EMPLOYMENT LAW CONSIDERATIONS IN THE PURCHASE OF A BUSINESS – TRANSFER OF WORK & CONTINUITY OF EMPLOYMENT

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PART 1: SUMMARY OF TWO KEY CONCEPTS

There are a range of provisions in the *Fair Work Act 2009* (Cth) ("**FW Act**") dealing with the sale / purchase of businesses. Some deal with privately or publicly owned businesses and others deal with the sale of state government businesses to private enterprise.

Before dealing with these various provisions, there are four key concepts that need to be identified. The first is "**Transfer of Work**" and the second is "**continuity of employment**".

Continuity of employment is whether or not the employee(s) transferring from the vendor's (aka "old employer's") business to the purchaser's (aka "new employer's") business take with them their start date and all accrued but unused employee benefits.

There are also issues related to whether or not the new employer can rely on the six or 12 months[1] exemption provisions that exclude new employees from taking proceedings under the Unfair Dismissal Provisions of the FW Act.

Continuity of employment is an issue not only in instances of Transfer of Work but also in redundancy cases where the old employer's business is not being sold. They may also impact the effectiveness of restraints of trade when an employee moves from an old employer to a new employer.

As continuity of employment is the broader concept, I propose to deal with it first.

Transfer of Work, as we shall soon see, relates to the industrial instruments that "follow" a transferring employee from the old employer to the new employer's business and therefore bind that new employer.

The rules that apply with respect to the Transfer of Work Provisions under the FW Act are substantially different to those that applied under the Transmission of Business Provisions of the Work Choices regime which ended in 2009 and are no longer relevant.

The third key concept is that of "**associated entities**" and the fourth (companion) key concept is of "**non-associated entities**". These need to be understood before progressing further into this paper.

[1] Six months for businesses with 15 or more employees and 12 months for businesses with less.

Associated entities

An “associated entity”, by **s.12** of the FW Act, has the same meaning as set out in **s.50AAA** of the *Corporations Act 2001* (Cth).

> *(1) One entity (the **associate**) is an associated entity of another entity (the **principal**) if subsection (2), (3), (4), (5), (6) or (7) is satisfied.*
>
> *(2) This subsection is satisfied **if the associate and the principal are related bodies corporate**.*
>
> *(3) This subsection is satisfied if the principal **controls** the associate.*
>
> *(4) This subsection is satisfied if:*
>
> *(a) the associate **controls** the principal; and*
>
> *(b) **the operations, resources or affairs of the principal are material to the associate**.*
>
> *(5) This subsection is satisfied if:*
>
> *(a) the associate has a **qualifying investment** (see subsection (8)) in the principal; and*
>
> *(b) the associate has **significant influence** over the principal; and*
>
> *(c) the interest is **material** to the associate.*
>
> *(6) This subsection is satisfied if:*
>
> *(a) the principal has a **qualifying investment** (see subsection (8)) in the associate; and*
>
> *(b) the principal has **significant influence** over the associate; and*
>
> *(c) the interest is **material** to the principal.*
>
> *(7) This subsection is satisfied if:*
>
> *(a) an entity (the **third entity) controls** both the principal and the associate; and*
>
> *(b) the operations, resources or affairs of the principal and the associate are both **material** to the third entity.*
>
> *(8) For the purposes of this section, one entity (the **first entity**) has a **qualifying investment** in another entity (the **second entity**) if the first entity:*
>
> *(a) has an asset that is an investment in the second entity; or*

(b) has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.

[**Emphasis added**]

In cases where there are associated entities, then special provisions apply with regard to continuity of employment and transfer of work. These will be noted throughout the paper.

Non-Associated entities

Where the old employer and the new employer are not associated entities, the definition of "transfer of work" requires that the employees are transferring due to a "transfer of business" from the old employer to the new employer.

This means for example that the purchase of shares of a business would not be a transfer of business as the employee would remain in the same entity – it is just the shareholding that changes.

PART 2: CONTINUITY OF EMPLOYMENT

When any employer decides that an employee's role is no longer required, (be it due to the Sale of the Business, technological or other structural changes, business downturn or as a result of changes in business systems), certain obligations trigger.

For example, if the employee's services are no longer required, the employer must:

(a) Provide "notice" or payment in lieu of notice, to bring the employment to an end. If there is no applicable notice provision in the Contract of Employment or Award or pursuant to the NES (**s.117** of the FW Act), "reasonable notice" will apply;

(b) Provide severance payments for redundancy under either **s.119** of the FW Act[2] or under a Modernised Award[3];

(c) Where an Award or EBA applies that creates the obligation, comply with the obligation to consult with the employee to see if the effects of the redundancy can be diminished;

(d) Comply with other contractual obligations (if any) with respect to notice, severance payments, consultation and the provision of outplacement services;

(e) Pay out accrued but unused annual and long service leave (which is calculated or determined by the length of an employee's service (see **s.113** of the FW Act).

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2 Note that the transitional arrangements provide for a phased introduction of these payments.

3 Note that in many Modernised Awards there are transitional arrangements, which provide for severance payments from former Awards or NAPSAs to be taken into account.

