



# Transfer of Business

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# About Us

- Part of The EI Group
- An experienced team of workplace lawyers dedicated to providing workplace relations advice and legal representation in employment law and industrial law matters
- “OneStopHR” as a cost-effective and efficient way of getting the workplace relations legal support that you need
- Our legal services include:
  - Industrial Relations
  - Enterprise Agreement Making
  - Contracts, Policies
  - Terminations (including general protections claims)
  - Compliance
  - Legal Representation
  - Training

# Importance of Transfer of Business Provisions

- Applies to all companies
- Far broader than previous “transmission of business” rules under *Workplace Relations Act 1996 (Cth)*
- Very different to previous “transmission of business” rules

# What is a Transfer of Business? (s311)

1. The employment of an employee with old employer must terminate (including by way of resignation);
2. Within 3 months, the employee must commence work with the new employer;
3. There must be a “transfer of work” (ie: “the same, or substantially the same” work for old and new employers); and
4. There must be a “connection” between old and new employers.

# What will constitute a “connection” between the old and new employers?

- Connection between the old employer and the new employer (s311(3)-(6))
  - The new employer owns, or has the beneficial use of, some or all of the tangible or intangible assets that the old employer (or an associated entity of the old employer) owned or had the beneficial use of (eg. sale of business)
  - Transfer between “associated entities” (eg. corporate restructure)
  - Outsourcing
  - Insourcing

# Effects of a Transfer of Business

- Suitable/adequate alternative employment?
- Transferable Instruments (s312)
- Employee entitlements

# Adequate Alternative Employment

- Employees who transfer from the old employer to the new employer in a “transfer of business” = “transferring employees”
- Transferring employees must be offered adequate alternative employment on terms and conditions no less favourable than those they enjoyed with the old employer
  - Same salary;
  - Same skill;
  - Same seniority; and
  - All the same terms and conditions.

# Adequate Alternative Employment (cont'd)

- *Nuplex Industries Australia Pty Ltd [2008] AIRC 1133*
- Employee with 35 years service
- Offer made to employee by new employer
  - Same salary;
  - Transfer of credits;
  - BUT without the more generous redundancy entitlements of old employer's industrial instrument.
- Not "acceptable alternative employment - old employer ordered to pay 64 weeks' redundancy pay (as per industrial instrument)

# Sale of Business Without Transferring Employees

- Redeployment options?
- Redundancy where position no longer required to be performed by anyone
- Entitlements on redundancy:
  - Notice (or pay in lieu);
  - Redundancy pay;
  - Accrued annual leave; and
  - Any other entitlements on termination (as determined by the relevant industrial instrument and employment contract).

# Transferable Instruments

- Transferable Instruments continue to apply until terminated or replaced (subject to FWA orders discussed later on)
- Transferable Instrument = enterprise agreements (including those made under previous legislation), workplace determinations, named employer modern awards (and an individual flexibility agreement made under an agreement or named employer modern award)
- Modern award coverage continues automatically

# New Non-Transferring Employees

- The only circumstance where a Transferable Instrument will apply to new non-transferring employees is where (s314(1)):
  - The new non-transferring employee performs the “transferring work”; and
  - At the time the new non-transferring employee is employed, no other collective agreement or modern award covers the new employer and the new non-transferring employee in relation to that work.

# Fair Work Australia Orders (s314, s317, s318, s320)

- FWA can make orders where there is, or is likely to be, a transfer of business
- Orders can be made in relation to transferring employees or non-transferring employees
- Ability for applicant to obtain order prior to transaction can be useful

# Orders in respect to Transferring Employees

- New employer, transferring employee or relevant union can apply
- Orders:
  - Transferable Instrument that would cover new employer and transferring employees does not do so
  - EA or named employer award that covers new employer will also cover transferring employees
- Orders will not come into effect until 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
- *James Brown Memorial Trust Order No AG2010/15241*

# Orders in respect to Non-Transferring Employees

- New employer, non-transferring employee or relevant union can apply
- Orders:
  - Transferable Instrument that would cover new employer and a non-transferring employee because of the circumstances we discussed earlier (s314(1)), does not cover the non-transferring employee
  - Transferable Instrument that covers new employer, also covers non-transferring employee who performs transferring work for new employer (*Retail Group (Aust) Pty Ltd Order No C2010/3751*)
  - Enterprise Agreement or Modern Award that covers new employer, does not cover non-transferring employee who performs transferring work
- Orders will not operate until later of time non-transferring employee starts work with new employer or day on which order is made

