



**Transfer of Business Provisions of the *Fair Work Act*
Negative Impacts Upon the ICT and Other Industries**

 AUSTRALIAN INDUSTRY GROUP

July 2010



TRANSFER OF BUSINESS PROVISIONS OF THE *FAIR WORK ACT*

Executive Summary

The transfer of business provisions of the *Fair Work Act 2009* (FW Act) are causing many problems for industry. The problems may not be obvious to those who fail to look beyond the decisions which have been made to date by Fair Work Australia (FWA). As currently enacted, the provisions are operating against the interests of both employers and employees. Some sensible changes are warranted.

The purpose of this submission is to highlight the problems that the transfer of business laws are causing for employers and employees, using examples from the information and communications technology (ICT) industry to support the case for legislative change.

The transfer of business laws result in a lose-lose-lose scenario. Client companies lose because they need to make employees redundant when outsourcing occurs. ICT companies lose because they cannot access the valuable skills possessed by their clients' employees. Employees lose because their jobs disappear along with their continuity of service for long service leave and other purposes. Such a situation defies common sense and needs to be addressed.

“The new transfer of business rules have deterred our organisation from proactively offering employment to employees of our client – something that we were more than willing to encourage and support under the old transfer of business arrangements.” - Ai Group ICT industry member company

The extinguishment of the High Court's “character of the business” test has resulted in an array of business services being caught by transfer of business regulation for the first time, and the consequent imposition of unworkable, impracticable and unfair arrangements on both employers and employees.

The transfer of business laws can be readily fixed with a series of relatively simple changes to the FW Act. These changes include:

- Reinstating the High Court's "character of the business test";
- Preventing transfer of business implications in circumstances where an employee resigns;
- Linking the three month maximum period for the break in the employee's employment with the old and new employers, with the transfer event to avoid unintended consequences;
- Defining the term "outsourced";
- Limiting transfer of business implications to circumstances where the ownership of assets transfers, and not where two employers simply use the same assets;
- Preventing transferable instruments applying to the employees of the new employer; and
- Incorporating a "sole and dominant reason" test in the General Protections, to avoid unions frustrating outsourcing proposals.

Ai Group is the largest individual industrial organisation of employers in Australia, representing industries with around 440,000 businesses employing approximately 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees. Ai Group itself provides services to approximately 10,000 companies employing around 750,000 employees.

For the past 40 years, Ai Group has played the leading role in representing Australia's ICT industry in relation to workplace relations matters. Ai Group has a large membership in the industry, including providers of outsourced ICT services, software developers and suppliers, hardware suppliers, telecommunications companies, contract call centre companies and producers of office equipment. Most of the major players in the industry are Ai Group members.

The transfer of business provisions and key problems summarised

The transfer of business laws are summarised below. The key problems are explained in the box under each item.

1. A transfer of business occurs if each of the following four requirements are satisfied (s.311):
 - (a) The employment of an employee of the old employer has terminated;
 - (b) Within 3 months of that termination, the employee becomes employed by the new employer;
 - (c) The 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; and
 - (d) There is a connection between the old employer and the new employer as described in point 2 below.

Problems:

- Item (a) should relate only to circumstances where the old employer terminates the employment of the employee. If an employee resigns from the old employer (perhaps years after the business transfers) and applies for a job with the new employer within three months, it is unfair for the industrial instruments to transfer to the new employer.
- The three month period in (b) needs to be linked to the time when the business transfers. The existing provision requires that new employers establish stringent recruitment controls to avoid inadvertently hiring persons who were employed by the old employer (including years after the business transfer occurs).
- There is a great deal of doubt about the scope of “transferring work”, as referred to in (c). The example used in the Explanatory Memorandum of an employee stacking shelves in a supermarket carrying out the same work as an employee operating a checkout is ridiculously broad.

- Consistent with the High Court's decision in *PP Consultants Pty Ltd v FSU [2000] HCA 59*, s.311 needs to include a requirement that the character of the business of the new employer be the same as the character of the business of the old employer.

2. There is a connection between the old and the new employer in any of the following circumstances (s.311):

- (a) In accordance with an arrangement between the old employer and the new employer, the new employer owns or has the beneficial use of some or all of the assets (tangible or intangible) that the old employer owned or had the beneficial use of, and that relate to the transferring work;
- (b) The old employer outsources work to the new employer;
- (c) The old employer terminates an outsourcing arrangement, and carries out the outsourced work itself; or
- (d) The new employer is an associated entity of the old employer.

Problems:

- Item (a) should relate only to the transfer of the ownership of assets, not the use of assets. The existing provision is far too broad and creates widespread negative consequences.
- The concept of "outsource" in (b) and (c) needs to be clarified to avoid unintended consequences.
- Point (d) operates as a major disincentive to transfer employees between associated entities, and it conflicts with the purpose of s.389 of the FW Act which requires that employers consider redeployment in redundancy scenarios.