The obligations in (a), (b), (d) and (e) can be avoided if the employer can redeploy the employee into "suitable alternate employment" within its operations or perhaps with a new employer (on the sale of the business)[4].

Where the redundancy occurs due to a business downturn some employers will try to redeploy employees to part time or lesser roles to ensure that their skills are retained for a time when the business recovers. Consent of the employees is required.

"Suitable alternate employment" requires the employer (or in the case of a Sale of Business, the new employer) to offer the employee whose role is redundant with the old employer, alternative employment on conditions that are no less favourable than the current (ie old) employment.

This entails the recognition of the employee's commencement date with the old employer, the continuation of personal leave, annual and long service leave entitlements and same salary and conditions as well as similar employment status.

The date of commencement with the old employer is not only important for the accrual of leave, but also the accrual of redundancy entitlements and access to time off under Parental Leave Provisions in the FW Act, as 12 months "continuous service" is required[5].

Arguments will often occur as to whether or not the employer (or new employer on a purchase) is offering "suitable alternate employment". For example, the employee may be 58 years of age and is happy to leave the old employer with a substantial redundancy payment, especially if the employee does not like the new employer or additional travel to a new site is required.

On the other hand, the old employer will want to keep redundancies to a minimum as this will reduce capital gains from the sale.

Other problems arise in Sales of Business if the employee is a key employee and the purchasing employer needs them to assist with the running of the business.

In *Application by Nuplex Industries Australia Pty Limited*[6] the AIRC found that the offer of new employment was not "suitable alternate employment", as the employee's 64 weeks of redundancy pay with the old employer did not carry over to the new employer. Senior Deputy President Drake noted:

> *If Mr Brinskele had moved across to Lomb and was then made redundant he would have been in a dire situation. If he accepted Nuplex's assessment of the employer obligations, Mr Brinskele would have retained his Agreement entitlements for twelve months. He would then, if he became redundant, have been in the unenviable position of having to pursue his entitlements from Lomb who did not accept Nuplex's assessment of their obligations.*

4 This can also be called "acceptable alternative employment"
5 See s.65(2) and s.67 of the FW Act
6 [2008] AIRC 1133, 26 September 2008

... An offer of employment may not be an acceptable alternative offer if it does not contain comparable terms overall. One of the most beneficial terms in Mr Brinskele's existing employment arrangements with Nuplex was his redundancy entitlements.

Her Honour also found that the new employment was not "suitable alternate employment" for several other operational reasons.[7]

In *Smith v Onesteel Limited and Commonwealth Steel Company Pty Ltd* [8] the NSW District Court awarded a steelworker, who had been a furnace operator for over 20 years, $153,316 in award redundancy entitlements because he wasn't offered acceptable alternative employment when transferred to an inferior job on the same pay and hours. According to Workplace Express:

In October 2010 he was transferred to a finishing line primarily to paint railway wheels due to a lack of work in the forge. The finishing line was in the same plant as the forge and the employee's salary and working hours remained the same. The company said his transfer would be re-assessed in January 2011. The worker told the NSW District Court he felt humiliated by the transfer and that the painting work was physically difficult because he suffered from osteoarthritis in his knee joints. He tendered his resignation on November 9, 2010. Judge Michael Elkaim said the worker regarded the transfer as tantamount to a demotion, even though the skill levels were not significantly different and his salary was the same. Notwithstanding this, the judge said he was satisfied that the finishing line job was not acceptable alternative employment, and ordered the company to pay the worker $153,316 in redundancy entitlements under the award.

In cases involving Sale of Business, **s.384(2)(b)(iii)** of the FW Act permits the new employer to only offer the employees with the old employer employment **without** continuity of employment. The section states as follows:

(1) An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

…

(b) If

(i) The employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) The old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

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7 Note that s.120 of the FW Act allows employers to approach the FWC to vary redundancy payments when the employer has obtained suitable alternative employment for the employee or when the employer cannot pay the amount due to the employee. See *Application by Glen Cameron Nominees Pty Ltd* [2015] FWC 5016 (2 October 2015)

8 [2013] NSWDC 18, 15 March 2013

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer.

[**Emphasis added**]

Naturally, this can sometimes give rise to the old employer being liable for notice payments, severance payments and the payment for accrued but unused annual and long service leave. Effectively, the "employment clock" is stopped and re-started. An example is *Ahmed, Coker and Ors v Serco Australia Pty Limited*.[9]

In that case, Serco, which took over operations in October 2009 from a previous detention centre operator (G4S Australia Pty Limited), clearly advised seven employees that a period of service with the old employer would not be recognized when their employment transferred to Serco. The seven transferring employees were dismissed by Serco in March 2010 and each filed applications under the Unfair Dismissal Provisions of the FW Act. The seven applicants sought to argue that their employment was continuous and that the time restrictions on making Unfair Dismissal claim did not exclude them. They failed and the seven Applications were dismissed. Serco was able to show that its actions fell within s.384(2)(b)(iii) of the FW Act. The letter from Serco stated:

> *You will not be required to serve a period of probationary employment. Nevertheless, as your position at Serco is a new contract of employment, all qualifying periods set out in the Fair Work Act and the Serco Immigration Centres Agreement 2009 will apply.*

For a recent example, see *Glick v Domoney Properties Pty Limited*[10].