# Orders to Vary Enterprise Agreements

- Orders to vary enterprise agreements:
  - To remove terms not capable of meaningful operation because of the transfer
  - To remove ambiguity in agreement arising out of transfer
  - To allow instrument to operate in way that is better aligned with new employer's enterprise
- Order will not come into effect until time when transferrable instrument starts to cover new employer or date when variation made

# Fair Work Orders (cont'd)

- Obligated to consider certain factors in making such orders
  - Views of new employer and employees to be affected by order
  - Whether any employees will be disadvantaged in the making of such order
  - Nominal expiry date of enterprise agreement
  - Negative productivity and economic impact on new employer
  - Degree of business synergy
  - Public interest
- Onus on applicant to put evidence on each of matters that will support making of order

# Questions?



# Employee Entitlements

- s22(5)
- Transfer between associated entities: All entitlements and service will continue as usual for transfers between associated entities.
- Transfer between non-associated entities: New employer can choose not to recognise employee's service with old employer for purposes of:
  - Annual leave
  - Redundancy Pay
  - Unfair dismissal (where expressly stated in new contract/letter of appointment provided PRIOR to the commencement of employment)

# Employee Entitlements (cont'd)

- Personal/Carer's leave
- Parental leave
- No double entitlement

# Guarantee of Annual Earning (s316)

- Will transfer to new employer BUT new employer not obliged to comply with guarantee for period before the transfer
- New employer must undertake due diligence and old employer must ensure compliance with guarantee for period before transfer
- If not practicable for new employer to provide any of non-monetary benefits contained in guarantee, is entitled to convert them into money (“based on agreed monetary value”)

# Long Service Leave

- Some transfers will not break continuity of service for purposes of long service leave
- Will depend on State legislation
- For example, in NSW, transfers between “related” entities do not break continuity of service for purpose of long service leave (service with old employer = service with new employer)

# Practical Considerations for Outsourcing / Insourcing

- Understand which terms and conditions apply to transferring employees so can accurately reflect these in contracts/letters of offer
- Ensure transferring employees' leave entitlements are accurately recorded (as per commercial agreement)
- Ensure service agreement is accurately documented

# Practical Considerations for Transfers between Associated Entities

- Understand which terms and conditions apply to transferring employees so can accurately reflect these in contracts/letters of offer
- All leave balances need to transfer to new employer and continuity of service preserved

# Practical Considerations for a Seller in Sale of Business

- Data room ready with all employment contracts, policies etc (be prepared to answer a million due diligence questions of a well advised buyer!)
- Continue to employ non-transferring employees in associated entities or terminate their employment (must pay out all relevant entitlements)
- Terminate the employment of transferring employees (may occur simultaneously with signing of new contract with new employer)

# Practical Considerations for a Seller in Sale of Business (cont'd)

- Pay out annual leave if contractually agreed with buyer
- Ensure any guarantees (incl non-monetary benefits) pursuant to “guarantees of annual earnings” have been satisfied (or could become liable for claims after the sale)
- Asset Sale and Purchase Agreement drafted, negotiated and executed

# Practical Considerations for a Buyer in Sale of Business

- Do you want to take some, or all of the old employer's employees?
- Conduct employment due diligence (together with other commercial aspects of due diligence)
  - Transferrable Instruments (and FWA orders if necessary)?
  - Guarantees of Annual Earnings?
  - Entitlements over and above NES (will need to be maintained) – eg. more generous redundancy or company paid parental leave policy ?
  - Leave entitlements accrued properly (accounting/financial due diligence issue)?
  - Specific entitlements on sale of business?

# Practical Elements of a Transfer – Buyer (cont'd)

- New contracts/letters of appointment negotiated (for senior employees like CEOs) and drafted and signed by transferring employees (should be conditional on completion of sale)
- Asset Sale and Purchase Agreement drafted, negotiated and executed
- HR integration/ change management (if necessary)

# Other Considerations

- Employee records must be transferred from old employer to new employer at time of transfer (Regulation 3.41)
- Transferring employees must be given Fair Work Information Statement
- New employers should be aware of orders that FWA can grant which provide opportunity for streamlined terms and conditions

# Questions?

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