SYDNEY BUSINESS LAWYERS

Employee Entitlements in a sale of business

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SECTION 1

1. Introduction to management of employee entitlements on a sale of business

1.1 The purpose of this document is to set out guidance about the management of employee entitlements when an employer (**old employer**) sells old employer's business to a buyer (**new employer**).

Note This document is for an asset sale and not a sale of shares / units / interest in partnership.

Note This document is accurate at the time of its creation but laws can change and so, it may not remain accurate. Also, application of the law to the facts can require legal assistance. We recommend that this document is used as a guide only and that it is not intended to replace legal advice.

1.2 Everyone knows that employee entitlements need to be managed when there is a sale of business. However, in this document we show you how they should be managed and in the case of a new employer, how they can be managed favourably, why new employer would want to do that and how to do it. In doing this, we also explain the law behind it so you can see why you can do what we suggest can be done and the consequences of it.

1.3 In **section 2** (clause 2) is set out the employee entitlements that need to be managed at the time of the end of any employment relationship, not just on the completion of sale of a business.

1.4 In **section 3** (clause 3) there is a head line summary about the management of employee entitlements on a sale of business.

1.5 In **section 4** (clauses 4 to 8) the law behind the management of each of those employee entitlements mentioned in **section 2** and **section 3** is explained.

1.6 At the end of our commentary, in **section 5** (clause 9), there is a guide to working out how the amounts of the employee entitlements should be adjusted on completion of the sale of the business.

1.7 In **section 6** (clauses 10 and 11) there is a draft "employee" clause for inclusion in the sale contract.

1.8 In **section 7** (clause 12) there is a draft letter to employees by a new employer making an offer of employment to the employees of old employer and to which would be attached the new employment contract.

1.9 In **section 8** (clause 13) there is a checklist for old employer and new employer to use on a transfer of business.

1.10 In **section 9** (clause 14) there is a guide to managing period of service on a transfer of business.

1.11 At the back, in **section 10** (clause 15), are extracts from each of the legislative provisions about the employee entitlements. Shaded in those extracts are the particular provisions that impact on the outcome of the management of the things which have been set out in sections **2 to 4** inclusive.

SECTION 2

2. What employee entitlements need to be managed when employment ends?

2.1 When an employee's service with their employer ends, whether in the ordinary course of the operation of the employer's business or on completion of a sale of business by old employer to new employer, the following employee rights must be considered, depending on the circumstances in which the employment comes to an end:

Note Legislative references will be references to the Fair Work Act unless otherwise stated.

(a) **Annual leave**

[Sections 90 and 91]

(b) **Long service leave**

[Section 4 NSW Long Service Leave Act]

Note This guide only applies to NSW employees when referring to long service leave. Each comment needs to be checked against the applicable state or territory law for non NSW employees.

(c) **Personal / carers leave**

[Section 96]

(d) **Notice of the termination**

[Section 117]

(e) **Redundancy pay**

[Section 122]

(f) **Unfair dismissal**

[Section 384]

(g) **Superannuation**

[Superannuation Guarantee (Administration) Act]

SECTION 3

3. Headline summary about management of employee entitlements on a sale of business

3.1 On a transfer of business **to a non associated entity** (ie a non associated entity for Fair Work Act purposes), the new employer:

(a) **must** recognise period of service with old employer for the purpose of:

(i) long service leave;

(ii) personal / carers leave;

(iii) notice of termination;

(iv) superannuation;

Note Periods of service must also be recognised for determining entitlements to parental leave and flexible working arrangements but they will not form part of the commentary in this guide.

(b) **can make a choice** about whether the new employer will recognise period of service with old employer for the purpose of:

(i) annual leave;

(ii) redundancy pay; and

(iii) unfair dismissal.

3.2 If **a non associated** new employer makes a **choice not to** recognise a transferring employee's period of service with old employer for:

(a) **annual leave:**

(i) a transferring employee's accrued annual leave is paid out by old employer on completion of the sale of business from old employer to new employer; and

(ii) the new employer inherits the transferring employee without any accrued annual leave.

A new employer is only likely to make this choice about annual leave where the new employer does not want annual leave to interfere with work flow after completion of the sale of the business from old employer to new employer.

The negative about this choice is that employees will not be able to take their annual leave when they want and may be unhappy about that. This is an exception to the normal rule that employees cannot be forced by their employer to take their annual leave.

The positive about this choice is that the employees will have some cash in the hand that they would not otherwise have received until a later time. This is an exception to the normal rule that annual leave entitlements of employees cannot be cashed out.

(b) **redundancy pay:**

(i) if the old employer is a small business employer with less than 15 employees, the old employer does not have to pay and the employees **will not receive a redundancy payment** from old employer due to new employer's choice not to recognise period of service with old employer;

(ii) if the old employer has more than 14 employees, the old employer does not have to pay and the employees **will not receive a redundancy payment** from old employer due to new employer's choice not to recognise period of service with old employer if:

(A) the employee had less than 12 months continuous service with the old employer; **or**

(B) if the employee had 12 months or more continuous service with the old employer, and:

(I) the job offer from new employer to the transferring employees is on terms and conditions substantially similar and overall no less favourable to those of the old job; and

(II) **the new employer recognises the employee's service** with the old employer for redundancy pay; and

(III) there would have been a transfer of employment if the employee had accepted the offer.

(iii) if the old employer has more than 14 employees, an employee had 12 months or more continuous service with the old employer and new employer chooses not to recognise the employee's service with the old employer for redundancy pay, **the employee will be entitled to a redundancy payment not matter what**.

Even though section 122(1) permits a choice to be made by new employer about whether to recognise period of service for redundancy purposes, section 122(3)(a)(ii) means the employee will be entitled to a redundancy payment from old employer not matter what.

A new employer is more likely to make the choice to not recognise the employee's service with the old employer about redundancy pay if the new employer is not sure what the new employer's employee resource requirements are going to be after completion of the sale of the business from old employer to new employer.

A new employer is not normally going to make this choice about periods of service for redundancy purposes because if the selling old employer has to pay a redundancy, the cost of the transaction is likely to go up.

(c) **unfair dismissal:**

the employee will not be entitled to continuity of service for unfair dismissal purposes in the employment of new employer.

So when the transferring employee starts employment with the new employer, the transferring employee's period of service for unfair dismissal purposes starts at 0 and the minimum employment period before their unfair dismissal rights will kick in again will be:

(i) 12 months, if new employer has less than 15 employees (including the employees already in the employment of new employer); and

(ii) 6 months, if new employer has more than 14 employees (including the employees already in the employment of new employer).

If the new employer chooses not to recognise period of service for unfair dismissal purposes, after completion of the sale of business from old employer to new employer, new employer can terminate the transferring employee/s during the minimum employment period for unfair dismissal purposes and so long as redundancy (or an unlawful reason) is not a factor, new employer will have solved their excess employee resource need.