Continuity of employment under the FW Act

Section 22 of the FW Act sets out the meanings of "service" and "continuous service". Sub-sections (1), (2) (3) and (3A) deal with the general meaning.

Sub-sections (4) and (4A) deal with the meaning for the purposes of:

- Requests for flexible working arrangements (Division 4 of Part 2.2 - ss.65 and 66 of the FW Act);
- Parental leave (Division 5 of Part 2.2 – ss.67-85 of the FW Act); and
- Sub-Division 11A of Part 2.2 – ss.117-118 of the FW Act);

With respect to the transfer of business, the relevant sub-sections are (5) to (7).

9 [2010] FWA 5121, 12 July 2010
10 [2016] FWC 7649 (24 October 2016)

It is important to note that **s.22(5)** of the FW Act confirms that "*any period of service of the employee with the first employer counts as service with the employee's second employer*." This will include for example, accrued but unused personal leave. The prerequisite is that there is a "*transfer of employment*" as defined in s.22(7) of the FW Act, which will be discussed later.

Furthermore, where there is a transfer of employment within three months, any period between the termination of employment with the first (ie old) employer and re-commencement with the second (ie new) employer does not break the employee's continuous service, but the period of the gap does not count towards the length of service (see s.22(5)(b) of the FW Act).

If the transferring employee has had the benefit of the entitlement with the first (ie old) employer, that benefit related to that period of service is not counted (see **s.22(6)** of the FW Act). For example, if the employee has annual leave accrue with the old employer and has taken it, then it does not further accrue with the new employer. Similarly, if the employee was paid in lieu of notice by the old employer, that period is not paid a second time by the new employer.

However, note that **s.91** of the FW Act (dealing with transfer of employment situations that affect entitlement to payment for a period of untaken annual leave) states that **s.22(5)** of the FW Act does not apply to a transfer of employment between non-associated entities if the new employer decides not to recognise the employee's service with the old employer.

In other words **s.22(5)** of the FW Act does not apply automatically. It will not apply where the new employer decides not to recognise the employee's service with the old employer. This can only occur with respect to non-associated entities. By inference, if the entities are associated, then the prior service must be recognised.

Section 122 of the FW Act (dealing with severance payments) has a similar regime to **s.91** of the FW Act. However, note that FWC may make orders that the old employer pay a specified amount of redundancy pay if it would be unfair to deny the payment to the employee ((see **s.122(4)** of the FW Act).

If an employee is on parental leave with the old employer, that leave will continue and the new employer (see **s.69(1)** of the FW Act). All steps taken with the old employer in relation to proposed leave count as steps taken with the new employer (see **s.69(2)** of the FW Act).

Finally, with respect to long service leave and continuity of employment, the issue of continuity is usually dealt with in the relevant state legislation. In NSW, the *Long Service Leave Act 1955* (NSW) contains provisions for there to be continuity of service where the break between old and new employers is less than **two** months, and the gap period is not counted for the purposes of calculating the accrual.

PART 3: TRANSFER OF WORK

The Transfer of Work provisions of the FW Act commenced on 1 July 2009 and govern what industrial instruments (eg Awards and/or Enterprise Agreements) transferred from an old

employer to the new employer. The provisions are not about "continuity of employment" but the employee's governing industrial instruments. This is important to grasp.

Historical context

Before discussing the **Transfer of Work** provisions of the FW Act, it is important to note that the FW Act built upon the WorkChoices regime in terms of its constitutional basis (ie s.51(20) of the Constitution. This meant that the FW Act as it operated on 1 July 2009 only applied as follows:

(a) to all businesses in Victoria, which gave its industrial powers to the Federal Government in 1996;
(b) to all businesses in the Northern Territory and the Australian Capital territory, as they are covered by the Federal Government's power to deal with them under the Australian Constitution; and to
(c) to "constitutional corporations" in NSW, Queensland, Tasmania, South Australia and Western Australia.

For the purposes of (c) "constitutional corporations" had to be incorporated, and had to be trading or financial entities. For example, sole traders and partnerships were excluded and their industrial relations management remained in state hands.

While these distinctions existed (and they still exist with regard to the application to the FW Act's anti-bullying jurisdiction) this lead to a number of cases that dealt with the question of "what was a "constitutional corporation?" For example in one week, a court in Western Australia decided that a Local Government in that state was a "constitutional corporation" but a Court in Queensland decided that a Local Government in that state was not a "constitutional corporation".

The definition was also charged politically as at the time of Work Choices in 2006 as the Federal Government was right wing and the states were controlled by left wing parties who did not want the Work Choices regime taking away their industrial relations power. In NSW, this was best exemplified by the passing of legislation that took away the "corporatisation" of Local Government, so they were henceforth "bodies politic". This had the practical effect of ensuring that some 50,000 employees remained and continue to remain in the NSW industrial relations system and not under the Federal regime.

