Chapter 9

Transfer of business

9.1 Chapter 2, Part 2-8 establishes new transfer of business provisions to ensure agreements cannot be evaded and that transferring employees are not disadvantaged. WorkChoices provided that instruments transferred only in the event that employees were taken on by the new employer and instruments only transferred for 12 months. After that employees reverted to whatever applied in the workplace.[1]

9.2 The WRA does not define 'transmission of business'. This resulted in a number of tests being developed by the courts to determine whether a transmission has occurred.[2] Nor did the WRA adequately protect the conditions and entitlements of employees resulting from corporate restructuring.

Proposed changes

9.3 To remedy this, clause 311 of the bill introduces a specific test for transfer of business which occurs when:

- the employment of an employee of the old employer is terminated;
- former employees are retained by the new employer within three months;
- the work performed is the same, or substantially the same; and
- there is a connection between the old and new employer.[3]

9.4 Thus, the bill broadens the circumstances in which a transfer of business occurs and defines the focus of the work being performed rather than the character of the business.[4] It retains the provision that instruments transfer only in the event that employees transfer. There is no 12 month limitation. Instruments move permanently unless and until the employees and employer decide to make a new bargain.[5]

9.5 The creation of modern awards means that the transfer of awards will be less relevant in the future and the main issues is whether enterprise agreements will transfer.[6]

9.6 Part 2-8, Division 3 provides that FWA has a role in determining the application of agreements of the new employer to transferring employees, and

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1 Ms Natalie James, *Committee Hansard*, 11 December 2008, p 19.

2 DEEWR, *Submission 63*, p. 55.

3 EM, p. 269.

4 DEEWR, *Submission 63*, p. 55.

5 Ms Natalie James, *Committee Hansard*, 11 December 2008, p 19.

6 DEEWR, *Submission 63*, p. 56.

transferred instruments to non-transferring employees. The department described these powers as 'remedial orders' where, subject to a number of criteria such as views of the employees and employer, questions of disadvantage and public interest, FWA has the ability to change the default rule.[7]

9.7 While welcoming the intention of the transfer of business provisions, the ACTU noted that a transfer of business only occurs if an employee goes to work for the new employer within three months. It argued that this allowed new employers to avoid the provisions by withholding offers of employment for three months or more and advocated that this period be extended.[8]

9.8 Employer groups were concerned about the new definition of a transfer of business and argued it may force incoming employers to take on existing enterprise agreements and to continue to run operations in ways which have not been efficient, and this may affect whether transferring employees are taken on.[9]

9.9 DEEWR responded to concerns raised by employer groups by stating:

> …there is no greater disincentive as a result of the provisions of this bill for a purchaser of a business to bring across the employees than there is under the existing framework. In essence, that incentive remains the same as it is at the moment. It ultimately is a business decision in terms of the skill set of the employees and a whole range of factors that the business will take into account. In those terms, we do not see any significant change in this bill.[10]

Minimum employment period

9.10 The TCFUA objected to clause 384(b) (iii) which may allow an employer to require an employee to serve another minimum employment period to access unfair dismissal when they may have already worked for the old employer for decades. It argued that this provision will:

> …only encourage sham transferring arrangements, which are in fact, already a feature of the TCF industry. It is not uncommon, for example, for a business to close one day and re-open the next under a different name but operating out of the same premises, with the same directors and performing the same work[11]

9.11 DEEWR officials explained that in relation to the NES, the employer will have a choice to recognise service in relation to annual leave and redundancy pay. If the new employer does not agree to recognise service, these entitlements must be paid

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7 Ibid.; see also DEEWR, *Submission 63*, p. 18.

8 ACTU, *Submission 13*, p. 52.

9 See ACCI, *Submission 58*, p. 60; AiG, *Submission 118*, p. 78-82; Stooke Consulting Group, *Submission 153*, pp. 7-8.

10 Mr John Kovacic, DEEWR, *Committee Hansard*, 19 February 2009, p. 76.

11 TCFUA, *Submission 11*, p. 27.

out. There will also be a choice in relation to the minimum employment period for unfair dismissal protection. Previous service will be recognised unless the employer informs transferring employees in writing of a requirement for a new minimum employment period.[12]

Entitlements

9.12 The ACTU pointed out that the bill appears to allow a new employer to offer employment to a transferring employee on terms that they lose their accrued leave entitlements. It added that if the employee refuses this offer, it appears they will not be entitled to a severance payment from the old employer.[13]

9.13 DEEWR explained that the provisions deal with different entitlements in different ways, reflecting the current approach to termination change and redundancy clauses in awards as developed by the AIRC. For example with annual leave there are two options where the transaction occurs:

