

Fair Work | Fact Sheet

Transfer of Business

The information in this sheet only concerns national system employers and Victorian employers. It deals with provisions in the Fair Work Act 2009 (Cth) (FW Act) that will apply when an employer (new employer) takes over part or all of the business of another employer (old employer). If this situation leads to a transfer of business it will cause the new employer to inherit the enterprise agreement or a Modern Award that is expressed to cover one or more named employers or a workplace determination that bound the old employer. The provisions will commence operation on 1 July 2009. The transmission of business provisions in the Workplace Relations Act 1996 (Cth) (WR Act) will apply if the transmission of business occurs before 1 July 2009 (regardless of whether the employment of transferring employees ends with the old employer before, on or after that date).

Key differences between transmission of business provisions in the WR Act and the transfer of business provisions in the FW Act include:

- the transfer of business provisions will operate in a broader range of circumstances. The test for when they operate will no longer focus on whether the new employer has taken over the business of the old employer. Rather the test will be whether employees transferring from the old employer to the new employer will do the same or substantially similar work and whether there is a particular connection between the two employers;
- unlike the current provisions, the transferring workplace agreement will not cease to operate after 12 months; and
- unlike current laws, transferring agreements may also bind new employees recruited by the new employer who perform transferring work, where no Modern Award or enterprise agreement covers those employees.

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A key requirement for a transfer of business is the concept of “transferring work”. This is where the work that an employee performs for the new employer is the same or substantially the same as the work the employee performed for the old employer, that is, work performed in the business that was transferred.

There will be a transfer of business from the old employer to the new employer if:

- the employment of an employee of the old employer has been terminated;
- within 3 months after the termination, the employee becomes employed by the new employer and performs transferring work; and
- there is a relevant connection between the old employer and the new employer.

A relevant connection can arise in one of more of the following circumstances:

- there is an arrangement between the old employer (or an associated entity) and the new employer (or an associated entity) to the effect that the new employer either owns or has the beneficial use of some or all of the assets that the old employer (or an associated entity) had the beneficial use of and that relate to, or are used in connection with, the transferring work;
- where the old employer has outsourced the transferring work to the new employer (or an associated entity), irrespective of whether there is a transfer of assets between the old employer and the new employer;
 - the reverse scenario also applies, that is, where the new employer decides to take back the work previously done by the transferring employee as part of an outsourcing arrangement with the old employer; and
- where the new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer.

There will be no limit on the period of time that the transferred instrument will apply. It will continue to apply until replaced by a new enterprise agreement.

A transferable instrument will apply to non-transferring employees employed after the transfer date and who perform transferring work, in circumstances where no other enterprise agreement or modern award covers the non-transferring employees.

Transfer of entitlements

Generally speaking, where a transferring employee is a high income employee and is the subject of a guarantee of annual earnings by an old employer (see Modern Awards section for more information about this) the new



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employer must observe the guarantee for the balance of the guaranteed period that he/she is employed by the new employer.

Continuity of service

Generally speaking, the new employer will be obliged to recognise prior service for with the old employer for all transferring employees when calculating their service-based entitlements (except annual leave and redundancy pay), unless it has already been paid by the old employer.

In the case of annual leave and redundancy pay, the second employer may decide not to recognise the transferring employees' service with the first employer. In that case, the first employer will be obliged to make the relevant payment for annual leave and redundancy pay if the entitlement arises at that point. The exception is that the first employer will not be obliged to make a payment for redundancy where an employee is offered and rejects employment with the second employer on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the his or her terms and conditions of employment with the first employer.

Powers of FWA

FWA may make orders modifying the operation of the transfer of business provisions. For example, FWA can order that a transferring agreement not cover the transferring employee and the new employer, or that terms should be removed so that it operates more effectively in relation to the new employer.



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