However, with the Federal Election in March 2007, left wing Governments came to power Federally and in NSW, Queensland, Tasmania, South Australia, which all gave almost all of their remaining industrial powers to the Federal Government in 2009. This means that Western Australia is the only jurisdiction where the definition of "constitutional corporation" remains relevant.

Accordingly from 1 July 2010, the carving out of non "constitutional corporations" (partnerships and sole traders etc) from the FW Act was otiose.

In mid-September 2012, the Federal Government announced that it was intending to amend the FW Act so that the Transfer of Work provisions extended to transfers of business from a state public sector employer to a national system employer, thereby bringing the provisions into alignment with the provisions that already existed in Victoria, and ACT and the Northern Territory. The Bill, the Fair Work Amendment (Transfer of Business) Bill passed the House of Representatives on 1 November. That legislation was finally passed by the Senate in late November 2012. This legislation will be discussed in **Part 4** of this paper.

Finally, it is also worth noting that with the passing of the FW Act, there has been a simplification of the Australian industrial relations system. In summary:

(a) The five "Standards" created by the WR Act and which applied to all relevant employees have been expanded to under the FW Act to 10 National Employment Standards;

(b) The 1,750 Awards and NAPSAs that applied on 31 December 2010, have been reduced to 122 Modernised Awards, which operate as "common rule" Awards.

thereby removing many of the differences in industrial instruments that applied between old employers and new employers.

What are the Transfer of Work Provisions of the FW Act?

Section s.22(7) of the FW Act is the centre-piece and it provides as follows:

> *There is a **transfer of employment** of a national system employee from one national system employer (the **first employer**) to another national system employer (the **second employer**) if:*
>
> *(a) the following conditions are satisfied:*
>
> *(i) the employee becomes employed by the second employer **not more than 3 months** after the termination of the employee's employment with the first employer;*
>
> *(ii) the first employer and the second employer are **associated entities** when the employee becomes employed by the second employer; **or***
>
> *(b) the following conditions are satisfied:*
>
> *(i) the employee is a **transferring employee in relation to a transfer of business** from the first employer to the second employer;*
>
> *(ii) the first employer and the second employer are **not associated entities** when the employee becomes employed by the second employer.*
>
> *Note: **Paragraph (a) applies whether or not there is a transfer of business from the first employer to the second employer**.*
>
> [**Emphasis added**]

This means that:

(a) there is a transfer of employment if the employee becomes an employee of the new employer within three months of their termination of employment with the old employer and the parties are associated; and

(b) if the parties are "not associated entities" a transfer of employment occurs only if there is a "transfer of business" (ie a sale of assets between the old and the new employer".

Note that both the old and new employers must be "national system employers". This was not the case in *Holmes v Balance Water Inc & Ors (No.2)*[11], where the Respondent was a US corporation.

In each case, upon certain pre-conditions, where a transfer of employment occurs, the employee's service with the old employer becomes continuous with the new employer.

The key feature is that Transfer of Work focuses on there being a similarity in the work being performed by the transferring employees rather than looking at whether a business or part of a business is being transferred.

Section 22(7) also has some other key differences:

Firstly the period of the gap between the old employer and the new employer in increased from two months under Work Choices to three months.

Secondly, where there is a transfer between associated entities, a "transfer of business" is not required in order to have the industrial instruments transfer from the old to the new employer. This situation will cover staff moving between a holding and a subsidiary company.

This is picked up by **s.22(8)** of the FW Act, which states:

> *A transfer of employment:*
>
> *(a) is a **transfer of employment between associated entities** if paragraph (7)(a) applies; and*
>
> *(b) is a **transfer of employment between non-associated entities** if paragraph (7)(b) applies.*

Section 311(1) of the FW Act also provides that an industrial instrument will transfer to the new employer where:

(a) an employee has been terminated by the old employer. This can include resignation;

[11] [2015] FCCA 1093 (28 August 2015)

(b) within **three** months of the termination, the employee is re-employed by the *new* employer.

(c) the work (called "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. This is not a technical matter and there may be minor differences in the work performed. It will also be possible to categorise the work more generally to deal with groups of employees. For example in supermarkets – a stacker may work on the registers;

Under **s.311(2)** of the FW Act, employees who satisfy the requirements of (a), (b) and (c) above then they are ***transferring employees*** in relation to the transfer of business.

Under **s.311(3)** of the FW Act there must **also** be a *connection* between the old and new employer. This will require an asset transfer. This may also be occasioned directly between old and new employer **or** by associated entities of the old and new employers.

Section 311(4) of the FW Act provides an expansion of the concept of "connection". In addition to s.311(1) (a) – (c) being satisfied, the connection occurs if there is an outsourcing by the old employer of work to the new employer. There need be no asset transfer in this situation.

Section 311(5) of the FW Act continues with the expansion of the concept of "connection". It provides that there is a further transfer if the old employer takes back the outsourced work under s.311(4) of the FW Act.