A new employer is likely to make this choice about unfair dismissal if the new employer is not sure about whether transferring employees will fit into the culture of the new employer's business and they want some time to assess that after completion of the sale of the business.

This choice gives new employer some flexibility they would not otherwise have and some time to work out what employees they require without the fear of having to contend with unfair dismissal claims after completion of the purchase of the business from old employer.

As section 384 allows a new employer not to recognise an employee's prior period of service with old employer for unfair dismissal purposes, there is no risk that doing so means there is an immediate redundancy as the offer of employment will not be on terms and conditions substantially similar to and considered on an overall basis to be no less favourable than the employee's terms and conditions of employment with the old employer and therefore, a redundancy.

However, if the employee does not accept the offer of employment, a redundancy will arise immediately as the offer of employment will not be on terms and conditions substantially similar to and considered on an overall basis to be no less favourable than the employee's terms and conditions of employment with the old employer.

3.3 If unwanted problems from the management of this issue are not to arise between old employer and new employer:

(a) the **choice** about the recognition of period of service with old employer should be set out in:

(i) the “employee” clause of the sale contract from old employer to new employer; and

(ii) in the letter of offer from old employer to new employer that new employer gives to the employees after exchange of the sale contract.

All that is required is for the sale contract and the letter of offer of employment to the employees to state for which of those 3 things of annual leave, redundancy pay and unfair dismissal the prior period of service with the old employer will or will not be recognised.

(b) a clause should also be included in the sale contract that requires the terms and conditions of offers to the employees by new employer to be substantially similar to and considered on an overall basis to be no less favourable than the employee's terms and conditions of employment with the old employer.

SECTION 4

4. Employee entitlements when employment ends on transfer of a business

4.1 When old employer sells old employer's business to new employer, on completion of that sale, the employee's employment with old employer comes to an end in the same way as when an employee leaves their employment for whatever reason in the ordinary course of the business' operation.

4.2 So on completion of the sale of business, the same bundle of employee rights that are set out in **Section 2** have to be managed as when employment ends in the ordinary course of the business' operation.

4.3 The maximum amount of any one of those entitlements that an employee must be paid is a function of the then applicable ordinary rate of pay for the employee and the employee's period of service. Noting of course that not all of the entitlements have to be paid out on completion of the sale of business from old employer to new employer.

4.4 Under the Fair Work Act, different rules about the different entitlements apply in so far as the employee's period of service is concerned.

4.5 On transfer of the business from old employer **to a non associated new employer**, there are **2 different scenarios** within which this bundle of employee rights must be considered - **one that recognises period of service with old employer and the other that doesn't**.

5. 1st scenario - recognising an employee's period of service with old employer for annual leave, redundancy and unfair dismissal

5.1 **The 1st scenario** is where the employee's period of service with the old employer counts as period of service with the new employer for annual leave and/or redundancy and/or unfair dismissal.

5.2 If before completion of the sale of the business from old employer to new employer, in the course of the sale process and in the course of the engagement process of the employees by the new employer, the new employer says nothing formal about this issue to old employer, the choice of the new employer about recognition or not of the prior period of service will be left up in the air. **It is best that it is made clear by dealing with it in the sale contract process and the process by which the new employer makes an offer of employment to the employees of old employer**.

5.3 **So if an employee's period of service with old employer is to be counted as period of service with new employer**, important note 1 **should be done** (and be the case in fact when the offers are actually made) and it is best that the things in important notes 2 and 3 are also done so the intention to recognise period of service is beyond doubt.

IMPORTANT NOTE 1

The "employee" clause of the sale contract should provide that the new employer will offer all of the employees employment **on terms and conditions substantially similar to and considered on an overall basis no less favourable than the employee's terms and conditions of employment with the old employer**.

[**NOTE** This provision is not included in the sale contract in the same way when prior periods of service are not going to be recognised]

[**NOTE** See the "employee" clause in **Section 6 - Clause 10**]

IMPORTANT NOTE 2

The "employee" clause of the sale contract should make reference to periods of service with old employer being recognised.

[**NOTE** See the "employee" clause in **Section 6 - Clause 10**]

IMPORTANT NOTE 3

The "employee" clause of the sale contract should make reference to and the sale contract should have **attached** to it a draft of the letter of offer that will be given by new employer to the employees who are to be offered employment by new employer **and in that letter it should** make reference to the periods of service with old employer being recognised.

[**NOTE** See the draft letter in **Section 7 - Clause 12**]

6. 2nd scenario - NOT recognising an employee's period of service with old employer for annual leave, redundancy and unfair dismissal

6.1 **The 2nd scenario** is where the employee's period of service with the old employer does not count as period of service with the new employer for annual leave and/or redundancy and/or unfair dismissal.

6.2 This is a choice that the new employer can make under the Fair Work Act.

6.3 Making the choice has a bearing on who has the obligation to pay the affected employee entitlements. Each of the old employer and the new employer has an interest in the outcome of the making of this choice, so it is very important that the making of the choice is clearly set out in the sale contract and the employee engagement process to be used before completion of the sale of the business.

6.4 If the choice by new employer is not to recognise period of service with old employer, the sale contract and letter of offer to the employee should make reference to periods of service with old employer being recognised and for what of the purposes of annual leave, redundancy and unfair dismissal that **will not** be the case (*because as you will see below in **clause 8** and following, legally it is only those 3 that new employer has a choice about*).

6.5 **So if an employee's period of service with old employer is NOT to be counted as period of service with new employer**, the things in important note 4 and important note 5 must be done:

IMPORTANT NOTE 4

The "employee" clause of the sale contract must make reference to periods of service with old employer being recognised and for what of the purposes of annual leave, redundancy and unfair dismissal that **will not** be the case (*because as you will see below in **clause 8** and following, legally it is only those 3 that new employer has a choice about*).

[**NOTE** See the "employee" clause in **Section 6 - Clause 10**]

IMPORTANT NOTE 5

The "employee" clause of the sale contract must make reference to and the sale contract must have **attached** to it a draft of the letter of offer that will be given by new employer to the employees who are to be offered employment by new employer **and in that letter it should** make reference to the periods of service with old employer being recognised and for what of the purposes of annual leave, redundancy and unfair dismissal that **will not** be the case (*because as you will see below in **clause 8** and following it is generally those 3 that new employer has a choice about*).

[**NOTE** See the "employee" clause in **Section 6 - Clause 10**]

7. Employee rights that are not different when it comes to prior service!!!

7.1 Old employer and new employer must recognise the employee's prior period of service and rights to:

(a) long service leave;

(b) personal / carer's leave;

(c) notice of termination;

(d) superannuation.

