



The material contained in this document is provided by way of general information only and is designed to raise your awareness. It is not intended to be and is not a substitute for advice which evaluates the circumstances of your workplace. Its content is accurate as at the date which appears below. This work is copyright. Apart from any use permitted under the Copyright Act 1968, all other rights are reserved.

FAIR WORK ACT 2009 - FACT SHEET 4 Transfer of Business

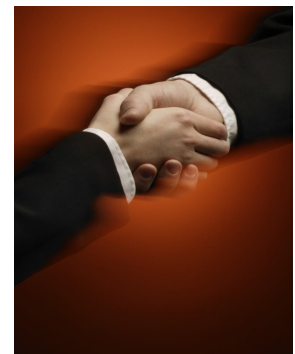
JUNE 2010

The transfer of business provisions of the *Fair Work Act 2009* (FWA) regulate transfers which take place on and after **1 July 2009**.

When is there a transfer of business?

Under section 311 of the FWA there is a transfer of business from an employer (old employer) to another employer (new employer) *if* the following requirements are satisfied:

- the employment of an employee of the old employer has been terminated;
- within **3 months** of the termination of employment, the employee becomes employed by the new employer; the work (transferring work) the employer performs for the new employer is **the same, or substantially the same**, as the work the employee performed for the old employer;
- there is a **connection** between the old employer and the new employer.



There will be the required connection between the old and new employers *if*:

- in accordance with the arrangement between the old employer/ associated entity of the old employer and the new employer/ associated entity of the new employer, the new employer or its associated entity has the **beneficial use of all of the assets** (whether tangible or intangible) that the old employer/ associated entity of the old employer owned or had the beneficial use of and that relate to, or are used in connection with, the transferring work;
- the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old employer/ associated entity of the old employer, has **outsourced** the transferring work to the new employer/ associated entity of the new employer;
- the transferring work had been performed by one or more transferring employees, as employees of the old employer, because the new employer/ associated entity of the new employer, had outsourced the transferring work to the old employer/ associated entity of the old employer *and* the transferring work is performed by those transferring employees, as

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

employees of the new employer, because the new employer/ associated entity of the new employer **ceased to outsource** the work to the old employer/ associated entity of the old employer

- the new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer.

The term "**associated entities**" has the same meaning as given to that term in section 50AAA of the *Corporations Act 2001*. This refers to a situation in which one entity (the associate) is an associated entity of another entity (the principal). This will arise where:

- the associate and principal are related bodies corporate;
- the principal controls the associate and the operations, resources or affairs of the principal are material to the associate;
- the associate has a qualifying investment (an asset that is an investment or an asset that is the beneficial interest in an investment and has control over that asset) in the principal and has a significant influence over the principal and the interest is material to the associate;
- the principal has a qualifying investment in the associate and has a significant influence over the associate and the interest is material to the principal;
- a third entity controls both the principal and the associate and the operations, resources or affairs of the principal and the associate are both material to the third entity.

Agreements, Workplace Determinations and Named Employer Awards

An instrument will be a **transferable instrument** for the purposes of the transfer of business provisions of the FWA *if* it is:

- an **enterprise agreement** which has been approved by Fair Work Australia;
- a **workplace determination** – this includes low paid workplace determinations; industrial action related workplace determinations and bargaining related workplace determinations;
- a **named employer award** – this is a modern award which is expressed to cover one or more named employees.

Since January 2010 the majority of modern awards have common rule (industry wide) coverage and accordingly the inclusion of awards in the definition of a transferable instrument in the FWA definition is superfluous.

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

Where a transferable instrument has covered the old employer and transferring employee immediately before the termination of the transferring employee's employment with the old employer:

- the transferable instrument will cover the new employer and the transferring employee *in relation to the transferring work* after the transferring employee commences work with the new employer (transfer time); and
- while the transferable instrument covers the new employer and the transferring employee, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to that work (*section 313(1)*).

The transferable instrument will also cover any non-transferring employee who is employed by the new employer, if s/he performs the transferring work and at the time s/he is employed no other enterprise agreement or modern award covers the new employer and the non-transferring employee in relation to that work.

Unlike the previous position under the WRA, in which the transferable instrument only had application for up to 12 months, the application of the transferable instrument to the new employer and the transferred employee is **permanent** *unless* an order to the contrary is obtained from Fair Work Australia. These applications are discussed on the next page.

High Income Earners

Special provisions of the FWA apply when the transferring employee is a high income earner; which is defined as being a person who earns more than the applicable high income threshold (currently \$108,300 and indexed every July).

These special provisions apply *if* the old employer has given a guarantee of annual earnings (i.e. a written undertaking) for a guaranteed period to a transferring employee *and* the employee was a high income employee immediately before the termination of his/her employment with the old employer *and* some of the guaranteed period occurs after the transfer time and the employee becomes employed by the new employer *and* the enterprise agreement does not apply to the transferring employee in relation to the transferring work at the transfer time. In such circumstances:

- the guarantee of annual earnings has effect after the transfer time as if it had been given to the transferring employee by the new employer;
- the new employer is *not* required to comply with the guarantee of annual earnings in relation to the guaranteed period before the transferring time;
- the new employer is *not* required to comply with the guarantee of annual earnings to the extent that it requires the new employer to pay an amount of earnings to the transferring employee in relation to the part of the guaranteed period after the transfer time, at a rate that is more than the annual rate of the guarantee of annual earnings.

