

**Senate Standing Committee on Education Employment and Workplace  
Relations**

**QUESTIONS ON NOTICE  
Supplementary Budget Estimates 2010-2011**

**Outcome 5 - Workplace Relations**

**DEEWR Question No.EW0594\_11**

**Senator Abetz asked on 20/10/2010, Hansard page 94.**

**Question**

*Transfer of business*

**WR BUSINESS PROVISIONS**

Mr Kovacic—That is the article that refers to transfer of business provisions?  
...Senator ABETZ—Could you take on notice whether the government is prepared to look at that is and see if they have any plans to deal with the issues raised in that article? Senator Chris Evans—Could you be a bit more specific? As I recall, there were a number of issues in the article. What was this in relation to? Senator ABETZ—It was in relation to the severe complications to shifting employees between subsidiaries is the issue of the article. I wonder whether or not the government has exercised its mind in relation to those expressed concerns and what its reaction is.

**Answer**

The Fair Work Act introduced new rules in relation to transfer of business that provide for the continuing application (in certain circumstances) of industrial instruments to employees who move from one employer to another when a business changes hands.

The new rules focus on the kind of work being performed by transferring employees rather than on the nature of the business that transfers, which was a narrower test under the *Workplace Relations Act 1996*.

The previous rules did not provide certainty and sometimes enabled arrangements to be structured to avoid employee entitlements. The new rules are fairer for employees, who should not be disadvantaged where they perform the same work for the new employer as they performed for the old employer.

However, the new framework also recognises the commercial considerations associated with business takeovers, providing substantial scope for flexibility in relation to the transfer of instruments between old and new employers.

Fair Work Australia (FWA) can tailor the operation of instruments transferring from an old employer to a new employer, before or after the transfer of business.

FWA can order that an instrument does not apply to the new employer at all, or can vary an instrument so that it better aligns with a new employer's business circumstances. In making such orders FWA must weigh factors such as the impact of the instrument on the employer's business, and any disadvantage to employees.

Monitoring by the Department to date suggests that most applications to FWA seeking that an instrument does not apply to the new employer or to vary the instrument are

granted, once FWA is satisfied that employees will not be disadvantaged (usually because there is an alternative enterprise agreement or named employer award in place at the new employer's enterprise). FWA gives considerable weight to the views of employees affected by the orders, and will generally make the orders sought if employees agree. FWA has made orders under the transfer of business rules in relation to in-sourcing and outsourcing arrangements, and has dealt with applications from both existing employers and prospective new employers.

The Department will continue to monitor the operation of the new transfer of business rules.