3. Enterprise agreements, workplace determinations and named employer awards (ie. “transferable instruments”) which covered the old employer, cover the new employer from the transfer time in respect of transferring employees. However, FWA has the power to make an order:

- that the transferable instrument not cover the new employer; and/or
- that the enterprise agreement or named employer award which covers the new employer, covers the transferring employees. (ss.312, 313 and 318)

Problem:

- The concept of “named employer awards” is causing confusion. No named employer modern awards have been made, other than enterprise awards. The legislation should be amended to replace the term “named employer award” with the term “modern enterprise award”.

4. If a transferrable instrument starts to cover the new employer and the new employer employs new employee/s to perform the transferring work, and no other enterprise agreement or modern award covers the new employer in relation to that work, then the transferable instrument covers the new employee/s. However, FWA has the power to make an order:

- that the transferable instrument not cover the new employee/s; and/or
- that an enterprise agreement or modern award that covers the new employer, does not cover the new employee/s. (ss.314 and 319)

Problem:

- These provisions are unfair upon the new employer and need to be deleted. It is not appropriate for transferable instruments to cover employees who are not transferring employees.

5. FWA has the power to vary transferable instruments to ensure that they operate in an appropriate way for the new employer (s.320).

6. The General Protections provisions of the FW Act:

- Enable unions to pursue injunctions and/or damages against employers who seek to outsource work on the basis that the employees who would be terminated or transferred as a result of the outsourcing are entitled to a benefit under a workplace law or instrument (s.341);
- Protect new employers from general protection claims if they refuse to hire employees of the old employer when a business is transferred (s.341(5)).

Problems:

- The “sole or dominant reason” test in s.792(4) of the former *Workplace Relations Act* needs to be incorporated in the FW Act. A general protection claim should not be able to be pursued if the employees’ entitlements under a workplace law or instrument were not the sole or dominant reason for the employer’s decision to outsource the work.

7. Upon the transfer of a business:

- Service with the old employer generally counts as service with the new employer (s.22(5), (6) and (7));
- Transferring employees are not entitled to redundancy pay from the old employer so long as the new employer counts service with the old employer (s.122(2));
- Employees who refuse to transfer are not generally entitled to redundancy pay if they reject an offer of employment made by the new employer of terms and conditions substantially similar to, and no less favourable than, the current terms, and the new employer recognizes the employee’s service with the old employer (s.122(3)).

ICT industry issues and examples

The transfer of business provisions in the FW Act are imposing excessive and unworkable restrictions on employers in the ICT industry. Many ICT employers are commercially hamstrung about how future business should be designed, tendered for and accepted as a result of laws which deem prevalent commercial functions of ICT businesses as a 'transfer of business' under the FW Act.

The transfer of business provisions are constraining the growth of the ICT industry and reducing employment opportunities for Australian workers.

The current transfer of business laws have the effect of:

- Discouraging ICT organisations which win outsourcing contracts from employing any of their clients' staff;
- Constraining outsourcing opportunities for ICT companies;
- Deterring companies that wish to outsource ICT functions from doing so;
- Driving ICT functions offshore;
- Constraining opportunities for on-hire businesses to provide labour to clients in the ICT and other industries;
- Deterring employers in the ICT and other industries from employing temps provided by on-hire firms;
- Restricting employee career progression and redeployment opportunities within corporate groups;
- Imposing multiple and inconsistent employment conditions on employers with the consequent additional costs and negative impacts upon productivity, efficiency and staff morale;
- Discouraging employers from applying for FWA transfer of business orders given the inappropriate legislative framework which applies;
- Imposing unworkable obligations on employers in excess of what is reasonable to protect employee interests.

These key problem areas have arisen due to the Government's redesign of the transfer of business laws, including basing such laws on the concept of work performed rather than the character of the businesses of the old and new employers.

The transfer of business laws in the FW Act have reinstated many of the problems which caused so many difficulties for industry in the late 1990s, prior to the following High Court and Full Federal Court decisions which resulted in settled, fair and productive laws:

- In *PP Consultants Pty Ltd v FSU* [2000] HCA 59 the High Court devised a "character of the business test" to determine whether a transmission of business had occurred. The High Court said that it was necessary to characterise the business, or relevant part of the business, of the outgoing employer, and to then identify the character of the business as carried on by the new employer. Only if the two are the same was there a transmission of business.
- In *Stellar Call Centres P/L v CPSU* [2001] 103 IR 220, the Full Federal Court had to decide whether a group of call centres which were outsourced by Telstra were subject to Telstra's certified agreements by virtue of their being a transmission of business. The Court found that Telstra's business was providing telecommunications services to its customers while the business of Stellar was the provision of telephone answering services. This meant that the businesses were not the same and hence the certified agreements did not transmit.
- The High Court's decision in *Gribbles Radiation Pty Ltd v HSU* [2005] HCA 9 established some further principles which applied when a business was transmitted, including the requirement that tangible or intangible assets needed to transfer from the old employer to the new employer for the transmission of business provisions to apply.

The transfer of business provisions in the FW Act appear to be expressly designed to extinguish the previous settled, fair and productive laws and Court decisions and impose the “similarity of work” approach which was rejected by the High Court and Full Federal Court.