Section 311(6) of the FW Act confirms that there is a "connection" between the old and the new employer if the new employer is an "associated entity" of the old employer under the *Corporations Act 2001*. This type of connection deals with corporate restructures and ensures that employers cannot avoid obligations under instruments by transferring employees between associated entities (although any attempt to change an employee's employer without consent may be ineffective: *McCluskey v Karagiozis*[12].

If the requirements are met with respect to the employee being a transferring employee **and** there is a transfer of business, then there is a transfer of employment for the purposes of s.**22(7)(b)** of the FW Act.

As there is a transfer of employment, **s.22(5)** of the FW Act applies (unless the new employer has exercised the right under **s.384(2)(b)(iii)** of the FW Act not to recognise the employee's prior service with the old employer and advises employees of this fact.

Minimum period of employment

Unless the old and the new employers are associated entities, the new employer is not obliged to recognize prior service with the old employer for calculating the employee's minimum

12 [2002] FCA 1137

employment period provided that the new employer meets the obligations in s.384 of the FW Act in advising the employee in writing that prior service with the old employer will not be recognised. This must be done before the employment with the new employer commences (see **s.384(2)(b)** of the FW Act.

John Lucas Hotel Management Services t/as World Square Pub v Hillie[13] examined an earlier FWC decision that found an arrangement existed under s.311 between the old employer and the new employer. It overturned that decision. The Full Bench noted:

> ***[18]*** *For Ms Hillie to be protected from unfair dismissal she would need to be a "transferring employee in relation to a transfer of business" from Wanslea Grove to the appellant within the meaning of* ***s. 384(2)(b)(i)****. In the circumstances of this case, for a "transfer of business" to have occurred there would need to be "a connection" between Wanslea Grove and the appellant within the meaning of s. 311 (3).* ***For such a connection to exist the appellant would need in effect to own or have the beneficial use of some or all of the assets (whether tangible or intangible) that Wanslea Grove owned or had the beneficial use of "in accordance with an arrangement" between Wanslea Grove and the appellant****. The evidence concerning the appellant having the beneficial use of some assets which Wanslea Grove previously had the beneficial use is fairly sketchy. However the only point of contention in this appeal is whether the appellant obtained the beneficial use (or ownership) of those assets "in accordance with an arrangement" between Wanslea Grove and the appellant.*
>
> *…*
>
> ***[21]*** *Did the transfer of assets (such as they were) between Wanslea Grove and the appellant occur in an accordance with an "arrangement" between them? The respondent cited as evidence of such an arrangement the request by Mr Lucas for Wanslea Grove to provide him with certain information, and the subsequent provision of that information.* ***However that in no way created any obligation, legal, moral or otherwise on the part of the appellant****. For example, while a list of employees was sent to the appellant, there was no evidence that this created an obligation on the part of the appellant to employ anyone on that list. In fact there is no evidence that the list was used at all. The uncontested evidence is that Mr Lucas contacted a person named Mosan whom he had employed previously and who he had seen working at the hotel and enquired whether he was looking for work. Mosan recommended Ms Hillie as another person who could work at the hotel.*
>
> ***[22]*** *The Commissioner referred in his decision [at 45] to an explicit understanding that the appellant would be taking over the operation of the hotel on Monday 29 August 2011. However that reflected an arrangement between the owner of the hotel and the appellant. Nor is there any evidence that Mr Lucas's misplaced expectation that he might receive the keys from Wanslea Grove suggest any arrangement he had with Wanslea Grove. Whatever arrangement existed was between the owner of the hotel and the appellant.* ***This does not establish a connection between the "old employer" and the "new employer" as required by s.311(3).***
>
> ***[24]*** ***…*** *we are satisfied that there was* ***no evidence to support his finding that there was an arrangement between Ms Hillie's previous employer and the respondent involving a transfer of assets as contemplated by ss 311(3). The finding was not***

[13] [2013] FWCFB 1198, 22 February 2013

available on the evidence. It follows that Ms Hillie did not complete the minimum of employment period as required by the Act and is not therefore a person protected from unfair dismissal.

[**Emphasis added**]

Which industrial instruments are transferred?

Section 312 of the FW Act confirms that "transferable instruments" are:

(a) an enterprise agreement that has been approved by the FWC;

(b) workplace determinations;

(c) "named employer" Awards;

(d) individual flexibility arrangements

(e) written guarantees of annual earnings for high income employees.

"**Named employer Awards**" are modern Awards that are expressed to cover one or more named employers (see s.312(2) of the FW Act).

Also able to be transferred are pre-reform Federal Awards, Collective Agreements, AWAs, ITEAs, Certified Agreements made before 27 March 2006, preserved redundancy entitlements, IFAs and guarantees of annual earnings.[14]

In effect **s.313** of the FW Act sets up the default rules. A transferable instrument covering the old employer and the transferring employee immediately before the termination of employment covers the new employer and the transferring employee:

(a) after the time the transferring employee becomes employed by the new employer; and

(b) any other enterprise agreement or named employer Award which covers the new employer will not cover the transferring employee, even if capable of doing so on its terms.

This will extend to an EBA that covers the transferring employee. The named Award supporting it would transfer but be inoperative while the EBA remains in effect.

