The industrial laws dealing with the transmission of business can be both significant in their impact and confusing to businesses in their application. The original rationale is sound, being an anti-avoidance mechanism to prevent an employer avoiding an industrial obligation by restructuring legal entities. However, the laws are not limited to movements between associated entities or to a typical circumstance where one company buys the business of another. Instead, following a substantial overhaul of the provisions with the introduction of the *Fair Work Act* (Cth) 2009 (*FW Act*), transfer of business provisions may apply in the event of outsourcing, insourcing and, more broadly, where there is an arrangement by which the new employer ‘owns or has the beneficial use of some or all of the assets’ previously owned or used by the prior employer. If enlivened, the provisions can result in a third party’s collective agreement (*CA*) or other industrial instruments being deemed to automatically apply to the new business or owner for the transferring employees and, absent an existing *CA* or award, for new employees going forward. This can lead to employers having to maintain multiple sets of payroll systems, inequities between employees doing the same job, and general confusion. More broadly, if an employee transfers under a transmission of business their period of service is deemed continuous which has ramifications to their entitlements and to unfair dismissal laws.

**The test under the FW Act**

Under s 311 of the *FW Act*, a transfer of business takes place when all of the following are satisfied:

- the employment with the old employer has terminated;
- the employee became employed by the new employer within three months of the termination;
- the work the employee performs for the new employer is the same or substantially the same; and
- there is a prescribed connection between the old employer and the new employer.

Four types of connections are prescribed:

- associated entities;
- outsourcing the transferred work;
- insourcing the transferred work; and
- an ‘arrangement’ between the old employer and the new employer by which the new employer ‘owns or has the beneficial use of some or all of the assets’ (including intangible assets) previously owned or used by the old employer that ‘relate to, or are used in connection with, the transferring work’.
There are some immediate observations that can be made:

1. Unlike under previous laws which involved a comparison of the character of the two businesses, any form of outsourcing of work (or insourcing of previously outsourced work) is sufficient connection for there to be a transfer of business provided an employee is employed by the new employer within three months of termination and does substantially the same type of work. The fact that the business operated by the new employer is of a different nature is of no relevance.

2. The legislation is triggered where initial employment ‘has terminated’. It does not expressly require the termination to have been instigated by the old employer and may be satisfied even where the employee has voluntarily resigned.

3. It is not necessary that there be a direct contract between the old employer and the new employer for the sale or assignment of a business interest. However, there does need to be an ‘arrangement’ for at least the use of assets which are relevant to the work. Clearly there is a legislative intent to significantly broaden the scope of what constitutes a transfer of a business in this context.

**Implications of triggering the transfer of business provisions**

There are four main implications to meeting the transfer of business test.

First, specifically in relation to the transferred employee(s), the new employer will be governed by the former employer’s CA. This may mean for instance that an employer is required to maintain multiple payroll systems based on different industrial instruments – its own and those it inherited. Employees working side by side doing the same task may be on different terms and conditions, with different pay rates, allowances, classifications and entitlements. The scope for errors, industrial tension and dispute is significant.

It ought to be borne in mind in this context that an employer cannot treat an employee adversely because of a workplace right, which includes the application of, or entitlements under, a CA. Accordingly, it may be unlawful for an employer to take into account the different pay rates, allowances or overtime rates in the preparation of rosters or in the allocation of overtime or in the making of any other employment decision, notwithstanding the commercial implications for the business. Furthermore, whether or not the different industrial instruments actually played any role in a decision, the very fact that differentiation exists creates an inference and a basis for the assertion of adverse action under the FW Act. The onus then falls on the employer to disprove that such issues played any role in the decision. In practical terms, the existence of such differentiation creates significant risk, and it is not difficult to foresee that anytime a transferred employee is subject to discipline that assertions may be raised that underlying the action or decision is the employee’s right to different industrial condition, rendering the decision open to challenge informally or by way of adverse action proceedings in the Fair Work Commission (FWC).

