from any subsequent work relationship which might arise. The only employment relationships relevant to the operation of the agreement were those between Amcor, as the employer party to and bound by the agreement, and its employees. Amcor’s obligations under the agreement could not be affected by the employees entering into an employment relationship with another employer. Although they did not express it in this way, their Honours’ approach is a contractual one, redolent of the doctrine of privity of contract.

A slightly different approach was taken by Moore J, for whom a key issue was the nature and source of the entitlements. Most of the redundancy payments under the agreement related to ‘unrealised benefits that the employee has accumulated in

12 *Josephson v Walker* (1914) 18 CLR 691 at 700 (Isaacs J); *Gapes v Commercial Bank of Australia Ltd* (1979) 41 FLR 27 at 29 (Smithers & Evatt JJ).

13 *Amcor FC*, above n3 at [34]; *Metropolitan Health Service Board v Australian Nursing Federation* (2000) 99 FCR 95 at 104 (French J).

14 *Amcor FC*, above n3 at [36] (Marshall and Merkel JJ).

15 *Id* at [41]–[42].

his or her employment with Amcor.¹⁶ The fact that they originated in the employment relationship with a particular employer, and accrued as that relationship continued, indicated that the parties had intended the benefits to become payable once that relationship had ended.

All the judges made it clear that Amcor's action in obtaining a promise of continued employment from Paper Australia could have no bearing on how the agreement was to be interpreted. Consistent with contract interpretation, subsequent conduct could not be used as evidence of the intention of the parties at the time they entered into the agreement, which was assumed to be the relevant time for ascertaining intention. This was particularly the case as only one party's conduct was involved.¹⁷

One argument relied on by Amcor was that when the standard award redundancy clause was devised by the then Australian Conciliation and Arbitration Commission in the *Termination, Change and Redundancy Case* (the *TCR Case*), it had not been intended to apply in the case of a transmission of business.¹⁸ This intention, Amcor argued, should govern the interpretation of the agreement currently before the court. This approach was rejected as no such intention was found in the terms of the agreement itself. There was nothing in the agreement to indicate that the *TCR Case* standard was being adopted. Nor could any intention be derived from the subsequent conduct of the parties to the agreement. The court did not discuss whether Full Bench principles should govern the interpretation of a particular agreement as an independent standard; rather, as in contract law, generally it was the mutual intentions of the parties at the time of the agreement which mattered.

Finally, Marshall and Merkel JJ denied that the interpretation of the agreement should be guided by parties' perceptions of the fairness of the outcome when the agreement was applied to particular situations. Their Honours noted that other ways of affecting the operation of the agreement had been open to Amcor. The company could have sought to vary the agreement by negotiation with the unions party to it and with the approval of the Commission. The *WR Act* also allowed the Commission to remove any ambiguity or uncertainty in the Agreement.¹⁹ That Amcor had not taken advantage of these opportunities negated, in their Honours' view, the argument that it should be relieved of the particular obligations under the agreement in this case on the ground of unfairness.

4. Legal Issues

A. Redundancy

Several rationales have been advanced in support of redundancy or severance pay. The early approach taken by the NSW Industrial Commission, in the immediate context of the severe 1982 recession, was to consider such pay as a cushion against

¹⁶ Id at [5] (Moore J).

¹⁷ Id at [6] (Moore J), [48] (Marshall & Merkel JJ).

¹⁸ *Termination, Change and Redundancy Case* (1984) 8 IR 34 (hereinafter *TCR Case*) at 75.