The FW Act gives no weight to whether a business which takes over outsourced work has the same character as the one which outsources the work.

The loss of the former “character of the business” test has resulted in the imposition of unworkable, impracticable and unfair arrangements on both employers and employees.

Outsourcing of ICT functions

The supply of IT and communications functions under an outsourcing arrangement is a core business service of the ICT industry. Many ICT businesses supply managed IT and communications services to an array of clients in different industries.

Many companies choose to outsource IT and communications functions to improve productivity and efficiency, to provide access to new technologies, and to enable them to concentrate on their core activities. Key functions of ICT outsourcing can be broadly categorised as infrastructure services which comprises 31% of outsourced ICT functions, application services which makes up 40% of outsourced ICT functions; and business process outsourcing at 29% of outsourced ICT functions.¹

Indeed, Ai Group statistics indicate that ICT activity constitutes a significant portion of total operational expenditure in a number of industry sectors, with the financial sector at 13.9% followed by Government at 13.6% (*Ai Group, Technology Industry Fact Sheet, 2010*). This is in keeping with growing requirements for data collection and data centre facilities across the community.

¹ “IT Services in Australia to 2013 (Databook)”; Datamonitor; March 2009.

The banking and financial industry, and indeed Government itself, are some of the largest users of outsourced ICT services. Communications, customer contact and back-office transactional services are not necessarily functions that non-ICT industries or Government can easily staff in-house, particularly given constantly changing technology. ICT companies provide specialized services to a variety of industries so that clients do not need to invest time, infrastructure and cost in developing specialized functions that do not relate to their core business.

Despite the rapid growth in streamlined technology and infrastructure for the supply of outsourced services, the ICT industry is now hindered by transfer of business laws which impose major restrictions upon their operations.

In outsourcing arrangements the transfer of skilled employees who have knowledge of client systems and infrastructure is often strongly supported by both clients and outsourced service providers to facilitate a successful delivery of the services. Indeed many ICT companies have built their businesses on the engagement of their clients' IT employees. However, the transfer of business laws now deter ICT companies from employing any of their clients' employees.

Consider the case of a software consultancy firm providing outsourced IT services to a Government, a mining company, an airline or a steel manufacturing company. Typically the software company will have very different employment conditions to those which apply to the client company. Most software companies employ staff on common law contracts, in contrast with other industries where collective agreements are common. The transfer of business laws expose ICT companies to transferable instruments becoming binding upon their operations for both transferring employees and non-transferring employees. Accordingly, the laws ensure that ICT companies will make every effort to avoid employing any employees of their clients.

The transfer of business laws result in a lose-lose-lose scenario. Client companies lose because they need to make employees redundant when outsourcing occurs. ICT companies lose because they cannot access the valuable skills possessed by their clients' employees. Employees lose because their jobs disappear along with their continuity of service for long service leave and other purposes. Such a situation defies common sense and needs to be addressed.

“The new transfer of business rules have deterred our organisation from proactively offering employment to employees of our client – something that we were more than willing to encourage and support under the old transfer of business arrangements.” - Ai Group ICT industry member company

Industrial instruments are very much focused on the industry and the type of business for which they were specifically designed to cover. Consequently the notion that an employer in one industry can easily adopt an industrial instrument from another industry is flawed. This notion, however, is the default or assumed position taken by the FW Act in relation to transfer of business.

Subject to an order from FWA (discussed in a later section of this submission), companies in the ICT industry which regularly contract with non-ICT organisations, including Government, are faced with the prospect of taking on a transferring instrument that has been negotiated to meet the needs of the client's enterprise and industry.

Requiring an ICT company to be covered by a transferring instrument which has no relevance to the ICT industry is fraught with difficulties. Yet this is the direct result of transfer of business laws which are based on the notion of the transfer of work and individuals, rather than the transfer of a business and how that business relates to the new employer.

Further, the removal of the “sole or dominant” reason test, that was a feature of the *Workplace Relations Act* (s.792(4)), threatens the ability of an employer to outsource business functions. Prior to the former *Workplace Relations Act* being amended to insert this test, unions were able to stymie outsourcing plans with applications for an injunction on the basis that employees were being dismissed due to their entitlement to the benefits of an industrial instrument. This union tactic is again available under the FW Act.

Restrictions on employee career progression and redeployment opportunities

Many ICT companies are part of a broader corporate group. Such corporate groups often have a variety of employing entities as a result of mergers to keep pace with the increasingly competitive global ICT market.

Larger ICT businesses frequently specialise in different fields of ICT services and technology, marketed under a common brand. Employees often seek redeployment to different parts of their employer’s business to, for example, obtain the opportunity for an assignment overseas, or to work with different technologies. The ICT workforce is increasingly mobile both locally and globally.

Under transfer of business laws, employees who seek redeployment to another entity within a corporate group for the purposes of career progression or broader experience, risk having such opportunity stymied, because any enterprise agreement applicable to the employee’s employment with the original entity would become binding upon the other entity creating potentially widespread consequences for the business.

The transfer of business laws also limit the redeployment opportunities of employees when positions become redundant. The transfer of business laws impose onerous obligations on employers which discourage employers from redeploying employees to other entities within a corporate group.