Second, in relation to future employees, if the new employer has inherited a CA under the transfer rules and does not have its own CA covering the work or the work is not subject to a modern award, then the inherited CA will apply not just to the transferred employees, but also to all new employees performing substantially the same work. As such, the operation of the transferred industrial instrument can expand through the business to persons unconnected with the former business.

Third, an employee deemed to have been transferred under these provisions will have continuity of service. This means, first, that entitlements such as leave which are calculated by reference to the period of employment will include the service with the old employer. Any period of unemployment in between is excluded from consideration, as are entitlements which have previously been used or paid out so as to avoid duplication. Second, the service counts towards the employee meeting the minimum employment period to become eligible for unfair dismissal protection. That period is 12 months for small employers and six months for all other employers. This is important as the new employer will not get the benefit of a minimum employment period to assess the performance of transferring employees before becoming subject to the unfair dismissal provisions of the FW Act. It is in this context many of the initial decisions regarding the transmission of business rules have been litigated.

Finally, if there is a transfer of business and continuity of service, the employee is not entitled to redundancy pay from the former employer.

**Recent Case Law**

Some recent decisions of the FWC provide clarity on the application of the statute:

1. **Change of outsourced contractor is not a transfer of business**

   In Watson v Oliver-Ramsay Group Pty Ltd, a security worker at the Federation University in Ballarat was found not to have continuity of service, in circumstances where the security provider he worked for was replaced following re-tender. Despite continuing work at the same location performing the same duties for the new security company, with no break between working for the former security company and the new one, there was no transmission of business to enliven the continuity of service provisions. This was because there was no transaction or ‘arrangement’ of any kind between the former employer and the new employer, but rather the transactions were between the university and security providers. In the absence of continuity of service, it is only the duration of employment with the new employer that is considered. Accordingly, in this case when the security worker’s employment was terminated three months after commencing with the new security provider, his unfair dismissal application was dismissed because he had less than six months service (he had not satisfied the ‘minimum employment period’ in s 383 FW Act).

2. **What is an arrangement, and incidental assets may not be assets for the performance of work**

   Lachlan v Transclean Facilities Pty Ltd involved very similar circumstances to the Oliver-Ramsay Group case above. The supervisor of a security contractor
moved employment from one firm to another when the contract to provide security services at a tram depot was re-tendered. When he was later dismissed by the new employer, Zabrdac sought to apply his service with the prior security provider to meet the necessary minimum employment period for protection from unfair dismissal. What is of particular interest in this case, is that the incoming security provider did have use of the outgoing contractor’s procedures manual and uniforms, and inherited various appliances (microwave oven, fridge, radio, sandwich maker and kettle) and assorted stationery in the security guardhouse. The argument then was whether there was an ‘arrangement’ for the ‘beneficial use of some or all of the assets’ previously used by the former security provider that ‘relate to, or are used in connection with, the transferring work’. Commissioner Bissett of the FWC concluded that for there to be an ‘arrangement’ there must be communication, the reaching of an understanding, and an expectation of a particular outcome, and this had not been satisfied in circumstances where items had essentially been abandoned by the former contractor of its own volition.

Commissioner Bissett also went on to make some very useful comments regarding the issue of the use of assets, stating that she was ‘not convinced that the appliances are assets in the strict sense that they have some economic value’, having likely been written off. Furthermore even if they were assets in the strict sense there was nothing to indicate that they ‘relate to or were used in connection with the transferring work’. At best they could be said to be incidental to work in the provision of amenities, but were not themselves for the performance of security services.

3. Labour hire is not outsourcing … probably

In Gausden v Silvan Pty Ltd a dismissed employee asserted that a period of labour hire performed immediately prior to his employment should count towards his service for determination of his employment period. The worker asserted that his employer had initially ‘outsourced’ the engagement of labour to a labour hire company, and then had ‘insourced’ that hiring when he was directly employed, and that as he performed the same duties at all times it was sufficient to trigger the transfer of business rules. In dismissing the argument and finding the prior service with the labour hire company to be irrelevant, the FWC noted that ‘there was no evidence of a transfer of business or a transfer of assets, nor was the Applicant a transferring employee’.