¹⁹ *WR Act* s170MD.

the immediate financial effects of unemployment while the employee looks for other work, rather than as a compensation for lost job security based on past service.²⁰ A somewhat different view was preferred by the federal Commission in the *TCR Case*: severance pay was primarily directed at ameliorating the ‘inconvenience and hardship’ of sudden job loss rather than as direct income support in the search for new employment. Based on previous decisions, the Commission also justified it as providing compensation for loss of non-transferable credits such as sick and annual leave.²¹ The Commission accepted a qualification to this entitlement where the employee’s income was not completely severed. The Commission emphasised that it did not ‘envisage severance payments being made in cases of succession, assignment or transmission of a business.’ Accordingly, a standard clause was inserted which provided that in the case of transmission an employee’s service was carried over to the new employer for the purpose of calculating severance pay.²² However the former employer was not automatically relieved from the redundancy pay obligation. If they obtained suitable alternative employment for their redundant employees, they could apply for relief from such obligations in part or full. Whether the new employer recognised all the employee’s previous service would be a significant consideration for exercise of discretion in such a case.

The approach to redundancy pay taken in the *TCR Case* has continued to this day, and was reiterated in the recent *Redundancy Test Case*.²³ The current standard federal award provisions for redundancy continue to allow an employer in a specific situation to apply for a variation of the general severance pay amounts ‘if the employer obtains acceptable alternative employment for an employee.’²⁴ The Commission routinely grants an exemption to an employer who has been instrumental in obtaining work for an employee which is reasonably suitable for their personal situation. The Full Bench of the Commission has held that it is inappropriate to make an order for severance pay in the case of the sale of a business and transfer of employees when the employees had agreed to the transfer and the new employer recognised their accrued entitlements. Where there is a simple transmission of business the Commission has recently stated that the *TCR* severance pay standard should not apply.²⁵ However the Commission takes this approach in exercise of its discretion: the result is not automatic and depends on an assessment of the particular redundancy situation in question.²⁶

20 *Shop, Distributive and Allied Employees’ Association (NSW) v Countdown Stores* (1983) 7 IR 273 at 273, 293 (Fisher P).

21 *TCR Case*, above n18 at 71–73.

22 *Id* at 75, 76; *Termination, Change and Redundancy Case, Supplementary Decision* (1984) 9 IR 115 at 129.

23 *Redundancy Case* (AIRC, Full Bench, 26 March 2004) PR032004 at [133]. The Commission restated the position that redundancy pay was not designed to supplement income loss, but was for hardship and loss of credits. It was these factors which justified an increase in pay entitlements for those with more than four years’ service: *id* at [138], [154].

24 *Hospitality Industry, Accommodation, Hotels, Resorts and Gaming Award 1998* (AIRC) AW783479 c116.5.

It would appear, therefore, that industrial practice is against severance pay being available in the case of a simple transmission of business when there is no loss of continuity in work, especially if the new employer recognises leave entitlements accrued in service with the former employer. That is so when standard redundancy provisions apply. But in this case the redundancy provisions in the Amcor agreement were rather unusual. They were briefer and less qualified than is the norm. The agreement did not contain the standard clause deeming prior service to be carried over in a transmission of business. There was no statement of objects or even an express definition of redundancy. It also seems that there was no regulation of redundancy in the underlying industry award.²⁷ If this is so, then any entitlements on redundancy (apart from general notice periods for termination) depended solely on the agreement. This situation also tends to negate the view that the parties must have negotiated with the *TCR Case* award standard in mind. Is there anything in this particular agreement to indicate that the severance payment was intended to compensate only for lost entitlements and the hardship of unemployment? Unless we are to apply standards and notions extraneous to the agreement itself, it is difficult to ascribe any particular purpose to the terms. All that can be relied on is their plain meaning in context.

Finkelstein J's view was that redundancy means the termination of the existing employment relationship. The fact that in several cases, including the *TCR Case* itself, an exception was allowed where there was a transfer of the business with no loss of employment, merely confirmed this point in his opinion, since there would be no need to make such an exception if it did not otherwise result in redundancy. This view is supported by the difference between making and interpreting. In such cases the tribunals concerned were acting in their capacity as arbitrators deciding what future legal relations should pertain between parties to a wide-ranging interests dispute. They were not acting as courts of construction. In the present situation, the court's task was strictly that of an interpreter, charged with finding meaning according to the presumed intention of the framers of the agreement.