Section 389(2) of the Act provides that “a person’s dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances to be redeployed within the employer’s enterprise; or the enterprise of an associated entity of the employer.” Ai Group contends that the imposition of an inappropriate transferable instrument upon another entity within a corporate group would be viewed by many employers as being a reasonable reason to not offer an employee redeployment as an alternative to redundancy.

The impact of managing multiple and inconsistent employment conditions on costs, productivity and staff morale

The transfer of business laws are having a detrimental impact on business costs, productivity and staff moral.

Many of Ai Group’s ICT industry members have needed to reconfigure or outsource parts of their payroll system to accommodate different entitlements and employment conditions, creating significant compliance and administration costs.

*“A major logistical consequence of the transfer of industrial instruments for the new employer have been significant costs associated with payroll due to a requirement to outsource the payroll for this group of employees as the current corporate global payroll solution could not be re-designed, and re-configuration to cater for the different terms and payments.” - **Ai Group ICT industry member company.***

In addition, companies are finding that administering different employment conditions as a result of transferring instruments leads to employee tension and lower morale.

“In the case where we offered employment to an employee of our client this created significant challenges in managing inconsistent employment terms, particularly in circumstances where we have employees sitting beside each other performing the same work on different terms and conditions. From a cultural perspective this is difficult to manage.” - Ai Group ICT industry member company.

“Having separate collective agreements has also meant that cultural integration has been stymied which has led to difficulty in engaging the staff and negatively impacts productivity and retention. On a day to day basis this has created substantial impacts, including the necessity to manage a multiplicity of inconsistent penalty payments, shift allowances, standby rates and variations in leave arrangements. In some cases staff sitting next to one another performing similar or like work are subject to different allowances or benefits. This has led to instances of resentment and a break down in working relationships.” - Ai Group ICT industry member company.

Ai Group’s proposed amendments to the transfer of business laws will minimize these problems, particularly through the restoration of the High Court’s “character of the business” test.

“Temp to perm” scenarios

Many employees obtain permanent employment with a company after working for an on-hire firm and being placed with the company for a temporary period. This is referred to in the on-hire industry as “temp to perm” transition.

There are many employers who use labour hire agencies for the purpose of assessing whether or not prospective employees are suitable for direct employment with that company – particularly where the work is of a specialised nature, as commonly applies in the ICT industry. Moreover if an employer is looking to engage more staff due to a change or expansion in its business, then on-hire employees are often engaged first until the company has determined its ongoing staffing needs.

Ai Group is of the view that the transition of on-hire employees from agency employment to direct employment is not an arrangement which is caught by the transfer of business laws. However, the decision of Deputy President Sams of FWA in *Whitehaven Coal Mining Limited* [2010] FWA 1142 is of great concern. This decision concerned an application to FWA by Whitehaven Coal to prevent the transfer of the collective agreement of labour hire firm TESA when Whitehaven employed 16 on-hire employees of TESA. Whitehaven made the application due to doubt about whether its “temp to perm” scenario would constitute a transfer of business for the purposes of the FW Act.

In his decision, Sams DP unequivocally stated at para [12]

“I have no doubt that the specific requirements referred to above have been satisfied. In particular, there can be no doubt that the employees’ employment will be terminated by TESA; they will commence employment with the new employer, Whitehaven, within three months of their terminations; the employees will be performing the same work at the mine they have been working at as they were performing before termination; and, there remains a connection between the old and new employer by virtue of their outsourcing arrangements, which are to continue: see s 311(2) to (6).”

The commercial arrangement between TESA and Whitehaven for the supply of labour was construed as an outsourcing arrangement under section 311(4).

FWA's decision has caused a great deal of uncertainty and concern amongst Ai Group's on-hire members and users of on-hire labour in the ICT and other industries.

Prior to the decision of Sams DP, Ai Group wrote to the Department of Education, Employment and Workplace Relations (DEEWR) seeking its view on whether "temp to perm" scenarios were intended to be covered by the transfer of business laws. Ai Group's letter included the following typical scenario:

"We would appreciate your confirmation that, in the view of DEEWR, a transfer of business would not occur in the following scenario:

- 1. A labour hire company supplies a group of 10 temporary production workers to a food company;*
- 2. During the placement, the workers are integrated into the production workforce of the food company and they use the food company's tools and equipment;*
- 3. After 3 months the food company decides to hire the 10 workers;*
- 4. The labour hire company is happy to accommodate the client, but consistent with the terms of the standard contract which labour hire companies ask clients to sign, the client is required to pay a recruitment fee to the labour hire company;*
- 5. The fee is paid and the 10 workers resign from, or are terminated by, the labour hire company and employed by the food company."*

Whilst of course stating that the factual scenario of individual cases would need to be considered, the view expressed by the Department on the above typical "temp to perm" scenario set out in Ai Group's correspondence, was that such a scenario does not fall within the transfer of business provisions of the Act. The following extract from DEEWR's reply is relevant:

Section 311(3) of the Act provides that the 'asset transfer' connection will be satisfied where there is an arrangement between the old employer and the new employer (or their associated entities) that the new employer owns or has beneficial use of some or all of the tangible or intangible assets that the employer owned or had the beneficial use of and that relate to the transferring work.

