



Australia's Fair Work system

11. Transfer of business

The transfer of business provisions under the Fair Work system are designed to be simple and fair.

The Work Choices provisions for transmission of business required a legalistic focus on what the 'business' of the old employer was, and whether the new employer had in some way taken over that 'business'. This meant that some of these arrangements between the old employer and the new employer were not regarded as transmissions of business. As a result, employees sometimes lost the benefit of their industrial instruments even though they were performing the same work for the new employer.

These new laws feature a definition of a transfer of business that is simple and easy to understand and which delivers broader protection for employees' terms, conditions and entitlements.

These laws took effect on 1 July 2009.

Definition of 'transfer of business'

Under Fair Work, the definition of a 'transfer of business' focuses on whether the work performed by employees for each employer is substantially the same and also specifies a required connection between the employers.

There is a transfer of business from an employer to a new employer if:

- the employment of an employee of the old employer has terminated
- within three months, the employee is employed by the new employer
- the transferring employee performs the same, or substantially the same, work for the new employer as for the old employer, and
- there is a connection between the old employer and the new employer.

The new provisions protect employees' terms, conditions and entitlements in a broader range of corporate restructuring activities, including movements to associated entities and some outsourcing and insourcing arrangements.

Terms and conditions of employment

The Government recognises the importance of balancing employee protections with the need to encourage businesses to take on employees of the old employer and operate in an efficient and productive manner.

Certain workplace instruments that covered employees of an old employer continue to cover those employees if they are offered and accept employment with a new employer within three months of a transfer of business. These include enterprise agreements that have been approved by Fair Work Australia (whether or not in operation), workplace determinations and named employer awards.

Fair Work Australia has broad power to change the coverage of transferred instruments and a new employer's existing instruments to ensure the rules work in a practicable and fair way for employees and employers. On application from the new employer, in addition to being able to order that an instrument will not transfer at all, Fair Work Australia also has flexibility to order that a transferring instrument be modified so that it better fits with the operation of the new enterprise.

In deciding whether to make an order, Fair Work Australia is required to consider matters such as whether employees would be disadvantaged in relation to their terms and conditions of employment.

Fair Work Australia must also have regard to the new employer's situation when considering whether to vary the application of a transferring employment instrument. For example, it must consider factors such as whether the employer will suffer significant economic disadvantage as a result of failing to modify the application of the instrument, and also the degree of alignment between any employment instruments of the old employer and arrangements that already exist in the new employer's enterprise agreement.

National Employment Standards Entitlements

On a transfer of business, a new employer is bound to recognise employees' service with the old employer when calculating certain National Employment Standards entitlements. These are personal/carer's leave, parental leave and the right to request flexible work arrangements.

In the case of annual leave and redundancy pay, the new employer has a choice whether to recognise service. If the new employer does not agree to recognise service, the old employer must pay out these entitlements. In addition, the National Employment Standards will allow for an employer's redundancy obligations to be waived on a transfer of business should an offer of employment be made by the new employer on substantially similar terms and conditions.

If an employee is transferred to an employer that is an associated entity of the previous employer, service with the previous employer will be deemed to be continuous for the purposes of all service-related National Employment Standards entitlements including annual leave and redundancy pay.

Minimum employment period for unfair dismissal protection

On a transfer of business, transferring employees' previous service for the purposes of the minimum employment period for unfair dismissal will be recognised unless the new employer expressly informs transferring employees in writing of a requirement for a new minimum employment period.

Where an employee takes up new employment within a three-month period with an employer that is an associated entity of the previous employer, the employee's service with the previous employer will be taken to be continuous for the purposes of the unfair dismissal minimum employment period.