Against this, it can be argued that there is a significant difference between a situation where an employer makes an employee redundant while offering to assist them in finding work, and the position (as here) where the employer sells the business but takes steps to ensure that all employees will be offered jobs with the new employer. In this case, Paper Australia had not only assumed liability for the employees' accrued entitlements, but made a clear offer of employment to all

25 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v United Milk Tasmania Ltd* (AIRC, Full Bench, 23 June 2000) Print S7351; *Re Steppes t/as The Beaufort Darwin v Australian Liquor, Hospitality and Miscellaneous Workers Union* (1998) 86 IR 337. While this approach is reached in exercise of the Commission's discretion, a similar result has been reached in the interpretation of a certified agreement on the basis that redundancy pay in the case of business transmission was not within the contemplation of the parties: see *Stones v Simplot Australia Pty Ltd* (Industrial Relations Court of Australia, Ryan JR, 30 June 1997).

26 *Commonwealth Bank of Australia v Finance Sector Union of Australia* (AIRC, Duncan SDP, 4 December 2002) PR925304 at [85].

27 The current award does not contain any specific severance provisions, apart from the standard termination clauses: Pulp and Paper Industry – Production Award 1999 (AIRC) AW792323.

Amcor's employees once they had been made redundant by Amcor. The assumption of responsibility for the existing entitlements was contained in a contract between the two companies, which the employees could not enforce under the doctrine of privity of contract. However the employees' new employment contracts with Paper Australia were made on the express promise of recognition of all benefits and continuity of service. The employees' right to claim redundancy pay against Paper Australia for their prior service with Amcor now simply rested on a contractual basis rather than by virtue of the certified agreement.

B. Successorship

It is here that the successorship provisions of the *WR Act* become relevant. It is not altogether clear whether they would protect the employees' entitlements when there is a time delay between the transmission of business and the change in employer. The provisions in the *WR Act* dealing with successor employers appear to contemplate that these two events are simultaneous, since it states that the new employer becomes bound by a certified agreement only from the time that the employer becomes the successor or transmittee of the business, and then only to the extent that the agreement relates to the transmitted business.²⁸ At the time Paper Australia took over the paper manufacturing business of Amcor it did not yet employ any workers covered by the agreement, so the agreement did not apply to it as an employer. Arguably, however, once it became the employer, Paper Australia became bound by the agreement, which by then related to the business which Paper Australia was operating. Amcor continued to be bound by the agreement as long as it remained the employer, even though it no longer operated the business. Presumably Amcor also continued to be liable under the agreement for entitlements accrued prior to the transfer of the business. The issue was raised but not decided by Finkelstein J.²⁹

This case also raises a broader issue in relation to successorship. Recent decisions have highlighted the limitations of the current provisions to outsourcing arrangements. An employer which takes over the outsourced work may not be bound by an award or agreement which covered the work if the character of its business as a whole is found not to be substantially identical to that of the outsourcing employer.³⁰ This will commonly occur in outsourcing arrangements, since one of the principal purposes of such moves is to hive off 'non-core' functions to an external supplier which will ordinarily be engaged in a different range of business activities from the outsourcing corporation.

The separation of the business owner and the employer, as happened in *Amcor*, is of concern because if the successorship provisions do not apply (or apply in a limited way), a corporation might be free to divest its business while remaining the employer, leaving the employees with no effective recourse for recovery of future

28 *WR Act* s170MB; see also s149(1)(d) in relation to awards.

29 *Amcor*, above n1 at [6].