In this instance, if there is no arrangement between the labour hire company and the client company under which some assets of the labour hire company transfer to the client company, then the section will not apply. Equally, the section will not apply if there is no asset transfer of no employees transfer.

This means that, in your example, the section would not apply if the transferring employees were only using assets of the client company; it requires the client company to own or have the beneficial use of assets which were owned or beneficially used by the labour hire company and there must be an arrangement between the two employers for that asset transfer to occur.

In relation to whether the scenario would give rise to an outsourcing or insourcing arrangement within the meaning of ss.311(4) and (5), our view is that on the information provided to us, the requirements set out under those provisions would not be satisfied. The scenario you describe does not fall within the ordinary and accepted meaning of these words. Specific examples on how these provisions are intended to operate is provided at paragraphs 1224 and 1226 of the Explanatory Memorandum of the Act”

The transfer of business laws need to be amended to ensure that “temp to perm” scenarios are not caught by the laws, either as a result of the on-hire firm and client using the same assets (s.311(3)) or due to outsourcing (s.311(4) and (5)).

Applications for FWA orders are not being commonly utilized because of the inappropriate legislative provisions

Whilst it may be the Government view that difficulties and business costs associated with transferring instruments can be cured through an FWA order, this option is not being widely utilized because the legislative provisions are not appropriate and because of the risks involved.

In almost all cases so far, FWA orders have been issued in circumstances where:

- the new employer, the employees and the relevant unions have supported the order being issued; and
- there was an established relationship between the relevant parties.

For example, see *Whitehaven Coal* [2010] FWA 1142, *Queensland Nickel* [2009] FWA 335 and *Optus Administration v ASU* [2010] 3567.

Where there is an existing relationship, new employers can more readily consult with prospective employees about any pending transfer and offers of employment. However, commercial outsourcing arrangements are frequently determined by way of a tightly regulated tendering process between an old employer and potential new employers. The tendering process is typically competitive and confidential. As such, tendering employers generally cannot publicly disclose the business being sought and have no access to the employees of the client. Accordingly, an application to FWA before the work is won is typically impossible in practice.

“In the context of outsourcing arrangements, in the majority of cases initial discussions with clients are subject to strict confidentiality obligations until the commercial negotiations have been completed (particularly in circumstances involving tenders). Whilst the parties may be seeking to identify and determine the terms and conditions that will apply to employees under the outsourcing arrangements the prospect of an outsourced organisation

approaching FWA for an order is simply not tenable in the context of commercial in confidence discussions with prospective clients. Furthermore, in the case of a tender, the idea of approaching FWA alone would, in most cases, be enough to have a company removed from the confidential tender process.” - Ai Group ICT industry member company.

The uncertainty that an FWA application presents prior to a potential transfer of business deters ICT companies from seeking an order.

“To date our organisation has not made application for an FWA Order due to a number of uncertainties surrounding the application of the legislation. These include the question of timing. In particular, the necessity for our business to settle on a clear employee engagement strategy well before the commencement of the commercial relationship with our client.” - Ai Group ICT industry member company.

Proposed changes to the transfer of business provisions

The changes which Ai Group proposes to the transfer of business and associated general protection provisions are set out in the **Attachment**.

These changes are designed to address the problems referred to in this submission.

Attachment

Proposed Changes to Transfer of Business and Associated Provisions

Part 2-8—Transfer of business

Division 1—Introduction

307 Guide to this Part

This Part provides for the transfer of enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from one national system employer to another national system employer.

Division 2 describes when a transfer of business occurs and defines the following key concepts: *old employer*, *new employer*, ~~*transferring work*~~, *transferring employee* and *transferable instrument*.

Division 2 also sets out the circumstances in which enterprise agreements, certain modern awards and certain other instruments that covered the old employer and the transferring employees (including high income employees) cover the new employer, the transferring employees and certain non-transferring employees and organisations.

Division 3 provides for FWA to make orders in relation to a transfer of business.

308 Meanings of *employee* and *employer*

In this Part, *employee* means a national system employee, and *employer* means a national system employer.

309 Object of this Part

The object of this Part is to provide a balance between:

- (a) the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and
 - (b) the interests of employers in running their enterprises efficiently;
- if there is a transfer of business from one employer to another employer.

Division 2—Transfer of instruments

310 Application of this Division

This Division provides for the transfer of rights and obligations under enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from an old employer to a new employer.

311 When does a transfer of business occur

Meanings of transfer of business, old employer, new employer and transferring work

- (1) There is a **transfer of business** from an employer (the **old employer**) to another employer (the **new employer**) if the following requirements are satisfied:
 - (a) the employment of an employee of the old employer has terminated on the initiative of the old employer;
 - (b) within 3 months after the of a connection occurring as described in any of subsections (3) to (6), the employee becomes employed by the new employer;
 - (c) the work (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;
 - (d) the character of the business of the new employer is the same as the character of the business of the old employer;
 - (e) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6) (5).

