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TROUBLED WATERS OR PLAIN SAILING

- the new transfer of business rules under the *Fair Work Act 2009*

Navigating one's way through a corporate restructure can be a hazardous but rewarding task – firstly, a destination is chosen, a course must be then charted and the journey begun where turbulent waves of change, challenge and conflict are encountered; finally, clear water is found together with a destiny of opportunity and promise.

This may be romanticising the hard world of commercial transactions but it is an apposite comparison as many transactions get wrecked by inadequate planning (ie poor due diligence exercises) while others get marooned by unexpected disasters (eg the sudden departure of key high performing personnel). For some, the journey becomes so perilous that they regret having embarked upon it in the first place. It is seldom a case of plain sailing.

While this is all commonplace for those accustomed to mergers and acquisitions, some re-plotting of the course now needs to occur as a result of changes to the transfer of business rules brought about by the *Fair Work Act 2009* which repealed and replaced the *Workplace Relations Act 1996* (WRA). These changes are significant – they present challenges but also offer opportunities.

In this article, we explore the new transfer of business rules and distil some key points to take on board when considering your next transaction.

The new transfer of business rules

The new rules are in Part 2-8 of the *Fair Work Act 2009* and came into operation on 1 July 2009. All transactions affecting national system¹ employers and employees after that date must comply with these provisions.

Part 2-8 sets out:

- The purpose of the new rules;
- The circumstances when a transfer of business occurs;
- Which instruments transfer (transferable instruments);
- Which employees are covered by transferable instruments;
- Orders which Fair Work Australia (FWA) can make regarding transferable instruments.

We will look at each of these areas.

The purpose of the new rules

The purpose of the new transfer of business rules is to provide for the transfer of enterprise agreements, modern awards and other instruments if there is a transfer of business from one national system employer to another. The intention is to achieve a balance between the protection of employees' terms and conditions of employment under these instruments and the interests of employers in running their enterprises efficiently.

When does a transfer of business occur

A transfer from one employer (the old employer) to another (the new employer) will occur if the following requirements are met:

¹ A "national system" employer includes: a constitutional corporation (ie a corporate entity that trades or is a financial or foreign corporation); the Commonwealth; a Commonwealth authority; the employer of a flight crew officer, maritime worker or waterside worker; employers in the Territories; and employers in any State which has referred their industrial relations powers to the Commonwealth (eg Victoria) – see s14 of the FWA read with s30D

- a) **Within 3 months** of termination of employment with the old employer, the employee (who is called a “transferring employee”) becomes **employed by the new employer**;
- b) The employee **performs the same or substantially the same work** for the new employer as for the old employer (called the “transferring work”); and
- c) There is a **connection** between the old and new employer.

There is a **connection** between the old and new employer if:

- i. There is transfer of ownership or of beneficial use of assets from the old employer to the new employer; or
- ii. The old employer outsources work to the new employer; or
- iii. The new employer ceases to outsource work to the old employer and the work is now performed in-house (referred to by some as in-sourcing); or
- iv. The new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer.

Which instruments transfer

Transferable instruments include an enterprise agreement that has been approved by FWA, a workplace determination and a named employer award. Transitional instruments (eg enterprise agreements which were in operation or made prior to 1 July 2009) are now also expressly included as transferable instruments².

Which employees are covered by transferable instruments

A transferable instrument that covered the **transferring employee** immediately prior to termination with the old employer, will cover the transferring employee in their employment with the new employer – this will continue indefinitely until the transferable instrument is terminated or replaced by another instrument.

The transferable instrument will also apply to any **non-transferring employees** (ie new employees who had not been employed by the old employer) employed by the new employer and who perform the same work as the transferring employees.

Orders by Fair Work Australia regarding transferable instrument

FWA has the power to make a range of orders, including:

- a) That a transferring instrument that would otherwise cover the new employer and transferring employees, will not cover them;
- b) That an enterprise agreement or named employer award that covers the new employer, will cover the transferring employees;
- c) That a transferable instrument that would otherwise cover non-transferring employees, will not cover them.

These applications can be brought by the new employer, a transferring employee, a non-transferring employee or a relevant employee organisation.

When considering such an application, FWA must take into account:

- The views of the new employer and any employees who would be affected by the order;
- Whether any employees would be disadvantaged by the order;
- The nominal expiry date of any enterprise agreement, if relevant;
- 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; and
- The public interest.

² Sub item 2(3) of Schedule 3 read with Item 8, Part 3 of Schedule 11 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

One of the few reported cases on these provisions so far is *Queensland Nickel Pty Ltd* [2009] FWA 335. In this case, a transfer of business arose from the company ceasing to outsource its maintenance work and choosing to have it performed internally instead (in-sourced). The company did not want the transferable instrument which had applied to the old employer, to cover it and the transferring employees. The company applied to FWA for an order that the transferring agreement not apply to the transferring employees.

In granting the company's application, Senior Deputy President Richards took the following into account:

- The results of a transferring employee ballot which showed that only 16% of the transferring employees who had participated in the ballot, wanted to remain covered by the existing agreement;
- The superiority of the new agreement offered by the company with regard to earnings, superannuation and redundancy compared with the existing agreement;
- The company's agreement to recognise prior service of the transferring employees; and
- The absence of any union opposition to the company's application.

Implications for employers

Parties involved in corporate restructures need to be aware of the new transfer of business rules and in particular, the four key changes:

- Because of the wider definition, more arrangements will constitute a transfer of business (in contrast, the WRA did not define transfers of business and left it to case law to determine what arrangements were covered by the WRA's transmission of business provisions);
- Transferable instruments now apply indefinitely (in contrast, under the WRA, instruments only transmitted to the new employer for 12 months);
- Transferable instruments will also apply to non-transferring employees - ie to new employees who join the new employer after the transfer (this did not occur under the WRA); and
- FWA has power to grant a range of orders including orders exempting new employers from these provisions – this is particularly helpful where a new employer wants to avoid maintaining two distinct and disparate employment systems (ie its own and that of the old employer) or where it wants to acquire a failing business where one of the problems is a punitive and costly enterprise agreement. Having a single employment system also assists in the integration of staff into a single workforce (there was no scope for such orders under the WRA).

Corporate restructuring will never be plain sailing, however, being better informed of the conditions ahead will always give one a distinct advantage and will assist in getting a transaction off to a flying start.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

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