30 *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648; *Minister of State for Employment, Workplace Relations and Small Business v Community and Public Sector Union* (2001) 109 FCR 303 at 350 (Ryan & Madgwick JJ); compare *Gribbles Radiology Pty Ltd v Health Services Union of Australia* [2003] FCAFC 56.

entitlements. There would be a similar situation to the waterfront dispute of 1998,³¹ when assets owned by Patrick's stevedoring companies were transferred to a parent company within the same group without the employees' knowledge, leaving the employer companies as 'empty shells.' In the present case Amcor retained substantial assets so the employee's entitlements were never in danger; however there was an attempt to transfer future obligations under the certified agreement to another corporation within the same group. Should this be considered any differently from the everyday situation where a business is sold and the employees are at the same time more or less automatically transferred to the new business owner?

C. *Interpretation of Agreements*

All the arguments from common industrial practice in relation to redundancy provide support for Amcor's position, based on principle and policy. But are they relevant? The development of enterprise bargaining over the last decade has resulted in working conditions being predominantly regulated by various kinds of industrial agreements at federal and state level. Such instruments are hybrid in form, bearing elements of both contract and statute. In most cases such agreements are enforceable only by way of civil penalty, with the possible support of an injunction to cease conduct in breach of the agreement.³² Their dual character raises significant questions of interpretation. Should such agreements be construed in the same way as contracts, giving strong weight to the presumed intentions of the parties and the factual background; or should they be treated more like statutes, with primary emphasis on the ordinary meaning of the words in their context, bearing in mind the purpose of the enactment?³³

The approach used in the interpretation of awards and agreements is anything but uniform, but has tended to adopt a similar approach to that used in statutory interpretation. It has long been accepted that narrow literalism is not appropriate, and that the interpreter should read an award 'broadly' with the aim of giving effect to its intended operation as far as the 'general intention of the parties can be gathered from the whole award.'³⁴ This approach is probably not very far from that which is now used in the interpretation of statutes,³⁵ although it is not truly purposive since awards tend to be more specific in effect and not so concerned with a wide range of public policy issues. Awards and agreements are also treated

31 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; see Andrew Frazer, 'Major Tribunal Decisions in 1998' (1999) 41 *Journal of Industrial Relations* at 80–83; Andrew Stewart, 'The Labour Law Implications of the 1998 Waterfront Dispute' (1999) 5 *International Employment Relations Review* at 83–86.

32 *WR Act* ss178, 170NG. However injunctions and declarations under the general law are not available: *ACTEW Corporation Ltd v Pangallo* [2002] FCAFC 325.

33 It has, however, been argued that the task of interpretation is essentially the same for statutes and contracts: see Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24 *Statute LR* 95.

34 *George A Bond & Co Ltd (In Liquidation) v McKenzie* [1929] AR(NSW) 498 at 503–504 (Street J); *Re Hospital Employees (Administrative and Clerical) (State) Award* (1982) 2 IR 123 at 124–125 (Glynn J).

35 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381–382 (McHugh, Gummow, Kirby & Hayne JJ).

‘generously’ since they are often framed by non-lawyers with their practical operation in mind. The common approach to awards has been described as ‘partially statutory and partially contractual,’³⁶ a description which is particularly apt as many awards are drafted by the parties and made by consent.

At the heart of the Federal Court decisions in *Amcors* was the approach which the judges took to the interpretation of the agreement. The method used was similar to the objective approach conventionally adopted to the construction of contracts, the aim being to determine the mutual intention of the parties as evidenced by the document as a whole and in its factual context.³⁷ As Finkelstein J put it:

The object to be achieved is to discover what was meant by the parties to the agreement. The task does not involve deciding what the parties actually intended What must be done is to discover what the parties intended from the meaning that is conveyed by their words, construed in the context in which those words are used.³⁸

In recent years the Federal Court has been developing a consistent approach to the interpretation of certified agreements, one which emphasises their character as consensual documents rather than statutory instruments, and therefore focuses on the objectively determined intentions of the parties.³⁹ Finkelstein J has been a particularly strong exponent of a contractual approach to the interpretation of certified agreements, focussing on the parties’ presumed intentions. Hence his view of the limits to the court’s interpretive function in *Amcors*:

there comes a point when a court of construction must resist the temptation of forcing a meaning to a bargain which the parties did not intend and to substitute for the arrangements actually made, an arrangement which the court believes is a better one.⁴⁰