Note: The issue of whether or not two businesses have the same character was considered by the High Court in *PP Consultants Pty Ltd v FSU* [2000] HCA 59 and by the Full Federal Court in *Stellar Call Centres P/L v CPSU* [2001] 103 IR 220.

Meaning of transferring employee

- (2) An employee in relation to whom the requirements in paragraphs (1)(a), (b) and (c) are satisfied is a **transferring employee** in relation to the transfer of business.

Transfer of assets from old employer to new employer

- (3) There is a connection between the old employer and the new employer if, in accordance with an arrangement between:
 - (a) the old employer or an associated entity of the old employer; and
 - (b) the new employer or an associated entity of the new employer;the new employer, or the associated entity of the new employer, owns ~~or has the beneficial use of~~ some or all of the assets (whether tangible or intangible):
 - (c) that the old employer, or the associated entity of the old employer, ~~owned or had the beneficial use of~~; and
 - (d) that relate to, or are used in connection with, the ~~transferring work~~ business or part of the business which has transferred.

Old employer outsources ~~work~~ part of its business to new employer

- (4) There is a connection between the old employer and the new employer if the ~~transferring work is performed by one or more transferring employees, as employees of the new employer,~~ transfer of business has occurred because the old employer, or an associated entity of the old employer, has outsourced the ~~transferring work~~ part of its business to the new employer or an associated entity of the new employer.

New employer ceases to outsource ~~work~~ part of its business to old employer

- (5) There is a connection between the old employer and the new employer if:
 - (a) ~~the transferring work~~ had been performed by one or more transferring employees, as employees of the old employer, because the new employer, or an associated

- entity of the new employer, had outsourced ~~the transferring work~~ part of its business to the old employer or an associated entity of the old employer; and
- (b) the ~~transferring~~ work is performed by those transferring employees, as employees of the new employer, because the new employer, or the associated entity of the new employer, has ceased to outsource ~~the work~~ part of its business to the old employer or the associated entity of the old employer.

New employer is associated entity of old employer

- ~~(6) There is a connection between the old employer and the new employer if the new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer.~~

312 Instruments that may transfer

Meaning of transferable instrument

- (1) Each of the following is a *transferable instrument*:
- (a) an enterprise agreement that has been approved by FWA;
 - (b) a workplace determination;
 - (c) a ~~named employer~~ modern enterprise award.

Meaning of named employer award

- ~~(2) A *named employer award* is a modern award that is expressed to cover one or more named employers.~~

313 Transferring employees and new employer covered by transferable instrument

- (1) If a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee's employment with the old employer, then:
- (a) the transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (the *transfer time*) the transferring employee becomes employed by the new employer; and
 - (b) while the transferable instrument covers the new employer and the transferring employee in relation to the transferring work, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to that work.
- (2) To avoid doubt, a transferable instrument that covers the new employer and a transferring employee under paragraph (1)(a) includes any individual flexibility arrangement that had effect as a term of the transferable instrument immediately before the termination of the transferring employee's employment with the old employer.
- (3) This section has effect subject to any FWA order under subsection 318(1).

~~314 New non-transferring employees of new employer may be covered by transferable instrument~~

- ~~(1) If:~~
- ~~(a) a transferable instrument covers the new employer because of paragraph 313(1)(a); and~~

- ~~(b) after the transferable instrument starts to cover the new employer, the new employer employs a non-transferring employee; and~~
 - ~~(c) the non-transferring employee performs the transferring work; and~~
 - ~~(d) at the time the non-transferring employee is employed, no other enterprise agreement or modern award covers the new employer and the non-transferring employee in relation to that work;~~
- ~~then the transferable instrument covers the new employer and the non-transferring employee in relation to that work.~~
- (2) A **non-transferring employee** of a new employer, in relation to a transfer of business, is an employee of the new employer who is not a transferring employee.
 - (3) This section has effect subject to any FWA order under subsection 319(1).

315 Organisations covered by transferable instrument

*Employer organisation covered by ~~named employer~~ **modern enterprise** award*

- (1) If:
 - (a) a ~~named employer~~ **modern enterprise** award covers the new employer because of paragraph 313(1)(a); and
 - (b) ~~named employer~~ **the modern enterprise** award covered an employer organisation in relation to the old employer immediately before the termination of a transferring employee's employment with the old employer;
 then the ~~named employer~~ **modern enterprise** award covers the employer organisation in relation to the new employer.

*Employee organisation covered by ~~named employer~~ **modern enterprise** award*

- (2) If:
 - (a) a ~~named employer~~ **modern enterprise** award covers the new employer and a transferring employee because of paragraph 313(1)(a); and
 - (b) the ~~named employer~~ **modern enterprise** award covered an employee organisation in relation to the transferring employee immediately before the termination of the transferring employee's employment with the old employer;
 then the ~~named employer~~ **modern enterprise** award covers the employee organisation in relation to:
 - (c) the transferring employee; and
 - ~~(d) any non-transferring employee of the new employer who:

 - (i) is covered by the named employer award because of a provision of this Part or an FWA order; and
 - (ii) performs the same work as the transferring employee.~~

Employee organisation covered by enterprise agreement

- (3) To avoid doubt, if:
 - (a) an enterprise agreement covers a transferring employee ~~or a non-transferring employee~~ because of a provision of this Part or an FWA order; and
 - (b) the enterprise agreement covered an employee organisation immediately before the termination of the transferring employee's employment with the old employer;
 then the enterprise agreement covers the employee organisation.