Any Unions and employer association which are a party to the transferring instrument will also continue to be bound, along with the new employer.

Section 314 of the FW Act sets out the requirements:

[14] See Item 8 of Schedule 11 of the *Fair Work (Transitional Arrangements & Consequential Amendments) Act 2009* (Cth)

- It allows new employees who are not transferring employees and to whom no other instrument (eg a Modern Award) (called a **non-transferring employee**) applies to be covered by the same workplace instrument as the transferring employees.

- The section applies subject to any FWC order under s.319(1) of the FW Act (see below).

Section 315 of the FW Act sets out the circumstances in which employee and employer associations can be covered by a transferable instrument:

- The coverage deals with transferring employees and non-transferring employees.

- It effectively deals with named employer Awards and EBAs.

Section 316 of the FW Act applies if:

- the old employer gave a "guarantee of annual earnings" to a transferring employee who is a high income earner;

- the transferring employee was a high income earner immediately before the termination of employment with the old employer;

- some of the guarantee period occurs after the transfer to the new employer; and

- an enterprise agreement doesn't apply to the transferring employee in relation to the transferring work at the time of transfer.

In other words, a "guarantee of annual earnings" only applies where the employee is covered by a modern Award and to whom an EBA doesn't apply.

Under **s.316(2)** of the FW Act, the guarantee of annual earnings has effect after the transfer as if the guarantee had been given by the new employer. However, that guarantee can be revoked with the agreement of the employee and the new employer. If the new employer cannot provide the non-monetary benefits encompassed in the guarantee by the old employer, the guarantee is deemed to be varied to the extent that the transferring employee receives a monetary equivalent of the non-monetary benefits.

However, under **s.316(3) and (4)** of the FW Act, the new employer is not obliged to comply with the guarantee of annual earnings for the period **prior to** the transfer and pay the employee.

If the transferring employee is entitled to non-monetary benefits under the guarantee of annual earnings and it isn't practicable for the new employer to provide them, then the transferring employee is entitled to convert them into money (see s.316(5) of the FW Act). However, the conversion is the equivalent of the "agreed money value of those benefits" and this may provide a fertile ground for arguments and calculation.

Section 316 of the FW Act is important as it will require new employers to conduct effective due diligence reviews of the contractual entitlements of all transferring employees, lest they think that they are liable for the full amount of the guaranteed annual earnings for the full period of the guarantee.

It also means that many vendors of businesses not aware of the obligations may receive claims from former employee's months after their departures from the business.

Section 317 of the FW Act allows the FWC to make certain orders where this is or is likely to be a transfer of business.

In particular, **s.318** of the FW Act permits the FWC to decide that:

- a transferable instrument that would or would be likely to cover the new employer and the transferring employees does not or will not do so; or that

- an EBA or a named employer that covers the new employer will also cover the transferring employee.

In making its decision, pursuant to **s.318(3)** of the FW Act, the FWC must have regard to:

- the views of the new employer and the employees likely to be affected by the order;

- whether any employees will be disadvantaged in relations to their terms and conditions of employment;

- if the order relates to an EBA, the nominal expiry date of the EBA;

- 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; and

- the public interest.

One of the first cases involving the use of **s.318(3)** of the FW Act was *Application by AWH Pty Limited*[15]. In that case, five employees transferred from AWN. The new employer sought that its Agreement applies to them. It asked the transferring employees and the NUW if that was acceptable and they agreed. No employee would be disadvantaged by the then FWA order, if granted. The new employer's agreement would have beneficial terms and confirmed that the

[15] [2009] FWA 62, 7 August 2009

transfer would have no effect on productivity. Accordingly, the orders were made, FWA noting that the public interest would not be harmed by the orders being made.

Another example is *Futuris Automotive interiors (Australia) Pty Limited*.[16] In that case the company applied to the then FWA, supported by the AMWU, to be exempted from the transfer of work provisions. Futuris was wanting to improve productivity and decided to relocate plant and equipment and 26 employees from a related company (the old employer). The company's EBA was generally more beneficial to the transferring employees (with pay between 4-22% higher) but with superannuation 1% lower. The NUW covered the employees at the old employer and was concerned about the lower superannuation entitlements. 17 out of the 20 employees who voted in a secret ballot, wanted the Futuris Collective Agreement to cover them. The then FWA found that overall, the transferring employees would be better off under the Futuris Collective Agreement, especially after Futuris agreed to make special arrangements for employees made redundant up top 12 months from the date of transfer. FWA noted that the Futuris Collective Agreement was to expire shortly and this would allow the transferring employees to elect whether they wanted NUW or AMWU coverage in the negotiations for the new EBA. Traditional demarcations from the past were now inappropriate.

For a recent example of a successful s.318 Application, see *PHIA Operating Company Pty Ltd T/A Port Hedland International Airport*[17]. In that case, the s.318 Application was made in respect of the employment of three employees who on 11 March 2016 commenced employment with PHIA. The Employees were previously employed by the Town of Port Hedland (**Town**) and worked at the Port Hedland International Airport (**Airport**) as Airport Reporting Officers (**AROs**).

