

# CG LAW BULLETIN

## BUYING A BUSINESS? CRITICAL COMMERCIAL AND WORKPLACE CONSIDERATIONS!

Buying a new business can be an exciting experience - whether it's your first or just one of many. But even for experienced business people there are plenty of critical issues to consider to ensure the transaction proceeds smoothly. Get the right advice early in the transaction and you'll get your new business off to the best possible start.

### PART 2

In part 1 of this CG Law Bulletin we examined the business, due diligence and restraint issues you need to address while in this part, we'll examine the workplace and employment issues that you need to get right.

#### EMPLOYEE ISSUES

Employee issues can be notoriously complex and also inherently risky aspects to a business purchase transaction.

The *Fair Work Act* 2009 (Cth) (the **FW Act**) provides that where a business is 'transferred' from one national system employer to another, awards, agreements and other types of 'transferable instruments' may follow the sale of the business and become binding on the buyer.

You might find you are bound to employee conditions that are different to what you're accustomed to or that don't fit your future plans for the business.

#### CAN'T THE SELLER TERMINATE AND I REHIRE UNDER NEW CONDITIONS?

The short answer is no! Provisions under the FW Act cover this approach. For the purposes of the FW Act, a 'transfer of business' will occur where:

- the employment of an employee of the seller has been terminated **and within three months the employee has become employed by the buyer;**
- the work the employee performed whilst working for the seller is substantially the same to the work performed for the buyer; and
- there is a transfer of ownership or use of assets from the seller to the buyer that relate to the employee's work.

Where there has been a transfer of business, eligible 'transferable instruments' may continue to cover the transferred employee's employment when the employee commences employment with the buyer. The transferable instruments **will continue to cover the employee whilst they are performing work for the buyer until the instruments are terminated, or until replacement instruments begin to operate.**

A transferring instrument (for example an enterprise agreement) may also cover new employees who begin work for the buyer after the transfer where the new employee performs the work that was transferred and there is no other applicable instrument that is in place.

The general principle concerning employee entitlements (such as the accrual of annual and personal leave, and the calculation of redundancy and notice entitlements) is that **the service with the seller counts as service with the buyer.**

However, the buyer may stipulate in the contract of sale of business not to recognise the transferring employee's previous accumulated service.

In this scenario, **the seller would most likely be under an obligation to payout the transferring employee's accrued entitlements**, just as would ordinarily be the case where an employee's employment is terminated.

The FW Act provides that where a transferring employee has received a payout for accrued entitlements from the seller, that service is not counted again in determining entitlements owed by the buyer. For example, **if notice of termination is paid by the seller, the period of notice for any subsequent termination by the buyer is only calculated by reference to the period of service with the buyer only.**

A notable exception is that in most cases, the employee's continuity of service for the purposes of long service leave will not be broken despite any arrangement between the buyer and seller to the contrary.

For the purposes of the minimum employment period for an employee's right to protection from unfair dismissal, the service completed with the seller will be recognised as service completed for the buyer. The only exception is where the buyer informs the employee in writing before their new employment starts that the employee's period of service with the seller will not be recognised as counting towards the employee's minimum employment period. Where this occurs, the employee's minimum employment period with the buyer will begin from zero.

Finally, the seller is required to transfer the employment records for each transferring employee to the buyer. **The buyer is under an obligation to keep those records for seven years, in line with the obligations owed to any other employee.** If an employee who was employed by the seller becomes an employee of the buyer within 3 months of the sale, the buyer must request those records from the seller and the seller must provide those records on request.

## DIG DEEP AND ACT EARLY

If there is one piece of advice that every business purchaser should take to heart it is to dig deep to learn as much as you possible can about the business you are buying and to act early and clearly on any business or workplace issues that arise.

For advice on the due diligence, purchase or workplace issues of a business contact Clifford Gouldson Lawyers.

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