316 Transferring employees who are high income employees

- (1) This section applies if:
 - (a) the old employer had given a guarantee of annual earnings for a guaranteed period to a transferring employee; and
 - (b) the transferring employee was a high income employee immediately before the termination of the transferring employee's employment with the old employer; and
 - (c) some of the guaranteed period occurs after the time (the *transfer time*) the transferring employee becomes employed by the new employer; and
 - (d) an enterprise agreement does not apply to the transferring employee in relation to the transferring work at the transfer time.
- (2) The guarantee of annual earnings has effect after the transfer time (except as provided in this section) as if it had been given to the transferring employee by the new employer.
- (3) The new employer is not required to comply with the guarantee of annual earnings in relation to any part of the guaranteed period before the transfer time.
- (4) The new employer is not required to comply with the guarantee of annual earnings to the extent that it requires the new employer to pay an amount of earnings to the transferring employee, in relation to the part of the guaranteed period after the transfer time, at a rate that is more than the annual rate of the guarantee of annual earnings.
- (5) If:
 - (a) the transferring employee is entitled to non-monetary benefits under the guarantee of annual earnings after the transfer time; and
 - (b) it is not practicable for the new employer to provide those benefits to the transferring employee;then the guarantee of annual earnings is taken to be varied so that, instead of the entitlement to those benefits, the transferring employee is entitled to an amount of money that is equivalent to the agreed money value of those benefits.
- (6) This section does not affect the rights and obligations of the old employer that arose before the transfer time in relation to the guarantee of annual earnings.

Division 3—Powers of FWA

317 FWA may make orders in relation to a transfer of business

This Division provides for FWA to make certain orders if there is, or is likely to be, a transfer of business from an old employer to a new employer.

318 Orders relating to instruments covering new employer and transferring employees

Orders that FWA may make

- (1) FWA may make the following orders:
 - (a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a transferring employee because of paragraph 313(1)(a) does not, or will not, cover the new employer and the transferring employee;
 - (b) an order that an enterprise agreement or a ~~named employer~~ **modern enterprise** award that covers the new employer covers, or will cover, the transferring employee.

Who may apply for an order

- (2) FWA may make the order only on application by any of the following:
- (a) the new employer or a person who is likely to be the new employer;
 - (b) a transferring employee, or an employee who is likely to be a transferring employee;
 - (c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;
 - (d) if the application relates to a ~~named employer~~ modern enterprise award—an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).

Matters that FWA must take into account

- (3) In deciding whether to make the order, FWA must take into account the following:
- (a) the views of:
 - (i) the new employer or a person who is likely to be the new employer; and
 - (ii) the employees who would be affected by the order;
 - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
 - (c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;
 - (d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;
 - (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;
 - (f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;
 - (g) the public interest.

Restriction on when order may come into operation

- (4) The order must not come into operation in relation to a particular transferring employee before the later of the following:
- (a) the time when the transferring employee becomes employed by the new employer;
 - (b) the day on which the order is made.

~~319 Orders relating to instruments covering new employer and non-transferring employees~~

~~Orders that FWA may make~~

- ~~(1) FWA may make the following orders:~~
- ~~(a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a non-transferring employee because of subsection 314(1) does not, or will not, cover the non-transferring employee;~~
 - ~~(b) an order that a transferable instrument that covers, or is likely to cover, the new employer, because of a provision of this Part, covers, or will cover, a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;~~

- ~~(e) an order that an enterprise agreement or a modern award that covers the new employer does not, or will not, cover a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer.~~

~~Note:—Orders may be made under paragraphs (1)(b) and (c) in relation to a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer, whether or not the non-transferring employee became employed by the new employer before or after the transferable instrument referred to in paragraph (1)(b) started to cover the new employer.~~

Who may apply for an order

- ~~(2) FWA may make the order only on application by any of the following:~~
- ~~(a) the new employer or a person who is likely to be the new employer;~~
 - ~~(b) a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;~~
 - ~~(c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;~~
 - ~~(d) if the application relates to a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).~~

Matters that FWA must take into account

- ~~(3) In deciding whether to make the order, FWA must take into account the following:~~
- ~~(a) the views of:
 - ~~(i) the new employer or a person who is likely to be the new employer; and~~
 - ~~(ii) the employees who would be affected by the order;~~~~
 - ~~(b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;~~
 - ~~(c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;~~
 - ~~(d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;~~
 - ~~(e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;~~
 - ~~(f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;~~
 - ~~(g) the public interest.~~

Restriction on when order may come into operation

- ~~(4) The order must not come into operation in relation to a particular non-transferring employee before the later of the following:~~
- ~~(a) the time when the non-transferring employee starts to perform the transferring work for the new employer;~~
 - ~~(b) the day on which the order is made.~~

320 Variation of transferable instruments

Application of this section

- (1) This section applies in relation to a transferable instrument that covers, or is likely to cover, the new employer because of a provision of this Part.