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

Further, if the transferring employee is entitled to non-monetary benefits under the guarantee of annual earnings after the transfer time and it is not practicable for the new employer to provide those benefits to the transferring employee, then the guarantee of annual earnings is taken to be varied so that, instead of the entitlement to those benefits, the transferring employee is entitled to an amount of money that is equivalent to the agreed money value of those benefits.

Applications to Fair Work Australia

Under the FWA the new employer may seek an order from the Fair Work Australia that the transferable instrument will not have application to the new employer and the transferring employee.

The application can be made to Fair Work Australia *if* there is or is likely to be a transfer of business. The application may be made by: a new employer, or an entity likely to be a new employer; a transferring employee, or an employer likely to be a new employer; if the application is in relation to an enterprise agreement, an employee organisation who is or is likely to be covered by the enterprise agreement; if the application is in relation to a named employer award, an employee organisation that is entitled to represent the industrial interests of the employee who is a transferring employee or is likely to be a transferring employee.

In considering an application for an order that the transferable instrument or instruments will not apply to the new employer and transferred employee, Fair Work Australia must consider:

- the view of the new employer or a person likely to be a new employer and the employees who would be affected by the order;
- whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
- if the order related to an enterprise agreement – the nominal expiry date of the agreement;
- the public interest.

The order must take effect before the later of either the time when the transferring employee becomes employed by the new employer or the day on which the order is made.

An application can also be made for an order by Fair Work Australia that a transferable instrument does not apply to a non-transferring employee. The same considerations noted immediately above in relation to transferring employees apply when Fair Work Australia considers applications for such orders. The order must take effect before the later of either the time when the non-transferring employee becomes employed by the new employer or the day on which the order is made.

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

Further, applications may be made to Fair Work Australia for a **variation to the transferable instrument**, including the removal of terms which Fair Work Australia is satisfied are not capable of meaningful operation because of the transfer of business or to remove an ambiguity or uncertainty about how a term will operate. As with the other applications to Fair Work Australia, it will consider: the views of the affected parties; whether the affected employees will be disadvantaged; if the order related to an enterprise agreement – the nominal expiry date of the agreement; and the public interest. The order must take effect before the later of either the time when the transferable instrument starts to cover the new employer or the day on which the order is made.

The impact of a transfer of employment on an employee's service

Whether or not there is an actual transfer of business, there can be a **transfer of employment**. This will arise where either:

- the employee becomes employed by the second employer not more than three months after the termination of his/her employment by the first employer and the first and second employers are associated entities when the employee becomes employed by the second employer; or
- the following conditions are satisfied: the employee is a transferring employee in relation to a transfer of business from the first to the second employer; the first and second employers are *not* associated entities when the employer becomes employed by the second employer.

Where there is a transfer of employment, any period of service with the old employer will count as service with the new employer. Any break between the termination of employment with the old employer and the commencement of employment with the new employer will not break the employee's continuous service with the new employer but does not count towards the length of his/her continuous service with the new employer. This applies whether or not there has been an actual transfer of business.

If the employee has already had the benefit of an entitlement the amount of which was calculated by reference to his/her period of service with the old employer, that period of service is not calculated again by the new employer when calculating the employee's entitlement of the same kind. For example, if an employee has already taken paid annual leave in relation to a period of service he/she provided to the old employer, that period does not count again for the purposes of the new employer calculating the employee's annual leave entitlement.

Employee Entitlements

Under the FWA, if there is a transfer of employment between **associated** entities the new employer will be **required to recognise the employee's service** with the old employer in respect of all service related National Employment Standard (NES) entitlements (i.e. annual leave, personal leave, parental leave, the right to request flexible work arrangements and redundancy pay).

DEVINE LAW AT WORK



T: 02-8985 7312

M: 0410 622 887

E: elizabeth@devinelaw.com.au

W: www.devinelaw.com.au

However, when there is a transfer of employment between **non-associated entities**, the new employer will be required to recognise the employee's service with the old employer for the purposes of personal leave, parental leave, and the right to request flexible work arrangements, however they will have to make a choice about whether to recognise service with the old employer for the purposes of annual leave and redundancy pay. If the new employer chooses not to recognise the previous service, the old employer must pay out these entitlements.

Further, where there is a transfer of business, the employee will *not* be entitled to redundancy payments *if*:

- s/he rejects an offer of employment made by the (proposed) new employer which is on terms and conditions **substantially similar to, and considered on an overall basis, no less favourable** than, the terms and conditions of employment with the old employer immediately before the termination *and* recognises the employee's service with the old employer; and
- had the employee accepted the offer, there would have been a transfer of employment.

Despite this, if Fair Work Australia forms the view that this provision operates unfairly, it can make an order requiring the old employer to pay the employee a specified amount of redundancy pay. An employee would need to seek such an order from Fair Work Australia if s/he took a view that s/he was entitled to some amount of redundancy pay.

The FWA does *not* have any application to long service leave entitlements and that entitlement will continue to be sourced from State and Territory legislation.

DO YOU HAVE ANY QUESTIONS OR WOULD LIKE TO KNOW MORE?

Getting the answers you need is as easy as giving us a call or sending us an email. We look forward to hearing from you.

Tel: **02 8985 7312**

Fax: 02 8985 7373

Email: elizabeth@devinelaw.com.au

www.devinelaw.com.au