Nevertheless, some caution is appropriate, and contrast can be drawn with the decision of Deputy President Sams in Whitehaven Coal Mining Limited. This matter concerned an application by Whitehaven Coal for an exemption to prevent the transfer of a collective agreement of a labour hire firm (TESA) to Whitehaven when it decided to directly employ 16 labour hire employees of TESA who had been working within its business. Whitehaven made the application due to perceived doubt about whether the circumstances would constitute a transfer of business. In his decision, Sams DP unequivocally stated:

‘I have no doubt that the specific requirements [in s 311 for a transfer of business] have been satisfied. In particular, there can be no doubt that … there remains a connection between the old and new employer by virtue of their outsourcing arrangements, which are to continue.’

The reasoning is sparse, and was in a non-adversarial context where all parties were consenting to the order. On questioning by Ai Group, the Federal Department expressed the view that such circumstances do not constitute outsourcing. Nevertheless, some ambiguity remains.

Discussion

The application and impact of the transfer of business provisions are important considerations in business sale and purchase transactions and in contracting and outsourcing arrangements. The substantial overhaul of the laws and removal of the former ‘character of the business’ test means the laws have broader application, particularly in the context of outsourcing. Caution must be exercised by incoming contractors in making any arrangements to use or buy assets of outgoing contractors, if any employees of the former contractor are to be engaged. There remains some ambiguity regarding the interaction of these provisions in the context of labour hire, and careful consideration is warranted.

There are good reasons why an incoming purchaser or contractor may be better off avoiding the application of the transfer rules. These include avoiding inheriting a separate industrial agreement which may have terms which are inappropriate for the new business, the creation of tension in the workplace given differing terms and entitlements for workers performing similar duties, the administrative burden of maintaining different payroll systems, the potential for adverse action complaints, and the inability to assess the performance of employees without the unfair dismissal provisions of the FW Act applying. In such circumstances, the incoming company may choose not to engage any of the former workers, or to wait at least three months before doing so, or embark on the process of seeking an order from the FWC that the former employer’s industrial instrument not transfer (if the new employer can satisfy the requirements).

Perversely, transfer rules which exist for the protection of workers may well result in a lose-lose-lose situation.
First, companies which acquire a business or take on outsourced work ‘lose’ because unless they are prepared to assume the old employer’s industrial instrument they are unable to access the valuable skills possessed by the former employees for the reasons discussed above (at least for the first three months) and may incur additional costs in recruitment and training as a result. Second, the seller or outsourcer ‘loses’ because they often need to make employees redundant as a result of the refusal of the incoming company to hire the former employees. Third, employees may ‘lose’ because they may not be offered a seamless transfer of employment, along with their continuity of service in circumstances in which (but for these provisions) many would have otherwise been offered jobs with the incoming company.

As noted above, in order to secure the benefits of a continuing workforce without many of the potentially negative consequences of these FW Act provisions, businesses may apply to the FWC for an order exempting the transfer of industrial instruments. If the circumstances support such an exemption, the benefits and certainty provided suggest the modest upfront effort and cost may be a wise investment.

2 Sections 382 and 383.
3 Section 122.

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Upcoming presentation

Lessons for employers - probation periods, qualifying periods for unfair dismissal claims, and transfer of business

Stephen Hughes, Matthew Payten and Lara Radik will provide an analysis of the case law and relevant provisions of the Fair Work Act 2009 (Cth) surrounding:

• Probation periods – are they illusory?
• Employer obligations during qualifying periods for unfair dismissal claims;
• When does a transfer of business occur?
• Transferring employees and transferring instruments;
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Where
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