Power to vary transferable instrument

- (2) FWA may vary the transferable instrument:
- (a) to remove terms that FWA is satisfied are not, or will not be, capable of meaningful operation because of the transfer of business to the new employer; or
 - (b) to remove an ambiguity or uncertainty about how a term of the instrument operates if:
 - (i) the ambiguity or uncertainty has arisen, or will arise, because of the transfer of business to the new employer; and
 - (ii) FWA is satisfied that the variation will remove the ambiguity or uncertainty; or
 - (c) to enable the transferable instrument to operate in a way that is better aligned to the working arrangements of the new employer's enterprise.

Who may apply for a variation

- (3) FWA may make the variation only on application by:
- (a) a person who is, or is likely to be, covered by the transferable instrument; or
 - (b) if the application is to vary ~~named employer~~ **modern enterprise** award—an employee organisation that is entitled to represent the industrial interests of an employee who is, or is likely to be, covered by the named employer award.

Matters that FWA must take into account

- (4) In deciding whether to make the variation, FWA must take into account the following:
- (a) the views of:
 - (i) the new employer or a person who is likely to be the new employer; and
 - (ii) the employees who would be affected by the transferable instrument as varied;
 - (b) whether any employees would be disadvantaged by the transferable instrument as varied in relation to their terms and conditions of employment;
 - (c) if the transferable instrument is an enterprise agreement—the nominal expiry date of the agreement;
 - (d) whether the transferable instrument, without the variation, would have a negative impact on the productivity of the new employer's workplace;
 - (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument, without the variation;
 - (f) the degree of business synergy between the transferable instrument, without the variation, and any workplace instrument that already covers the new employer;
 - (g) the public interest.

Restriction on when variation may come into operation

- (5) A variation of a transferable instrument under subsection (2) must not come into operation before the later of the following:
- (a) the time when the transferable instrument starts to cover the new employer;
 - (b) the day on which the variation is made.

Part 3-1—General protections

Division 3—Workplace rights

340 Protection

- (1) A person must not take adverse action against another person:
 - (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
 - (b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) A person must not take adverse action against another person (the *second person*) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

341 Meaning of *workplace right*

Meaning of workplace right

- (1) A person has a *workplace right* if the person:
 - (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
 - (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
 - (c) is able to make a complaint or inquiry:
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
 - (ii) if the person is an employee—in relation to his or her employment.

Meaning of process or proceedings under a workplace law or workplace instrument

- (2) Each of the following is a *process or proceedings under a workplace law or workplace instrument*:
 - (a) a conference conducted or hearing held by FWA;
 - (b) court proceedings under a workplace law or workplace instrument;
 - (c) protected industrial action;
 - (d) a protected action ballot;
 - (e) making, varying or terminating an enterprise agreement;
 - (f) appointing, or terminating the appointment of, a bargaining representative;
 - (g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;
 - (h) agreeing to cash out paid annual leave or paid personal/carer's leave;

- (i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);
- (j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
- (k) any other process or proceedings under a workplace law or workplace instrument.

Prospective employees taken to have workplace rights

- (3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

Exceptions relating to prospective employees

- (4) Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings.
- (5) Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 (which deals with transfer of business).

342 Meaning of *adverse action*

- (1) The following table sets out circumstances in which a person takes *adverse action* against another person.

Meaning of <i>adverse action</i>		
Item	Column 1	Column 2
	<i>Adverse action is taken by ...</i>	<i>if ...</i>
1	an employer against an employee	the employer: <ul style="list-style-type: none"> (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: <ul style="list-style-type: none"> (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the <i>principal</i>) who has entered into a contract for services with an independent contractor against the	the principal: <ul style="list-style-type: none"> (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of

Meaning of adverse action

Item	Column 1	Column 2
	<i>Adverse action is taken by ...</i>	<i>if ...</i>
	independent contractor, or a person employed or engaged by the independent contractor	the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
4	a person (the <i>principal</i>) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association—imposes a penalty,

Meaning of *adverse action*

Item	Column 1	Column 2
	<i>Adverse action is taken by ...</i>	<i>if ...</i>
		forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).

- (2) ***Adverse action*** includes:
- (a) threatening to take action covered by the table in subsection (1); and
 - (b) organising such action.
- (3) ***Adverse action*** does not include action that is authorised by or under:
- (a) this Act or any other law of the Commonwealth; or
 - (b) a law of a State or Territory prescribed by the regulations.
- (4) Without limiting subsection (3), ***adverse action*** does not include an employer standing down an employee who is:
- (a) engaged in protected industrial action; and
 - (b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.
- (5) ***Adverse action*** does not include action taken because of s.341(1)(a) unless the benefit described in that paragraph is the sole or dominant reason for the employer doing any of the things described in s.342(2).