PHIA had operated the Airport from 11 March 2016 pursuant to the granting of a 50 year lease. Before PHIA took over the operation of the Airport, the Airport was owned and operated by the Town. Under the lease, PHIA took over the operation of the Airport and possession of all Airport equipment. As part of the transaction PHIA offered employees (who had been employed by the Town to operate the Airport) continuing employment with PHIA and each employee accepted the offer. The AROs were covered by the Port Hedland Agreement which had a nominal expiry date of 30 June 2017.

The AROs who accepted employment with PHIA perform substantially the same work as they did for the Town at the Airport.

PHIA submitted that the FWC approved a new enterprise agreement between the Town and its employees to replace the Port Hedland Agreement. This occurred on 4 September 2017. As such, the Port Hedland Agreement no longer applied to the employees of the Town or the Town, but remained binding on the AROs and PHIA.

16 [2010] FWA 1517, 1 March 2010
17 [2018] FWC 1082 (21 February 2018)

PHIA applied to the FWC for an Order that the Port Hedland Agreement cease to apply to PHIA and the Employees.

The FWC then assessed the Application against the requirements of s.318(3).

The FWC noted:

> ***[21]*** *This application was filed on 18 December 2017, being some months after the transfer of business took place. However, I have considered whether the terms of s.318 of the Act are intended to only apply where the Application is made prior to the transfer and consider that is not the case.*
>
> ***[22]*** *However, where the matter is considered after the transfer has taken place, the considerations cited in ss.318(3)of the Act must be approached having regard to the fact the transferrable instrument (in this case the Port Hedland Agreement) is already applying to the parties concerned.*

When it came to assessing ss.318(3)(b) any disadvantage to the employees in relation of their terms and conditions of employment, the FWC noted:

> ***[33]*** *PHIA submitted that where the Port Hedland Agreement is more favourable than the Award in all but three of those instances it has agreed with the Employees to continue the benefits set out in the Port Hedland Agreement through their common law contracts of employment or the introduction of a policy*
>
> ***[34]*** *Terms and conditions that will not be honoured include 6 weeks of annual leave per annum, 5 days of compassionate leave for each occasion where eligibility for compassionate leave arises and 2 days extra public holidays. However, it is submitted that PHIA has negotiated with each of the Employees and has reached agreement with them regarding terms and conditions of employment. Concerning the annual leave entitlement there is agreement that this will be reduced to 4 weeks and the Employees will forgo the entitlement to the extra 2 days of public holiday. Compassionate leave will be 3 days for each occasion. It is said that the Employees were agreeable to these compromises because they had secured increased rates of pay and an immediate payment*
>
> ***[37]*** *While a disadvantage to the Employees may not prevent the granting of the application, it may represent a significant hurdle as part of the wider considerations which must be taken into account for the purposes of ss.318(3) of the Act*

[38] *One of the primary considerations regarding disadvantage is, in my view, the pay rates that will be afforded to the Employees. The evidence before the Commission is that the Employees will not be disadvantaged by the pay rates.*

[39] *Having regarded the operation of both the Port Hedland Agreement, the Award and terms of conditions of employment, it is my view that there would not be a considerable reduction in the entitlements of the Employees if the order was granted, and further I am unpersuaded that overall the Employees would be disadvantaged.*

The Application was granted.

The orders that the FWC may make in respect of **non-**transferring employees are set out in **s.319** of the FW Act. They follow the pattern established in s.318 of the FW Act. In *Zancott Recruitment Pty Ltd*[18] the Full Bench of the FWC held that it cannot limit the life of determinations related to transfer of business. The Full Bench said there was no express power in s319(1) for the FWC to give an order an expiry date. It said this was tantamount to revoking the order, which was clearly prohibited by s603(3) of the FW Act.

Pursuant to **s.320** of the FW Act, the FWC may also vary transferable instruments.

However, employee's wages cannot be reduced. See *BC Meale Pty Limited v CFMEU*.[19] In that case, 32 employees transferred from the old employer. The new employer argued that the company's competitive difficulties arose from a non-competitive EBA that covered the employees. It applied under **s.320** of the FW Act to vary the wages and allowances, arguing that to do so created better alignment with its operations. The then FWA decided that the power to alter the EBA only applied to operational matters of the EBA and not to the labour costs issues imposed on the new employer by the EBA. The application failed.

Employee records

The FW Act's Regulations (see Regulations 3.41 and 3.42) include provisions for the transferring employees' employment records. The old employer must transfer those records at the date of the transfer of the assets, when the work is either in-sourced or out-sourced or, in relation to employees moving between associated entities, when the transfer occurs. The records must be kept for seven years.

3.41 Records—transfer of business

(1) For section 796 of the Act, this regulation applies if a transfer of business occurs as described in section 311 of the Act.

[18] [2014] FWCFB 351, 21 January 2014
[19] [2010] FWA 8584, 8 November 2010

Note: Section 311 identifies the participants in the transfer of the business as:

(a) the old employer; and

(b) the new employer; and

(c) a transferring employee.

