Confusion reigns over employment contracts

Phil Teece

Manager, personnel & industrial relations
phil.teece@alia.org.au

Right across Australia, ALIA members continue to grapple with labour market upheaval and new forms of work. This column recently discussed some of the legal and practical challenges now being raised by outsourcing. They remain an actual or potential problem for many employees.

But the booming labour hire industry is also challenging traditional ideas of the employment contract. In New South Wales, for example, almost a quarter of all employers now engage staff through labour hire companies. In some sectors, half the workforce is employed by these companies, which then contract individuals out to host organisations. So it is no surprise that a major government task force has been established in New South Wales to investigate the activities of employment agencies. [details can be found at http://www.dir.nsw.gov.au/action/policy/labourhire.html].

Increasingly, librarians in both public and private sectors are being employed via labour hire companies. Many are expressing concerns about the trend.

These and other developments have at least one thing in common — they are seriously complicating the relationship of employer and employee (once called master and servant), which for centuries has formed the basis for legal rights and duties at work. Now there is often confusion about who are the actual employers, whether workers are in fact employees, which contractual obligations are owed and by whom.

Several important legal cases have failed to clarify the situation satisfactorily. The *Drake Personnel Case* in late 1999, for example, ruled that an injured worker was in law employed by the labour hire company that hired him out to a factory. But when he was injured at work, the Court found the physically remote employer [the hire company] could not reasonably be expected to have known about the hazard that caused his injury. Rather, the client [the factory] had an obligation to provide a safe working environment even though it was not the employer. This and other cases make it clear that contracts and their inherent obligations are becoming vastly more complex. In many situations, *ad hoc* litigation is likely to become the primary avenue for determining specific obligations, as the traditional framework for employment law is destroyed. The negative implications of this for employees are obvious.

There is similar confusion when complete or partial businesses move from one legal entity to another. This can result from contracting out of public service provision to the private sector. Or it can follow corporate take-overs. The former has become vastly more prevalent through both government privatisation policies and the trend to outsourcing particular functions. And take-overs are much more evident in today's transient business environment than in earlier periods of relative calm. A number of members have recently asked ALIA to help them establish continuing rights to specific employment conditions, some after their companies have been taken over and others following contracting out of their library service.

The question here is: if an enterprise negotiates a set of employment conditions with its staff, what happens to those conditions when a completely different legal entity takes over the functions carried out by the previous organisation? The critical yardstick is the transmission provisions contained in labour legislation.

A transmission of business occurs when all or part of it moves from one legal entity to another. Virtually any employer activity is classified as 'business', whether for profit or not. When a business is sold or when part is transferred, the *Workplace Relations Act 1996* requires that any award, certified agreement or workplace agreement that bound it will also bind the new [successor] business. All existing conditions will continue to apply to employees, regardless of whether their original contract of employment has been terminated. In other words, sacking of the staff, followed by re-employment by the new business will not remove employee rights to their conditions of employment. Accordingly, ALIA's National Office staff, for example, *automatically* retained all the provisions of the enterprise agreement negotiated by the organisation that ceased to exist when ALIA was incorporated.

Employees elsewhere have the same rights. They have been strongly emphasised in recent cases dealing with transmission of business provisions. In its judgements, the Federal Court has consistently applied what is known as 'the substantial identity test'. This considers whether the activity transferred is inherent to the business and whether there is similarity between the work before and after the transfer. The practical effect is that conditions will follow the work, unless the work is either quite different or is merely peripheral to the conduct of business [cleaning, for example].

ALIA members experiencing problems with any of these difficult changes in the labour market should make use of the National Office Industrial Services program. We will do our best to help.

...if an enterprise negotiates a set of employment conditions with its staff, what happens to those conditions when a completely different legal entity takes over the functions?