

CHANGES TO TRANSMISSION OF BUSINESS PROVISIONS UNDER WORK CHOICES

Recent amendments to the *Workplace Relations Act 1996* have placed new obligations on employers when they sell or purchasing a new business (ie a transmission of business). The Act has set clear parameters defining the extent to which an industrial instrument is transmitted to a new employer. This article provides information for anyone considering selling or purchasing an existing business.

What is a “transmission of business”?

Where a new employer becomes a successor, transmittee or assignee to the whole or part of a business, a transmission of business normally takes place. Although it may not necessarily mean that the business has been sold, usually an existing business is sold by asset sale from an “old” employer to a “new” employer.

Who is a “transferring employee”?

An employee formerly working for the old owner who is taken on by the new employer through the transmission of business is known as a “transferred employee”. A new employer becomes bound by the terms of a “transferring industrial instrument” that applied to the old employer if:

they employ the transferred employee(s) within two months of the sale; or

the transferred employee was terminated by the old employer within one month prior to the sale for genuine operation reasons (eg redundancy), and employed by the new employer within two months of the transmission time.

Transferring Industrial Instruments

These laws apply to Australian Workplace Agreements/Certified and Collective Agreements (pre-reform and Work Choices); Awards; Australian Pay and Classification Scales; and State transitional instruments (including Notional Agreements Preserving State Awards and Preserved State Agreements) can be transmitted to a new employer. However, it is only instruments that bound a transferring employee and the old employer that will be transmitted and apply to the new employer. *Note that such transmitted industrial instruments will only apply to the new employer for 12 months.* If the new Employer and Employees agree they can terminate the “transmitted industrial instrument” prior to the expiration of the 12 month period and negotiate a replacement or new workplace agreement. Once in place, it will override the transferred industrial instrument. *You cannot, however, enter into a replacement or new workplace (collective) agreement during the transmission period if the transmitted industrial instrument is an Australian Workplace Agreement (ie you must wait for the 12 months to expire or negotiate a new AWA).*

Scenario	Application
No employees from old employer are hired by new employer.	New employer not bound by transmitted industrial instrument
Several employees from old employer hired by new employer.	Transmitted industrial instrument will only bind transferred employees.
New employees hired by new employer	New employer can negotiate a workplace agreement with new employees
New employer has collective agreement with their current employees.	This collective agreement will not bind transferring employees until after transmission period ends.
12 months lapse of transferred employees with new employer.	Transferred employees bound by relevant industrial instrument used by new employer (or where no instrument in place, the Australian Fair Pay and Conditions Standard will apply).

Notification of Transmission

Transferring employees must be notified by the new employer of the transmitted instrument applying to them within 28 days of their employment including details of what terms and conditions they will be employed under, when the instrument will cease operation, what can replace that transmitted instrument, etc. This notice is also lodged with the Office of the Employment Advocate with 14 days following distribution to the transmitted employees.

Exceptions to Notification: there is no requirement to notify the transferred employees if they and the new employer become bound by a workplace agreement under the new legislation within 14 days of the time of transmission.

The old employer also has notification obligations including providing details to new employer of employees on parental leave who may be affected by the transmission of the business and could become potential transferred employees as a result. Similarly, any employees on parental leave at the time must be informed by the old employer of the pending transmission.

Failure to do so can result in fines of up to \$33,000 for a corporation and \$6,600 for individuals.

Records

All records relating to the transferring employees must be provided to the new employer by the old employer. Financial penalties of up to \$2,750 for a corporation and \$550 for an individual may be imposed.

Further Information

If you are considering becoming involved in a transmission of business, whether as an "old" or "new" employer, it is critical that you consider the implications of the new legislation. At Agnew D'Arcy Legal we can assist you in ensuring you comply with all obligations under the Act, including preparing notices to give employees. For further information contact us on 8354 1844.