



FACT SHEET

Transfer of Business

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Replaces: January 2013

This fact sheet outlines the general rules regarding the transfer of rights and obligations under transferable instruments (e.g. enterprise agreements) where there is a transfer of business from an old employer to a new employer. This fact sheet will primarily deal with transfers of business that occur on or after 1 July 2009.

WHAT IS A TRANSFER OF BUSINESS?

Under the *Fair Work Act 2009* (the 'Act'), a transfer of business occurs from an old employer to a new employer if the following requirements are satisfied:

- The employment of an employee of the old employer has terminated;
- Within 3 months after the termination, the employee becomes employed by the new employer;
- The work ('the transferring work') the employee performs for the new employer is the same or substantially the same as the work the employee performed for the old employer;
- At least one of the following connections exists between the old employer and the new employer;
 - Ownership or Beneficial Use of Assets - The new employer owns or has the beneficial use of some or all of the assets (whether tangible or intangible) that the old employer owned or had the beneficial use of and those assets relate to or are used in connection with the transferring work;
 - Outsource of Work - The work from the old employer is outsourced to the new employer;
 - Insource of Work - The work previously outsourced from the old employer to the new employer is then insourced back to the old employer (thereby becoming the new employer);
 - Associated Entities - The old employer and the new employer are associated entities in accordance with the meaning of section 50AAA of the *Corporations Act 2001* (Cth). Generally speaking, a new employer is an associated entity of the old employer if the old employer controls the new employer.

Please note that there are a number of ways entities can be associated. Members should peruse section 50AAA of the *Corporations Act 2001* (Cth) and if necessary obtain professional corporate advice in relation to the specific circumstances.

WHAT IS A TRANSFERABLE INSTRUMENT?

Under the Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, each of the following is a transferable instrument:

- An agreement (ie. an enterprise agreement approved by the Fair Work Commission ('FWC'), a collective agreement, a preserved individual or collective state agreement, an Australian Workplace Agreement, an Individual Transitional Employment Agreement, a certified agreement made before 27 March 2006 and an old industrial relations agreement);
- A workplace determination;

- An award made under the *Workplace Relations Act 1996* (Cth) ('former federal award')
- A notional agreement preserving a state award ('NAPSA');
- A named employer award (a modern award that commenced on 1 January 2010 that expressly covers one or more named employers);
- In certain circumstances, preserved redundancy provisions, individual flexibility arrangements and guarantee of annual earnings).

NOTE: A modern award, such as the *Hospitality Industry (General) Award 2010* is not a transferrable instrument.

WHAT HAPPENS TO A TRANSFERRABLE INSTRUMENT WHEN THERE IS A TRANSFER OF BUSINESS?

Transferring Employees

Subject to an order by the FWC, if a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee's employment with the old employer, then:

- The transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (transfer time) the transferring employee becomes employed by the new employer; and
- While the transferable instrument covers the new employer and the transferring employee in relation to the transferring work, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to the work.

Note: An Enterprise Agreement that commences after the transfer time can cover employees who are subject to any previous Enterprise Agreement (after its nominal expiry date) or any other collective or certified agreement, NAPSA or former federal award. From 1 January 2010, a modern award can cover employees under former federal awards and NAPSA's.

Non-Transferring Employees

Subject to an order by the FWC, non-transferring employees of the new employer (that is, new employees employed after the transfer of business) may be covered by a transferable instrument in relation that work in limited circumstances if:

- The transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (transfer time) the transferring employee becomes employed by the new employer; and
- After the transferable instrument starts to cover the new employer, the new employer employs a non-transferring employee; and
- At the time the non-transferring employee is employed, no other enterprise agreement or modern award covers the new employer and the non-transferring employee in relation to that work.

However, if, at the time the non-transferring employee is employed by the new employer, there is an Enterprise Agreement or modern award (e.g. *Hospitality Industry (General) Award 2010*) that covers the new employer and the non-transferring employee in relation to that work, then the non-transferring employee will be covered by the Enterprise Agreement or modern award.

ORDERS BY THE FWC

TYPES OF ORDERS

The FWC may make certain orders relating to the application of transferable instruments if there is, or is likely to be, a transfer of business from an old employer to a new employer. The types of orders include whether a

transferable instrument will or will not apply to the new employer or that an enterprise agreement (or other collective agreement) or modern award that applied to the new employer applies to the transferring employees.

WHO MAY APPLY?

The FWC may make an order relating to the application of a transferable instrument only on application by any of the following:

- The new employer or a person who is likely to be the new employer;
- A transferring employee or an employee who is likely to be a transferring employee;
- A non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
- If the application relates to an enterprise agreement (or collective agreement-based transitional instrument e.g. workplace agreement), an employee organisation that is, or is likely to be, covered by the agreement;
- If the application relates to a named employer award, an employee organisation that is entitled to represent the industrial interests of the transferring or non-transferring employee.

MATTERS THAT THE FWC MUST TAKE INTO CONSIDERATION

When deciding to make an order, the FWC must take into account the following:

- The views of the new employer or a person who is likely to be the new employer and the employees who would be affected by the order;
- Whether any employee would be disadvantaged by the order in relation to their terms and conditions of employment;
- If the order relates to an enterprise agreement - the nominal expiry date of the agreement;
- Whether the transferable instrument 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 transferable instrument covering the new employer;
- The degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;
- The public interest.

WHAT HAPPENS TO THE EMPLOYMENT RECORDS OF TRANSFERRING EMPLOYEES?

The *Fair Work Regulations 2009* outlines the requirements and obligations of employers concerning records of transferring employees when there is a transfer of business.

TRANSFERRING EMPLOYEE AT THE TIME OF CONNECTION BETWEEN THE TWO EMPLOYERS

If the transferring employee becomes an employee of the new employer at the time at which the connection between the old employer and the new employer occurs (i.e. when the transfer of assets occurs, outsource, insource or for associated entities when the employee is transferred), the old employer must provide to the new employer the employee record (as required to be kept under section 535(1) of the *Fair Work Act 2009*) of each transferring employee.

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RETENTION OF EMPLOYEE RECORDS

The employee records must be kept by the new employer for seven years.

THE MINIMUM EMPLOYMENT PERIOD AND A TRANSFER OF BUSINESS

The Act provides at section 384(2) that, where there is a transfer of business between non-associated entities, the new employer does not need to recognise a transferring employee's period of service with the old employer.

Where transferring employees have been given notice in writing before their employment with the new employer starts that their period of service will not be recognised by the new employer for the purpose of unfair dismissal, the transferring employee will essentially serve a new Minimum Employment Period with the new employer. This means that should the transferring employee be terminated within the Minimum Employment Period, the transferring employee is not eligible to pursue an unfair dismissal claim through the FWC.

NOTE: Other claims can still be made, such as discrimination or adverse action, regardless of the Minimum Employment Period applying.

Refer: QHA's Termination Provisions Fact Sheet

ABOUT TO BUY OR SELL A BUSINESS?

The arrangements that may, or may not apply, with a business transfer are complex and legislatively determined. It is therefore an area of law that requires careful consideration. This Fact Sheet has been developed to provide general guidance about those arrangements provided by legislation. Members involved with the purchase or sale of a business should ensure that their commercial lawyer has adequately considered these transfer of business employment issues as these are often forgotten.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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