



# FACT SHEET: transfer of employment

K 201

## What happens to employee entitlements and enterprise agreements when a transfer of business occurs?

If an employer (the first employer) sells or transfers its business to another organisation, the existing employment contracts will come to an end and the employment of the employees will be terminated. It is then up to the new employer to determine whether it wishes to offer new employment contracts to the employees.

On termination of employment, employees should be advised of their relevant termination date pursuant to the notice provisions in their industrial instruments and/or the *Fair Work Act 2009*. Employees will also be entitled to be paid all accrued entitlements on termination, such as annual leave; redundancy pay; long service leave.

Where employees are offered employment, and accept employment, with the new employer, and the business is **transferred** (a **Transfer of Business**)<sup>1</sup> from one national system employer to another, then certain workplace instruments, such as enterprise agreements and awards, will continue to cover and apply to those employees employed by the new employer, and will be binding on the new employer. Further, **service** with the old employer will count as **service** with new employer, so that certain accrued entitlements, such as:

- personal/carer's leave;
- parental leave;<sup>2</sup>
- notice on termination;
- minimum employment periods for the protection from unfair dismissal;
- annual leave; and
- redundancy pay

will continue to apply.<sup>3</sup>

The only exception is that the new employer (if it is not an associated entity) can choose not to recognise the employee's service with the first employer and

accordingly<sup>4</sup>, the first employer will need to pay the employee his/her accrued annual leave and redundancy payments. Also, where an employee has had the benefit of an entitlement (e.g. received notice of termination or payment in lieu) the service with the first employer in relation to that benefit is not counted again with the new employer.<sup>5</sup> Further, a new employer can choose not to recognise a transferring employee's accumulated service for the purposes of determining the minimum employment period to qualify for unfair dismissal, but only if the employee is informed in writing this must be before the new employment starts.<sup>6</sup>

Also, Long Service Leave is governed by state and territory legislation, but in most cases the same rules will apply and service with the first employer will count.<sup>7</sup>

## Redundancy may not be paid if an employee rejects an offer of employment with the new employer in certain circumstances

Also, while an employee cannot be transferred to a new employer without the employee's consent, if an employee rejects an offer of employment with the new employer, then the first employer will not be obligated to pay the employee redundancy pay if:

- (i) the job offer is on terms and conditions similar to those of the old job and is no less favourable to the employee; and
- (ii) the new employer recognises the employee's services for the purposes of redundancy; and
- (iii) had the employee taken the job, there would have been a transfer of employment.<sup>8</sup>

## What happens if I take up an offer of employment with the new employer?

The new employer can choose whether to offer new employment contracts to some or all employees of the old employer.

If there is a transfer of business (within the meaning of the *Fair Work Act 2009*), then an enterprise agreement, or a modern award or modern enterprise award, or a workplace determination ("a transferable instrument") follows the employee and becomes binding on the new employer – although an employer can apply to the Fair Work Commission to seek orders that a transferable instrument not cover the employment (or a current instrument that applies to the new employer shall cover the transferring employees).<sup>9</sup> However, a new employer that is not an

associated entity of the first employer has the option of whether to recognise the transferring employee's previous service for the purposes of NES entitlement to annual leave or redundancy pay.<sup>10</sup> If the new employer won't recognise the service, then accrued annual leave and redundancy pay must be paid by the first employer. Other entitlements such as personal/carer's leave (and long service leave – pursuant to state / territory legislation) will continue to accrue with service with the first employer to count as continuous service.

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<sup>1</sup> Refer to s 311, *Fair Work Act 2009* – all conditions in the legislation need to be satisfied for there to be a *Transfer of Business*

<sup>2</sup> An employee who has started a period of parental leave is entitled to finish it – s 69, *Fair Work Act 2009*

<sup>3</sup> s 22 (5) – (7), *Fair Work Act 2009*

<sup>4</sup> Ibid

<sup>5</sup> s 22(6), *Fair Work Act 2009*

<sup>6</sup> s 384(b), *Fair Work Act 2009*

<sup>7</sup> For NSW employees, refer to s 4(11)(c) of the *Long Service Leave Act 1955* (NSW) ; for Qld – refer to *Industrial Relations Act 1999* (QLD), Part 6, ss 67-71 (which provides that continuity of service preserved for transferring employees); for Victoria – refer to s 60, *Long Service Leave Act 1992* (VIC) (definition of employer provides similar transfer of business provisions).

<sup>8</sup> s 122, *Fair Work Act 2009*

<sup>9</sup> s 318, *Fair Work Act 2009*

<sup>10</sup> s 22(5) – (7), *Fair Work Act 2009*