7.2 An employee's rights to those entitlements are:

(a) **long service leave:**

(i) The long service leave that accumulated with the old employer will be carried across to new employer.

(ii) An adjustment for this can and should be made between the old employer and the new employer in the sale contract for those employees who transfer to new employer from old employer on completion of the sale of business.

(iii) See **Section 5 - Clause 9** for suggestions about how to manage this.

(b) **personal / carer's leave**

(i) The Personal / carer's leave that accumulated with the old employer will be carried across to the new employer.

(ii) An adjustment for this can and should be made between the old employer and the new employer in the sale contract for those employees who transfer to new employer from old employer on completion of the sale of business.

(iii) See **Section 5 - Clause 9** for suggestions about how to manage this.

(c) **notice of termination of existing employment - old employer**

(i) The employee is entitled to the required period of notice set out in section 117 about the end of their employment on completion of the sale of business **or** payment instead of that notice.

(ii) Unless an award or the employment contract provides for a longer period of service, the maximum notice will be not more than 4 weeks **except** where the employee is over 45 years with at least 5 years continuous service, when not more than 5 week's notice will be required.

(iii) This period of notice must be given no matter what and it is not possible to contract out of this obligation. If the notice period is not given, it must be paid out at the employee's full rate of pay.

(iv) **The notice is required even if employees transfer their employment from the old employer to new employer however if time permits in the sale transaction from old employer to new employer, this can be managed to avoid any extra benefits having to be paid to the employee.**

IMPORTANT NOTE 6

All employees on any sale of business, whether they transfer to the new employer or not must be given notice of the end of their employment with old employer, otherwise a payment in place of that notice will be required from old employer on completion of the sale of business from old employer to new employer.

(d) **notice of termination after the transfer of employee - new employer**

(i) As a result of section 22, particularly section 22(4) and the fact that section 22(5) does not carve out section 117 from a transferring employee's continuity of service rights (it only carves out what is in section 119 about redundancy pay), if the transferring employee is terminated by new employer, the transferring employee will get the benefit of the section 117 notice periods when in the employment of new employer.

IMPORTANT NOTE 7

All transferring employees will automatically get continuity of service for notice rights on termination without the need to include that in the sale contract or letter of offer of employment from new employer.

(e) **Superannuation**

(i) The employer at the time of accrual (ie the old employer) of the "ordinary time earnings" (ie salary or wages) of the employee entitlements is obligated to make the compulsory superannuation payments directly to the employee's nominated fund no later than the 28th day after the end of the March, June, September and December quarters.

(ii) As between the old employer and the employee, this payment cannot be adjusted between old employer and new employer in the same way that other employee entitlements are adjusted and the employee cannot be denied the full entitlement.

8. Employee rights that are different when it comes to period of service!!!

8.1 The following employee entitlements are treated differently under each scenario, depending on which scenario is to apply:

(a) **annual leave;**

(b) **redundancy pay;**

(c) **unfair dismissal.**

8.2 The rights attaching to each employee entitlement under the 2 scenarios of recognising prior period of services and not recognising prior period of service will be:

(a) **annual leave** [see section 22(5) and section 91(1)]

1st scenario - recognising an employee's period of service with old employer

<u>If the employee's period of service with the old employer counts as period of service with the new employer for annual leave purposes:</u>

(i) The annual leave that accumulated with the old employer will be carried across to the new employer.

(ii) An adjustment for this can and should be made between the old employer and the new employer in the sale contract for those employees who transfer to new employer from old employer on completion of the sale of business.

(iii) See below under **Section 5 - Clause 9** for suggestions about how to manage this.

2nd scenario - NOT recognising an employee's period of service with old employer

<u>If the employee's period of service with the old employer does not count as period of service with the new employer for annual leave purposes:</u>

(i) If the old employer and the new employer are not associated entities, under section 22(5) and 91(1), the new employer can decide not to recognise an employee's period of service with the old employer for annual leave purposes.

(ii) If this happens, under section 90(2), the old employer has to pay employees their accumulated annual leave on completion of the sale of business from old employer to new employer which is the time at which the employment with old employer comes to an end.

(iii) When the employee starts work with the new employer, the employee will have no accrued annual leave.

(iv) This is contrary to the normal rules that, subject to the employment contract and any award, an employer cannot force an employee to take annual leave contrary to an employee's will (*subject to the other rules about this*) and an employer cannot force an employee to cash out their annual leave.

IMPORTANT NOTE 8

If the old employer has to pay out the employee's accumulated annual leave, that means that the transferring employees will have no accrued annual leave when they start their employment with new employer, potentially resulting in disgruntled employees. Although, they will have cash in hand that they would not otherwise have had.

IMPORTANT NOTE 9

Paying out annual leave should not have a cost impact on the sale of the business from old employer to new employer. As far as new employer is concerned, paying out annual leave means that production is less likely to be disrupted by staff taking accrued annual leave after the completion of the sale of business to new employer. Noting of course that even where employees transfer with their annual leave, employer consent is required for annual leave to be taken. Consent cannot be unreasonably withheld by an employer.

(b) **redundancy pay** [see section 22(5) and section 122(1)(2)&(3)]

1st scenario - recognising an employee's period of service with old employer for redundancy pay purposes

(i) **If the employee's period of service with the old employer counts as period of service with the new employer for redundancy pay purposes:**

(A) The potential redundancy pay entitlements calculated by reference to the period of service that accumulated with the old employer will be carried across to the new employer if the new employer recognises the employee's period of service with the old employer.

(B) Under section 122(2), an employee who transfers to a non associated new employer is not entitled to a redundancy payment on completion of the sale of business from old employer to new employer **if the employee rejects the new employer's offer of employment** but only if the requirements of section 122(3) are complied with.

Under section 122(3), a redundancy payment from old employer to the employee will not be required where the job offer from new employer to employee is on terms and conditions substantially similar to and considered on an overall basis to be no less favourable than the employee's terms and conditions of employment with the old employer.

IMPORTANT NOTE 10

EVEN IF service with the old employer counts as period of service with the new employer for the purposes of redundancy, under section 122(3) of Fair Work, on termination of the employment with old employer at the time of completion of the sale of business from old employer to new employer, **a redundancy payment from old employer to the employee will be required where** the job offer from new employer to employee **is not** on terms and conditions substantially similar to and considered on an **overall basis to be no less favourable than the employee's terms and conditions of employment with the old employer BUT ONLY IF THE EMPLOYEE REJECTS THE OFFER OF EMPLOYMENT**.

2nd scenario - NOT recognising an employee's period of service with old employer for redundancy pay purposes

(ii) **If the employee's period of service with the old employer does not count as period of service with the new employer for redundancy pay purposes:**

(A) If the old employer and the new employer are not associated entities, the new employer can choose not to recognise an employee's period of service with old employer for redundancy purposes.