> …The options are that the old employer pays everyone out with their annual leave or the new employer makes a decision to take on the accrued entitlements of any transferring employees.[14]

9.14 For other entitlements where this is not such a choice, the department reassured the committee that the entitlement moves over.[15]

9.15 The committee was concerned to hear the following example from the Australian Nursing Federation (ANF):

> Our experience in Victoria, certainly in late 2007, after the introduction of the legislation, and in early 2008, is that there were some six facilities where nurses who had been long-term employees of the facility, which was then purchased by another private aged-care employer, were dismissed during the probationary period. Despite the fact that their employer had received funds from the previous owner to cover the entitlements, those nurses were excluded under the probationary period. We attempted to fight that in the Australian Industrial Relations Commission. We got a favourable decision, which was then unfortunately overturned by a full bench. We are very keen on that provision being amended in the Fair Work Bill.[16]

9.16 This example was raised with the department because it intersected with the NES and unfair dismissal provisions (see chapter 5). The department advised that terminating employment unfairly to avoid LSL provisions would be a breach of the

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12 DEEWR, *Submission 63*, p. 56.

13 ACTU, *Submission 13*, p. 53.

14 Ms Natalie James, *Committee Hansard*, 11 December 2008, p 20.

15 Ibid.

16 Ms Lisa Fitzpatrick, Australian Nursing Federation, *Committee Hansard*, 16 February 2009, p. 52.

general protections.[17] In response to a Question on Notice[18] concerning the ANF example set out above, the Department advised:

> Under the Fair Work Bill a transferring employees' previous service for the purposes of the minimum employment period for unfair dismissal will be recognised unless the new employer expressly informs transferring employees, in writing, of a requirement for a new minimum employment period. This is in contrast to the existing position, where the Australian Industrial Relations Commission has held that a new qualifying period applies unless it is expressly waived.
>
> If the new employer is an associated entity of the previous employer, the employee's service with the previous employer will be taken to be continuous for the purposes of the unfair dismissal minimum employment period.
>
> These provisions were established to reflect a balance between protecting employees who have already served a minimum employment period for unfair dismissal and the needs of the new employer.
>
> In relation to the specific question about long service leave, the General Protections provisions in the Bill provide that an employee cannot be dismissed in order to prevent the employee from exercising a workplace right. A workplace right includes a benefit (for example long service leave) under a workplace law or workplace instrument.

9.17 The committee majority is concerned that this protection will not be adequate against employers evading their responsibilities in a situation such as the one described by the ANF.

Recommendation 10

9.18 **The committee majority recommends that a probationary period after a transfer of business should not be required to recommence and they should be treated as existing employees.**

Transfer of instruments

9.19 Employers were concerned about the requirement to take on the full 'contractual' obligations (that is, their obligations under an enterprise agreement) of a business which has been taken over.[19] There are significant disincentives to purchasing businesses if they are not doing well financially.

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17 Ms Natalie James, DEEWR, *Committee Hansard*, 19 February 2009, p. 77.

18 Senator Marshall, 16 February 2009, Hansard p. 77.

19 Telstra, *Submission 97*, p. 11.

9.20 In response to these concerns, DEEWR explained that although a business will come with contractual obligations, under Division 3, Part 2-8 , FWA will have the capacity to rationalise the instruments of employment that apply and such a request may be considered before or after the transfer.[20]

9.21 Employers were also concerned about whether they will be obliged to take on the employees of the business. DEEWR explained that the bill does not impose an obligation on a new employer to employ the employees of the old employer.[21]

9.22 The CPSU supported the new provisions and stated:

> …the issue is about balancing the legitimate interests of the business and those employees to have their conditions protected and that that is the question for the legislation. We think that the provisions that are proposed in the bill do that fairly.[22]

Conclusion

9.23 The bill contains anti-avoidance provisions. It provides a simple test for when a transfer of business occurs to ensure agreements cannot be evaded and that transferring employees are not disadvantaged. The committee has heard of many employees disadvantaged in this way. The bill includes protections for a transferred employee's accrued NES entitlements. The bill also provides for greater flexibility and certainty for employers and employees in dealing with transfer situations. FWA will be able to determine the application of agreements and named employer awards of the new employer to transferring employees and transferred instruments to non-transferring employees, including prior to the business transfer occurring.

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20 DEEWR, *Submission 63*, p. 55-56.

21 Ibid, p. 56.

22 Ms Melissa Donnelly, Senior Legal Officer, CPSU, *Committee Hansard*, 16 February 2009, p. 24.