(2) The old employer must transfer to the new employer each employee record concerning a transferring employee that the old employer was required to keep for subsection 535 (1) of the Act at the time at which the connection between the old employer and the new employer mentioned in paragraph 311(1)(d) of the Act occurs.

Note: Subregulation (2) is a civil remedy provision to which Part 4-1 of the Act applies. Division 4 of Part 4-1 of the Act deals with infringement notices relating to alleged contraventions of civil remedy provisions.

(3) If the old employer is a Commonwealth authority, the old employer only has to provide copies of those records.

(4) If the transferring employee becomes an employee of the new employer after the time at which the connection between the old employer and the new employer mentioned in paragraph 311(1)(d) of the Act occurs, the new employer must ask the old employer to give the new employer the employee records concerning the transferring employee.

Note: Subregulation (4) is a civil remedy provision to which Part 4-1 of the Act applies. Division 4 of Part 4-1 of the Act deals with infringement notices relating to alleged contraventions of civil remedy provisions.

(5) If the old employer receives a request under subregulation (4), the old employer must give the employee records to the new employer.

Note: Subregulation (5) is a civil remedy provision to which Part 4-1 of the Act applies. Division 4 of Part 4-1 of the Act deals with infringement notices relating to alleged contraventions of civil remedy provisions.

(6) The new employer who receives transferred employee records must keep the records, as if they had been made by the new employer at the time at which they were made by the old employer.

Note: Subregulation (6) is a civil remedy provision to which Part 4-1 of the Act applies. Division 4 of Part 4-1 of the Act deals with infringement notices relating to alleged contraventions of civil remedy provisions.

(7) The new employer is not required to make employee records relating to the transferring employee's employment with the old employer.

PART 4: TRANSFERS OF BUSINESS FROM A STATE PUBLIC SECTOR EMPLOYER TO A NATIONAL SYSTEM EMPLOYER

As noted above, the Fair Work Amendment (Transfer of Business) Bill passed into law in in December 2012 and added Part 6-3A to the FW Act.

It amended the FW Act to provide for the transfer of employees' terms and conditions of employment from an old public sector employer to a national system employer where there is a connection between the two and enable the Fair Work Commission to make orders that modify the general effect of the transfer of business rules in these circumstances.

The new Part mandates that there must be a transfer of business form a State public sector employer (the old employer) to a national system employer (the new employer). The transfer of business mirrors the pre-existing provisions in that the employment with the old employer must be terminated, within three months of the termination the employee is employed by the new employer, the transferring employees performs substantially the same work for the new employer, there is a connection between the old and the new employer (by a transfer of assets or outsourcing) or the old and the new employer are associated entities.

If these prerequisites are met, the transferring employees' terms and conditions with the old employer transfer to the new employer.

Instead of the notion of the transferring employees' industrial instruments transferring, the relevant State Awards are "moved" into the Federal jurisdiction through the devise of "copying them", and they are called "Copied State Awards". This also applies to State Enterprise Agreements that applied to the old employer and the transferring employee immediately before the transfer of employment.

The Copied State Instruments are then enforceable under the FW Act in the same way as Modern Awards and Enterprise Agreements.

The new employer can seek amendments of the Copied State Instruments in certain situations and there are provisions in place to deal with the interaction of the Copied State Instruments with the NES and Modern Awards.

PART 5: KEY CONSIDERATIONS WHEN UNDERTAKING A PURCHASE OF A BUSINESS

John Lunney in his paper "*inheriting more than just the business*": (10 November 2016) noted that any critical due diligence process would include the following. I have added my own commentary in bold:

- Assessing who are the key employees; **Take the key employees and allow the old employer to keep those not critical to the business**. **This is called "cherry-picking".**

Make sure that all such cherry picked employees are given a letter setting out the transfer of work to the new employer and confirming continuity of employment, recognizing their start date with the old employer, plus their accrued but unused Annual Leave, Personal Leave and Long Service Leave. Note any harmonization issues re such matters as access to company cars and credit cards. Confirm the reporting lines.

- Assessing their terms and conditions of employment. **Then work out if their arrangements are compatible with similar staff on the new employer. If not, have a strategy to harmonise Policies and Procedures**.

- Business sale agreement – what should go in it about the workforce. A commitment to employ all employees with services recognized? What about warranties and indemnities? **What will be done about the tail costs of employees coming over with significant redundancy entitlements and Personal Leave accruals**.

- Any culture shock issues? Private or public sector? Partnership model vs corporate governance? **Beware of governments bearing gifts**. **Budget to integrate staff to avoid "them and us"**.

- Principles and timing for appointments, relocations and redundancies – when is to happen and when? **Transfer of employee records from the old employer. Are the HR Staff of the new employer ready to take them on – letters and inductions? Contact the workers' comp insurer with new information about additional staff. Train new employer's managers on how to deal with the staff and their transferred industrial instruments. Harmonise the WHS systems of the transferring employees with those of the new employer**.

- Communication plan – what do transferring employees have to know or be consulted upon? What is the key story? **Plan to keep employees of the new employer, clients that will transfer, relevant unions, shareholders, stakeholders and the media informed.**

- The degree of business synergy between the instruments of the old and the new employer.