(B) **If the old employer has less than 15 employees**, under section 122, the redundancy payment rules will not apply, so the issue for old employer and new employer on completion of the sale of business from old employer to new employer is irrelevant in this situation.

If the new employer's employee numbers increase in the future to be above 14 (inclusive of the employee's who transferred from old employer), new employer will need to be careful in the management of redundancy after completion of the sale of business from old employer to new employer (with the relevant period of service being counted from the date of completion of the sale of business from old employer to new employer).

(C) **If the old employer has more than 14 employees and there is not 12 months or more of continuous service as at the date of completion of the sale of business from old employer to new employer**, under section 122, the redundancy payment rules will not apply, so the issue for old employer and new employer on completion of the sale of business from old employer to new employer is irrelevant.

If after completion of the sale of business from old employer to new employer there is 12 months or more continuous service (with the relevant period of service being counted from the date of completion of the sale of business from old employer to new employer) and new employer terminates an employee's employment due to redundancy, new employer will be required to make a redundancy payment by reference to the employee's prior period of service.

(D) **If the old employer has more than 14 employees and there is 12 months or more of continuous service as at the date of completion of the sale of business from old employer to new employer**, the redundancy rules will apply on completion of the sale of business from old employer to new employer **no matter what**.

As period of service with old employer will not be recognised by new employer, section 122(3) is not complied with no matter what other terms and conditions are offered to the employee by new employer on completion of the sale of business from old employer to new employer.

(E) **In working out the number of employees**, it is actual employees, whether full time or part time, and casuals employed regularly and systematically, and it is not an equivalent full time head count. The head count will take into account new employer's existing employee head count and the number of transferring employees.

IMPORTANT NOTE 11

If old employer has 14 employees and there is 12 months or more of continuous service, old employer will as a matter of course on completion of the sale of business have to make a redundancy payment to the employee even if the employee transfers to new employer.

The reason for this is that as the period of service is not recognised for redundancy pay purposes, there is no way that the offer can otherwise satisfy the requirement that **the offer of employment is otherwise on terms and conditions substantially similar to and considered on an overall basis to be no less favourable than the employee's terms and conditions of employment with the old employer**.

This is because of the combined operation of section 22(5) and section 122(1) and the words at the beginning section 122(1) that read "Subsection 22(5) does not apply (for the purpose of this Subdivision)" [ie Subdivision B sections 119 to 122]", which means that there is no continuity of service under section 22(5) if the new employer does not recognise the employee's period of service with old employer for redundancy purposes.

IMPORTANT NOTE 12

As period of service with old employer will not be recognised by new employer, section 122(3) is not complied with no matter what other terms and conditions are offered to the employee by new employer on completion of the sale of business from old employer to new employer.

IMPORTANT NOTE 13

A new employer should consider including this provision in the sale contract not to recognise prior period of service for redundancy purposes if new employer is not sure about whether staff are going to be made redundant after new employer takes over the business.

That of course will may increase the cost of the sale transaction, as the old employer (if employing more than 14 employees) is going to have to make a redundancy payment to the employees that is not otherwise payable.

IMPORTANT NOTE 14

If redundancy is paid to employee on transfer of employment to new employer and new employer later terminates the employee's employment due to redundancy after the employee starts employment with new employer, new employer will be required to make a redundancy payment only by reference to the employee's period of service with the new employer.

(c) **Unfair dismissal** [see section 384(2)]

1st scenario - recognising an employee's period of service with old employer for unfair dismissal purposes

<u>If the employee's period of service with the old employer counts as period of service with the new employer for unfair dismissal purposes:</u>

The unfair dismissal entitlements of employees with the old employer will be carried across to the new employer.

If after completion of the sale from old employer to new employer, the new employer has less than 15 employees and an employee has more than 12 months continuous service (including the period with old employer), the unfair dismissal rules will apply.

So, in this case, if an employee has 12 months continuous service at the time of completion of the sale of business, the unfair dismissal rules apply to that employee in the employment of new employer immediately on completion of the sale of business (assuming the employee transfers employment at that time).

Otherwise, the unfair dismissal rules will only apply to that employee in the employment of new employer when there is 12 months of continuous service for the employee combined between service with the old employer and the new employer.

If the new employer has more than 14 employees and the employee has more than 6 months continuous service (including the period with old employer), the unfair dismissal rules will apply when there are 6 months of service for the employee.

So, in this case, if an employee has 6 months continuous service at the time of completion of the sale of business, the unfair dismissal rules apply to that employee in the employment of new employer immediately on completion of the sale of business (assuming the employee transfers employment at that time). Otherwise, the unfair dismissal will only apply to that employee in the employment of new employer when there is 6 months of continuous service for the employee combined between service with the old employer and the new employer.

In working out the number of employees, it is actual employees, whether full time or part time (and casuals employed regularly and systematically) and is not an equivalent full time head count. It will also take into account new employer's existing employee head count.

2nd scenario - NOT recognising an employee's period of service with old employer for unfair dismissal purposes

If the employee's period of service with the old employer does not count as period of service with the new employer for unfair dismissal purposes:

If the old employer and the new employer are not associated entities, the new employer can choose not to recognise an employee's period of service with old employer for unfair dismissal purposes.

If that is to happen, before the employee begins working for new employer, the new employer must inform the employee in writing of the decision to not recognise period of service.

This can happen under section 384 without causing a requirement for redundancy pay by the old employer on completion of the sale of business by old employer to new employer **if the employee accepts the employment because** section 384 specifically allows the new employer not to recognise the prior period of service with old employer.

However, if the employee does not accept the offer of employment from new employer, there is going to be a redundancy as it must then be the case that, as there is no recognition of service for unfair dismissal purposes, the offer of employment cannot be on terms and conditions substantially similar to and considered on an overall basis to be no less favourable than the employee's terms and conditions of employment with the old employer.

So a real risk in the case of making the choice not to recognise the prior period of service for unfair dismissal purposes is a redundancy if the employee does not accept the offer.

If the offer of employment is accepted, after completion of the sale of business from old employer to new employer, it is only the employee's period of service with new employer that will count for unfair dismissal purposes.

If the new employer has less than 15 employees (including those employees who transferred from old employer on completion of the sale of business)**,** it is only when the employee has more than 12 months continuous service **with new employer** that the unfair dismissal rules will apply.

If the new employer has more than 14 employees (including those employees who transferred from old employer on completion of the sale of business), it is only when the employee has more than 6 months continuous service **with new employer** that the unfair dismissal rules will apply.

In working out the number of employees, it is actual employees, whether full time or part time (and casuals employed regularly and systematically) and is not an equivalent full time head count. It will also take into account new employer's existing employee head count.

