



## TRANSFER OF BUSINESS

The *Fair Work Act 2009* (Cth) (FW Act) makes a number of changes to the law governing transfer of business (previously referred to as transmission of business under the *Workplace Relations Act 1996* (Cth)). This Fact Sheet outlines the new arrangements and indicates the key areas in which changes apply.

### What is a transfer of business?

There is a transfer of business for the purposes of the FW Act if:

- Employees of the old employer become employed by the new employer within three months after their employment with the old employer has terminated; and
- The work that the employee performs for the new employer is the same, or substantially the same, as the work they carried out for the old employer; and
- There is a connection between the old employer and the new employer. There are four possible connections:
  - There is a transfer of ownership or beneficial use of assets;
  - Outsourcing of the transferring work (this can include outsourcing from the old employer or an associated entity of the old employer to the new employer, or an associated entity of the new employer). There does not need to be a transfer of assets for the outsourcing connection to apply;
  - Insourcing (or the ceasing of outsourcing); or
  - The old employer and the new employer are associated entities for the purposes of the *Corporations Act 2001* (Cth).

This definition of transfer of business is broader than applied under the *Workplace Relations Act*. It includes situations where an employee moves from one associated entity to another to perform substantially the same work, even where there is no transfer of assets. “Associated entity” is a broader concept than “related entity”.

### What protection is given to employees?

Where there is a transfer of business, the transferring employees will be covered by the old employer’s enterprise agreements or a named employer award (ie a modern award that is expressed to cover one or more named employers). The old employer’s enterprise agreements or named employer awards apply even if the new employer is already covered by an enterprise agreement or award.

Where a transferring employee had an individual flexibility arrangement with the employer that had effect as if it were a term of the agreement or award, that individual flexibility arrangement also continues to apply on the transfer of business.

After the transfer of business has taken place, new employees of the employer who are directed to perform work that was previously performed by the employees of the old employer will also be covered by the old employer’s enterprise agreements if the new employer has no enterprise agreement or named award capable of applying to those employees.



Unlike the transmission of business rules under the Workplace Relations Act, there is no maximum time limit for the application of the old employer's agreements or awards. They continue to apply until they are terminated or replaced.

On a transfer of business the new employer is required to recognise an employee's service with the old employer when calculating certain National Employment Standards entitlements (for example personal/carers leave, parental leave and the right to request flexible work arrangements). See Master Builders Fact Sheet 7 for more information on the National Employment Standards.

If the new employer and the old employer are not associated entities the new employer can choose whether to recognise an employee's prior service and their associated annual leave and redundancy pay. If the new employer does not agree to recognise service, the old employer must pay out these entitlements.

The new employer must inform transferring employees of any change to entitlements, including the requirement to serve a new minimum employment period for unfair dismissal. If the employer fails to inform the transferring employees in writing, previous service is recognised for the purposes of the minimum employment period and the employees will not be required to serve out a new minimum employment period.

Where an employee is transferred to an employer that is an associated entity of the previous employer, the employee's service with the previous employer will be deemed to be continuous for the purposes of the service-related National Employment Standards entitlements and the unfair dismissal minimum employment period.

## **Role of Fair Work Australia**

Fair Work Australia will have a role in determining the application of enterprise agreements and named employer awards where there is a transfer of business.

A transferring employee, unions covered by enterprise agreements, unions entitled to represent the interest of employees covered by an award or the new employer may apply to Fair Work Australia to order that the old employer's agreement or award not cover the new employer and the transferring employees.

In deciding whether or not to make such an order, Fair Work Australia will take into account a range of factors including:

- The views of the employer and affected employees, and any disadvantage that may be suffered by them;
- Whether the relevant enterprise agreements have reached their nominal expiry dates;
- Whether the old employer's agreement or award would have a negative impact on the productivity of the new employer's workplace;
- Whether the new employer would incur significant economic disadvantage as a result of the old employer's agreement or award covering the new employer;
- The degree of business synergy between the old employer's agreement or award and any workplace instrument that already covers the new employer; and
- Public interest.



Similarly, applications may be made by employees if the new employer does not recognise that enterprise agreements have transferred.

Fair Work Australia may also make an order varying enterprise agreements to:

- Remove terms that are not capable of meaningful operation because of the transfer of business (for example participation in the old employer's share or product discount plan);
- Remove ambiguity or uncertainty about how a term of the agreement operates; and
- Enable the agreement to operate in a way that is better aligned to the working arrangements of the new employer's business. For example, Fair Work Australia may consider it appropriate for transferring employees to keep their entitlements to pay and allowances but modify the hours of work in an agreement so that the transferring employees can be better integrated into the new employer's business.

## Transitional arrangements

The transfer of business rules in the FW Act only apply to transfers of business that occur on or after 1 July 2009.

The transmission of business rules in the *Workplace Relations Act 1996* continue to apply where the transmission of business occurred before 1 July 2009. Where a transmission of business occurs before 1 July 2009:

- A 12 month transmission period applies to the old employer's instrument;
- The rules governing the transfer of entitlements under the Australian Fair Pay and Conditions Standard are preserved; and
- Applications to the Australian Industrial Relations Commission for an order modifying the operation of the transferred instrument are preserved, provided that the application is made within 90 days of 1 July 2009.

The transfer of business provisions also cover employers and employees covered by transitional instruments made before 1 July 2009 (for example, Individual Transitional Employment Agreements (ITEAs)).

## What should employers do?

It is essential that when an employer is involved in the sale or purchase of a business they ensure the agreement dealing with the sale covers the issue of employee entitlements and what will happen to the employees' contracts of employment on transfer of business.



## FOR FURTHER INFORMATION

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**Disclaimer:** This information is provided as general advice on the workplace relations system. It does not constitute legal advice and it is always advisable to seek further information regarding specific workplace relations issues.