While it is well accepted that the Federal Court is restricted to declaring the true meaning of the award rather than its intended or appropriate effect,⁴¹ in *Amcors* this distinction was given a contractual basis. The contractual approach seems to depart from the more traditional purposive approach taken to awards, and to certified agreements as well.⁴² The difference in approaches is one of emphasis and there may be no difference in practical outcome in particular cases. *Amcors* seems to be a case where the difference between statutory and contractual approaches matters a great deal.

36 *Simpson v Australian Telecommunications Commission* (1978) 34 FLR 337 at 340 (St John J).

37 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 348, 352 (Mason J); *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510 (Mason, Wilson, Brennan, Deane & Dawson JJ).

38 *Amcors*, above n1 at [1] (Finkelstein J).

39 *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2001) 105 IR 172 at 175 (Gyles J); *National Tertiary Education Industry Union v University of Wollongong* [2002] FCA 31 at [27]–[28] (Branson J); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Skilled Engineering Ltd* [2003] FCA 260 (Finkelstein J); *University of Western Australia v National Tertiary Education Industry Union* [2003] FCA 1264 (Carr J).

40 *Amcors*, above n1 at [18] (Finkelstein J); approved in *Commonwealth Bank of Australia v Finance Sector Union of Australia* (2002) 125 FCR 9 at 29 (Full Court).

41 *City of Waneroo v Holmes* (1989) 30 IR 362 at 379 (French J).

It may be that the contractual approach is more suitable to enterprise bargaining under the *WR Act*. If the terms of a certified agreement are to be construed according to judicially identified purposes, and departures from award standards only allowed if the agreement shows a manifest intention to do so, this would undermine the object of the *WR Act* to ensure that ‘the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level.’⁴³

5. Conclusion

In view of the frequency of disputes over interpretation of agreements and the apparent differences in approach to them, it is hoped that the High Court will give close consideration to the wider interpretation issues raised by the case. Guidance in this area will be significant not only to the Federal Court, but to the federal Commission as well as the state courts and tribunals – not to mention the parties themselves. All are faced with the daily task of trying to derive the legal effect in particular circumstances from statutory collective agreements of varying precision. Inconsistency and uncertainty in their application can only harm co-operative industrial relations and reliance on workplace bargaining.

In some respects, though, industrial parties are moving away from the courts for resolution of differences over the application of agreements. Recent years have seen an explosion in the use of private arbitration clauses for the settlement of such disputes. In most such situations the parties give the Commission the power, in accordance with the *WR Act*, to decide contentious issues. The High Court has held that when it does so, the Commission acts as a private arbitrator and may make binding decisions in exercise of powers and procedures conferred on it by agreement between the parties.⁴⁴ Since this position was clarified, private arbitration has become a major aspect of the Commission’s business, providing a significant alternative to the Federal Court in matters involving the application of agreements. The Commission has much greater flexibility in procedure and approach than the Federal Court can exercise. It is also a more appropriate venue for taking into account the industrial background and consequences of decisions. As part of the dispute resolution procedure required in certified agreements, the Commission may be empowered to conciliate disputes with a view to obtaining a mutually satisfactory negotiated outcome. That avenue was not taken by Amcor in this case, although it appears to have been available under the terms of the agreement.⁴⁵

42 *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (Madgwick J); applied in relation to certified agreements in *Australasian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd* (1998) 80 IR 208 at 212 (Northrop J); *Hawkins v Commonwealth Bank of Australia (No 2)* (1996) 70 IR 213 at 218. All are cases relied on by Amcor.

43 *WR Act* s3(b).

44 *WR Act* s170LW; *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645.

45 *Amcor* HCA Trans, above n4 at 6–7.