IMPORTANT NOTE 15

If the new employer chooses not to recognise an employee's period of service for unfair dismissal purposes **and the employee does not accept the new employer's offer**, old employer will as a matter of course have to make a redundancy payment to the employee because it is not possible that, by failing to recognise period of service for unfair dismissal purposes, the offer of employment by new employer can be on terms and conditions substantially similar to and considered on an overall basis to be no less favourable than the employee's terms and conditions of employment with the old employer.

So, if the new employer chooses not to recognise an employee's period of service for unfair dismissal **but** the employee accepts the job offer, no matter what is in the offer, the old employer will not have to make a redundancy payment to the employee **providing** prior service for the purpose of redundancy is recognised.

IMPORTANT NOTE 16

A new employer may want to include this provision in the sale contract because the new employer is not sure about whether staff are going to fit into the culture of the business as seen by the new employer after new employer takes over the business or that perhaps not all of the staff will be required to operate the business after completion of the sale by the old employer to the new employer.

In that case, new employer will want to be able to end the employment of some of the employees without the unfair dismissal rules applying.

So long as the termination by new employer is lawful and not a case of genuine redundancy and certainly must be done without reference to redundancy, then the unwanted staff can be terminated within the applicable minimum employment period depending on whether they are a small business employer (14 or less employees), when 1 year is the period or they are not a small business employer (15 or more employees), when 6 months is the period.

SECTION 5

9. Guide to the amounts of the employee entitlements to be adjusted on a sale of business

Discount on employee entitlements for taxation effect

9.1 If the old employer is to make adjustments in favour of the new employer on completion of the sale of the business, old employer will not get an income tax deduction for them as the entitlements have not been paid directly to the employee by old employer.

9.2 When they are in turn paid by the new employer to the employees, the new employer will get an income tax deduction.

9.3 If there was $100 of adjustments to be made, that would cost the old employer $100 without an income tax deduction and new employer would get an income tax deduction on that $100. If new employer is a company with a 30% income tax rate, that means new employer is $30 in front from the $100 adjustment that has been paid to new employer by old employer.

9.4 So instead of old employer allowing $100, old employer must allow $70. When new employer has to pay the $100 entitlement, it will cost new employer $70 after tax. In that way, the employee entitlement adjustment between old employer and new employer is revenue neutral for them on an after tax basis.

Annual leave discount

9.5 That is why for annual leave, employee entitlement adjustments between the old employer and new employer are done on the basis of 70% of the entitlement.

Long service leave discount

9.6 When it comes to long service leave it is normally discounted in the same way, but in NSW at least, a further allowance is normally made between the time of 5 and 10 years period of service, as there is no guarantee that the accrued long service leave will have to be paid out before 10 years of service.

9.7 In NSW, this table is normally used to work out the discount for long service leave purposes:

Length of continuous service	Discount multiplier
Less than 5 years	0%
At least 5 years but less than 6 years	20%
At least 6 years but less than 7 years	30%
At least 7 years but less than 8 years	40%
At least 8 years but less than 9 years	50%
At least 9 years but less than 10 years	60%
At least 10 years	70%

Personal / carers leave discount

9.8 Seller's don't like allowing personal / carers leave as an adjustment on settlement as there is normally no certainty that the employees will take that leave. So an adjustment between old employer and new employer for personal / carers leave is something that normally needs to be negotiated between the parties. If an adjustment is to be made, it would normally be a function of the rate at which personal / carers leave is accrued and taken. A discount would be applied accordingly.

Add the on costs

9.9 If you are a buyer, consider the **on costs** of payroll tax (approximately 5.5% if payable), workers compensation (approximately 3%), superannuation (9.5%) and leave loading (17.5% on the annual leave amounts for some employees if payable at all) of employee entitlements that as the buyer, the buyer will have to pay for any employees that transfer to the buyer on completion of the sale of business and when the employee takes their leave. All up in excess of 20%.

SECTION 6

10. Draft "employee" clause for the sale of business contract - Employees clause where all periods of service are recognised - NSW only

10.1 The Seller's employees and their period of service are annexed and marked "Employees".

10.2 Not later than 21 days before completion, the Buyer must make an offer of employment to each employee in the Business that it wants to employ.

10.3 The offer will be as set out in annexure ELB and:

(a) be conditional on and effective from completion;

(b) be irrevocable before completion;

(c) be on terms and conditions including superannuation and recognising the employee's service with the Seller that are substantially similar to and on an overall basis no less favourable than the terms and conditions of employment that applied between the Seller and the employee at completion;

(d) provide that an employee who accepts the offer expressly authorises and directs the Seller on completion not to make any payment to them for any accrued Employee Entitlements and to transfer the value of them to the Buyer.

10.4 The Buyer's offer to each employee will be sent with a letter from the Seller in the form set out in annexure ELS.

10.5 Before completion, the Buyer must give to the Seller:

(a) a list of those employees who have accepted the Buyer's offer of employment (**Transferring Employees**), including full details in writing of each of those employees accrued Employee Entitlements;

(b) copies of each of those employees signed acceptances of employment.

10.6 Subject to the next sub clause, on completion,

(a) the Seller must pay or have paid to the required fund all compulsory superannuation entitlements payable at the time by law in respect of those employees for whom Employee Entitlements are payable;

(b) Seller will allow and pay to the Buyer the amount of:

(i) the Employee Entitlements Adjustment; and

(ii) the Long Service Leave Adjustment;

(c) the Buyer becomes liable for:

(i) the Employee Entitlements Adjustment; and

(ii) the Long Service Leave Adjustment.

10.7 Despite the prior sub clause, there will be no adjustments for any employee of the Seller for whom the Buyer has not given to the Seller a signed acceptance of employment.

10.8 If an employee for whom an Employee Entitlements Adjustment and/or Long Service Leave Adjustment has been made under this clause does not become a worker in the employ of the Buyer on transmission of the Business, the Buyer will within 7 days after completion pay to the Seller the amount of the Employee Entitlements Adjustment and/or Long Service Leave Adjustment made for that employee.

10.9 Subject to the next sub clause, on and from completion the Buyer indemnifies the Seller against any claim by an employee against the Seller for Employee Entitlements:

(a) which accrued while the employee was employed by the Seller and in respect of whom an adjustment was made under sub clause 6 of this clause; or

(b) relating to personal/carer's leave, whenever it accrued; or

(c) arising from the termination of the employment of that employee by the Buyer.

10.10 The indemnity under sub clause (a) of the prior sub clause is limited to the amount of the adjustment for that employee.

10.11 The Seller indemnifies the Buyer against any claim by an employee against the Buyer for Employee Entitlements arising prior to completion which have not been the subject of an Employee Entitlements Adjustment and/or a Long Service Leave Adjustment.

10.12 This clause does not merge on completion.

Column 1 Length of continuous service	Column 2 Discount multiplier
Less than 5 years	0%
At least 5 years but less than 6 years	20%
At least 6 years but less than 7 years	30%
At least 7 years but less than 8 years	40%
At least 8 years but less than 9 years	50%
At least 9 years but less than 10 years	60%
At least 10 years	70%

10.13 For the purpose of this clause:

(a) **Employee Entitlements** means the following entitlements of employees of the Business:

(i) salary or wages;

(ii) annual leave;

(iii) **[**personal/carer's leave;**]**

(iv) superannuation;

(v) long service leave.

(b) **Employee Entitlements Adjustment** means **[**70% of**]** the monetary value of all accrued Employee Entitlements as at completion for salary or wages and annual leave payable to those employees who will be employed by the Buyer on and from completion as set out in this contract.

(c) **Long Service Leave Adjustment** means the amount equal to the monetary value of the long service leave entitlements which the Seller would be liable to pay the employees on completion if those employees did not become workers in the employ of the Buyer on transmission of the Business and which corresponds to the length of continuous service shown in column 1 of the table set out in the **Employees clause** discounted to the per centage figure shown in column 2 of the table.

11. Draft "employee" clause for the sale of business contract - Employees clause where all periods of service are NOT recognised - NSW only

11.1 The Seller's employees and their period of service are annexed and marked "Employees".

11.2 Not later than 21 days before completion, the Buyer must make an offer of employment to each employee in the Business that it wants to employ.

11.3 The offer will be as set out in annexure ELB and:

(a) be conditional on and effective from completion;

(b) be irrevocable before completion;

(c) be on terms and condition including superannuation and recognising the employee's service with the Seller that are substantially similar to and on an overall basis no less favourable than the terms and conditions of employment that applied between the Seller and the employee at completion **except** the Buyer will not recognise the employee's period of service with the Seller **[**(**NOTE** amend as agreed) for annual leave, redundancy pay and unfair dismissal purposes**]**.

11.4 The Buyer's offer to each employee will be sent with a letter from the Seller in the form set out in annexure ELS.

11.5 Before completion, the Buyer must give to the Seller:

(a) a list of those employees who have accepted the Buyer's offer of employment (**Transferring Employees**);

(b) copies of each of the Transferring Employees signed acceptances of employment.

11.6 Subject to the next sub clause, on completion,

(a) the Seller must pay or have paid to the required fund all compulsory superannuation entitlements payable at that time for the Transferring Employees;

(b) Seller will pay to the Transferring Employee's their other Employee Entitlements **[NOTE** amend as agreed) and any redundancy pay that is due to them (because the Buyer will not recognise the Transferring Employee's period of service with the Seller)**]** and give to the Buyer an acknowledgement of receipt of their payment;

(c) Seller will pay the Personal/carer's leave Adjustment and the Long Service Leave Adjustment to the Buyer; and

(d) subject to the rest of this clause, the Buyer becomes liable for the future annual leave, the accrued and future long service leave and the accrued and future personal and/or carers leave entitlements of the Transferring Employees.

11.7 If an employee for whom a Personal/carer's leave Adjustment and/or a Long Service Leave Adjustment has been made under this clause does not become a worker in the employ of the Buyer on transmission of the Business, the Buyer will within 7 days after completion pay to the Seller the amount of Personal/carer's leave Adjustment and/or the Long Service Leave Adjustment paid to the Buyer for that employee.

11.8 The Buyer indemnifies the Seller against any claim by a Transferring Employee against the Seller for salary or wages, annual leave and/or superannuation arising for the period on and from completion.

11.9 The Seller indemnifies the Buyer against any claim by a Transferring Employee against the Buyer for salary or wages, annual leave and/or superannuation arising for the period prior to completion that is above the amount of the Personal/carer's leave Adjustment and/or a Long Service Leave Adjustment.

11.10 This clause does not merge on completion.

Column 1 Length of continuous service	Column 2 Discount multiplier
Less than 5 years	0%
At least 5 years but less than 6 years	20%
At least 6 years but less than 7 years	30%
At least 7 years but less than 8 years	40%
At least 8 years but less than 9 years	50%
At least 9 years but less than 10 years	60%
At least 10 years	70%

11.11 For the purpose of this clause:

[**NOTE** This definition of **Employee Entitlements** assumes that period of service will not be recognised for annual leave purposes – if period of service for annual leave is recognised, annual leave will need to be removed as an Employee Entitlement so it can be adjusted between the parties instead of being paid directly to the employees]

(a) **Employee Entitlements** means the following entitlements of Transferring Employees as at completion:

(i) salary or wages;

(ii) annual leave; and

(iii) superannuation.

(b) **Personal/carer's leave Adjustment** means **[**70% (**NOTE** or whatever is the agreed %) of**]** the monetary value of all accrued personal / carers leave entitlements as at completion for Transferring Employees.

(c) **Long Service Leave Adjustment** means the amount equal to the monetary value of the long service leave entitlements which the Seller would be liable to pay the Transferring Employees on completion if those employees did not become workers in the employ of the Buyer on transmission of the Business and which corresponds to the length of continuous service shown in column 1 of the table set out in the **Employees clause** discounted to the per centage figure shown in column 2 of the table.

SECTION 7

12. Draft letter making offer to employee and attaching the letter of employment

To: **[***insert employee's name***]**

As you now know, we are buying **[**seller's**]** business.

We are pleased to offer you employment with us on and from completion of our purchase of the business (**completion**).

As you have been working with **[**seller**]** for some time, we would be pleased if you accepted our offer so that the business can continue successfully under our new ownership.

Your employment with us is conditional on and effective from completion.

This offer is irrevocable by us.

This offer is conditional on you being employed by the seller at the time of completion.

This offer is conditional on you being able to undertake the inherent requirements of the role as at completion.

If on completion you are absent from work on parental leave, your employment by us is subject to your compliance with the terms on which that leave was granted.

If on completion you are absent from work other than on parental leave, your employment by us is subject to you returning to work on the first working day after the end of your granted leave.

The terms and conditions of your employment with us are set out in the **attached** letter of employment which is our offer of employment to you.

NOTE ONLY USE 1 OF THE NEXT 2 SETS OF BORDERED PARAGRAPHS DEPENDING ON THE CIRCUMSTANCES SET OUT IN THE GREEN HIGHLIGHTED NOTE FOR EACH SET

[**NOTE 1** Use the next 2 paragraphs if the employee's periods of service will be recognised for all purposes]

Those terms and conditions are substantially similar to and on an overall basis no less favourable than the terms and conditions of your employment that applied between you and the seller at completion of our purchase from the seller.

The terms and conditions recognise your period of service with the seller for all purposes.

[**NOTE 2** Use and modify the next paragraphs if the employee's periods of service will be recognised for all purposes **except** for annual leave, unfair dismissal and redundancy purposes as the case may be

Those terms and conditions are substantially similar to and on an overall basis no less favourable than the terms and conditions of your employment that applied between you and the seller at completion of our purchase from the seller and those terms and conditions recognise your period of service with the seller for all purposes **except**:

- annual leave;
- unfair dismissal;
- redundancy purposes.

What this means is that, on completion of the sale from seller to us:

- As we are not recognising your period of service with the seller for **annual leave purposes**, your annual leave will be paid out in full and when you start your employment with us, you will have no accrued annual leave.
- As we are not recognising your period of service with the seller for **unfair dismissal purposes** and as we will then have more than 14 employees, during the first 6 months with us your employment will be on a probationary basis. This is a period during which you can ensure that your decision to join us was the right one - similarly, we will have the ability to assess that everything is going right from our perspective. Any termination by us of your employment during that 6 month period would carry with it recognition of your statutory rights under which you were employed with **[**seller**] except** for recognition of your period of service for the purpose of unfair dismissal. So if for any lawful reason other than redundancy we terminate your employment in that 6 month period, you will not be able make a claim against us for unfair dismissal.
- As we are not recognising your period of service with the seller for **unfair dismissal purposes** and as we will then have less than 15 employees, during the first 12 months with us your employment will be on a probationary basis. This is a period during which you can ensure that your decision to join us was the right one - similarly, we will have the ability to assess that everything is going right from our perspective. Any termination by us of your employment during that 12 month period would carry with it recognition of your statutory rights under which you were employed with **[**seller**] except** for recognition of your period of service for the purpose of unfair dismissal. So if for any lawful reason other than redundancy we terminate your employment in that 12 month period, you will not be able make a claim against us for unfair dismissal.
- As we are not recognising your period of service with the seller for **redundancy purposes**, any service with the seller will not count as service with us.

If you accept our offer, by your acceptance, you will be agreeing to what is set out above and the seller will have to account to you on completion of the sale for pre completion entitlements **except** those transferring to us.

You can accept this offer by signing and returning a copy of this letter to us by no later than **[***insert date***]**.

The letter should either be sent to our address set out in our letter head or emailed to us **[***insert email address***]** marked to the attention of **[insert contact name]**.

We look forward to you accepting this offer or if you would like to talk to us about it, calling **[insert contact name]** on **[***insert telephone number***]** to discuss it.

SECTION 8

13. Checklists for managing employee entitlements on transfer of a business

OLD EMPLOYER CHECKLIST FOR MANAGING EMPLOYEE ENTITLEMENTS

☐ we will need to agree with the buyer about the timing and method for **informing staff of the sale** including the form of the offer of employment to the employees

☐ we will need to agree with the buyer about **what staff are to be terminated**

☐ if staff need to be terminated, we will need to ensure that the **requirement to give notice** before completion of the sale does not result in us having to make a payment in lieu of notice (including even to transferring employees)

☐ we will need to discuss with the buyer our expectations about the **treatment of staff transfer** overall and that we will advise our lawyer of what we require

☐ we will need to deal with all **necessary staff terminations**, including calculation and payment of all entitlements (and possibly redundancies for those employees that the buyer is not going to employ or does not employ in the same role and on the same terms and conditions **including by reference to prior period of service**)

☐ the buyer can choose not to recognise the employee's **prior periods of service** with us for **annual leave, unfair dismissal and redundancy** and so I recognise that if I am to stop it, I must deal with it in the sale contract

☐ if the buyer chooses not to recognise employees' prior period of service for the purpose of **unfair dismissal** and the employees do not accept the offer, we may have to pay a redundancy

☐ if the buyer chooses not to recognise employees' prior period of service for the purpose of **redundancy**, we may have to pay a redundancy no matter what

☐ we need to agree with the buyer whether **prior periods of service** will be recognised for annual leave, unfair dismissal and redundancy and tell our lawyer

☐ if the buyer **is not** to have that choice about unfair dismissal, redundancy and annual leave, it will need to be in **the sale contract and it will need to be in the letter of offer** given to the employees - and we must tell our lawyer

☐ unless the buyer offers to employ our employees on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than the employee's terms and conditions of employment with us immediately before settlement, we will be required to deal with **redundancy issues** for those employees who are not transferred from us to the buyer on settlement of the transaction which may increase the cost of the transaction

☐ we will need to ensure that all **employee entitlements** (wages, annual leave, personal / carer's leave, long service leave, superannuation and other entitlements) are either paid out on settlement to all non transferring employees / transferring employees or allowed to the buyer for all transferring employees. Noting not all entitlements are required to be paid out to non-transferring employees (e.g. personal leave) and some entitlements cannot be paid out to transferring employees (e.g. personal leave).

☐ we are aware that we will not be entitled to a **tax deduction** for any employee entitlements not paid to our employees but allowed instead to the buyer as a settlement adjustment and that is why they are normally discounted by at least 30% (to allow for after tax fairness between us and the buyer) and paid to the buyer as an adjustment on completion

☐ **Long service leave** is normally discounted in the same way, but in NSW at least, a further allowance is normally made between the time of 5 and 10 years services, as there is no guarantee that accrued long service leave will have to be paid out before 10 years of service

☐ we are aware that **employee entitlements** allowed to the buyer may never be paid to the employee for whom it is allowed if, in the case of long service leave for example, that employee resigns or is dismissed for serious misconduct before they are absolutely entitled to the accrued leave (ie in NSW, before 10 years of service)

☐ we will need to work out what the allowance will be for **personal / carer's leave** of the staff and we are aware that **personal / carers leave** allowed to the buyer may never be paid to the employee for whom it is allowed

☐ we are aware that the buyer may ask us to allow the **on costs** of payroll tax, workers compensation, superannuation and leave loading of employee entitlements that we have to allow to buyer

☐ we are aware that no matter what adjustments are made or indemnities that are given on completion, until an employee has been paid all of the employee's entitlements that relate to the period before completion, we may be liable for those entitlements if the employee is unable to recover them from the buyer

NEW EMPLOYER CHECKLIST FOR MANAGING EMPLOYEE ENTITLEMENTS

☐ we will need to agree with the seller about the timing and method for **informing staff of the sale** including the form of the offer of employment to the employees

☐ we will need to agree with the seller **what staff are to be terminated**

☐ if staff need to be terminated, we will need to ensure that employees are given the amount of notice of termination to which they are entitled before completion of the sale to ensure the seller does not have to make a payment in lieu of notice (possibly including even to transferring employees)

☐ we will need to discuss with the seller our expectations about the **treatment of staff transfer overall** and that we will advise our lawyers of what we require

☐ if we decide to terminate transferring employees, after transfer, we will need to deal with all **necessary staff terminations**, including calculation and payment of all entitlements

☐ we can choose not to recognise employee's **prior periods of service** with the seller for **annual leave, unfair dismissal and redundancy**, so this needs to be agreed with the seller

☐ if we do not recognise service for the purpose of **unfair dismissal** and the employees do not accept the offer, the seller may have to pay a redundancy

☐ if we do not recognise service for the purpose of **redundancy**, the seller may have to pay a redundancy no matter what

☐ we need to agree with the seller whether **prior periods of service** will be recognised for annual leave, unfair dismissal and redundancy and we must tell our lawyer

☐ if we want to make that choice about unfair dismissal **it will need to be in the sale contract and the letter of offer** given to the employees - so we need to tell our lawyer

☐ unless we offer to employ the seller's employees on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than the employee's terms and conditions of employment with the seller immediately before settlement, the seller will be required to deal with **redundancy issues** for those employees who are not transferred from the seller to us on settlement of the transaction which may increase the cost of the transaction

☐ we will need to ensure that all **employee entitlements** (wages, annual leave, personal / carer's leave, long service leave, superannuation and other entitlements) are either paid out on settlement to all non transferring employees / transferring employees or allowed to us for all transferring employees. Noting not all entitlements are required to be paid out to non-transferring employees (e.g. personal leave) and some entitlements cannot be paid out to transferring employees (e.g. personal leave).

☐ the sale contract may not provide for any allowance by the seller for accrued **personal / carer's leave** of the staff and we must ask for that to be included in the sale contract if we want an allowance to be made and we will need to work out what the allowance will be. This is important as we will inherit the leave even if the contract doesn't address it.

☐ if we take on an employee and then terminate their employment, a **redundancy** may be payable by us - therefore, we need to carefully consider our plans for all employees and understand the amount of those entitlements that may be payable

☐ we will need to ensure that all employee entitlements (wages, annual leave, personal leave, long service leave, superannuation and other entitlements) are either paid out or allowed to us on settlement, **otherwise, we may be liable for them** (except that by law certain entitlements, such as long service leave for transferring employees must be allowed in our favour on settlement and employees cannot be forced to take it)

☐ normally, a seller will only allow 70% of **unpaid annual leave** entitlements to us on settlement of the transaction (this is because the seller does not get a tax deduction for them when the seller pays them to us but we get a tax deduction for the full 100% when we pay them to the transferring employees);

☐ **Long service leave** is normally discounted in the same way, but in NSW at least, a further allowance is normally made between the time of 5 and 10 years services (and sometimes 0 and 10 years service), as there is no guarantee that accrued leave will have to be paid out before 10 years of service

☐ seller's don't like allowing **personal / carers leave** as an adjustment on settlement as there is normally no certainty that the employees will take that leave; this is something that normally needs to be negotiated between the parties; if an adjustment is made, the percentage should take into account the above comments about annual leave and tax deductions

☐ we should consider the **on costs** of payroll tax, workers compensation, superannuation and leave loading of employee entitlements that we may have to pay for any employees that transfer to us on settlement

SECTION 9

14. Guide for managing period of service on transfer of a business

GUIDE FOR MANAGING PERIOD OF SERVICE ON TRANSFER OF A BUSINESS - Page 1

A new employer **must** recognise a transferring employee's period of service with old employer for the purpose of:

1. long service leave

2. personal / carers leave

3. notice of termination

4. superannuation

Note Periods of service must also be recognised for determining entitlements to parental leave and flexible working arrangements but they will not form part of the commentary in this guide.

A new employer can make a choice about whether the new employer will recognise a transferring employee's period of service with old employer for the purpose of:

5. annual leave and if the new employer chooses not to recognise prior period of service for annual leave purposes:

(a) it should be recorded in the sale contract "employees" clause and in the covering letter that is sent to the employees with their offer of employment;

(b) the new employer inherits the transferring employee without any accrued annual leave;

(c) a transferring employee's accrued annual leave is paid out by old employer on completion of the sale of business from old employer to new employer.

6. redundancy pay and if the new employer chooses not to recognise prior period of service for redundancy purposes:

(a) it should be recorded in the sale contract "employees" clause and in the covering letter that is sent to the employees with their offer of employment;

(b) the new employer inherits the transferring employee without any period of service for redundancy purposes;

(c) if the old employer is a small business employer with less than 15 employees, the old employer does not have to pay and the employees **will not receive a redundancy payment** from old employer due to new employer's choice not to recognise period of service with old employer;

(d) if the old employer has more than 14 employees and an employee has less than 12 months continuous service with the old employer, the old employer does not have to pay and the employees **will not receive a redundancy payment** from old employer due to new employer's choice not to recognise period of service with old employer;

See note 1 below.

(e) if the old employer has more than 14 employees and an employee had 12 months or more continuous service with the old employer and new employer chooses not to recognise the employee's service with the old employer for redundancy pay, **the employee will be entitled to a redundancy payment not matter what**.

Note 1: If the old employer has more than 14 employees and an employee has less than 12 months continuous service with the old employer **and the new employer recognises period of service for redundancy purposes**, a redundancy payment will be required if:

(i) the job offer from new employer to the transferring employees is not otherwise on terms and conditions substantially similar and overall no less favourable to those of the old job; and

(ii) there would have been a transfer of employment if the employee had accepted the offer.

7. unfair dismissal and if the new employer chooses not to recognise prior period of service for unfair dismissal purposes:

(a) it should be recorded in the sale contract "employees" clause and in the covering letter that is sent to the employees with their offer of employment;

(b) the new employer inherits the transferring employee without any period of service for unfair dismissal purposes, so when the transferring employee starts employment with the new employer, the transferring employee's period of service for unfair dismissal purposes starts at 0 and the minimum employment period before their unfair dismissal rights will kick in again will be:

(i) 12 months, if new employer has less than 15 employees (including the employees already in the employment of new employer); and

(ii) 6 months, if new employer has more than 14 employees (including the employees already in the employment of new employer).

However, if the employee does not accept the offer of employment by new employer, a redundancy will arise immediately as the offer of employment will not be on terms and conditions substantially similar to and considered on an overall basis to be no less favourable than the employee's terms and conditions of employment with the old employer.

SECTION 10

8. Extracts from the law about employee entitlements

Commonwealth Consolidated Acts

FAIR WORK ACT 2009 - SECT 22

Meanings of service and continuous service

General meaning

(1) A period of **service** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an **excluded period**) that does not count as service because of subsection (2).

(2) The following periods do not count as service:

(a) any period of unauthorised absence;

(b) any period of unpaid leave or unpaid authorised absence, other than:

(i) a period of absence under Division 8 of Clause 2-2 (which deals with community service leave); or

(ii) a period of stand down under Clause 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or

(iii) a period of leave or absence of a kind prescribed by the regulations;

(c) any other period of a kind prescribed by the regulations.

(3) An excluded period does not break a national system employee's **continuous service** with his or her national system employer, but does not count towards the length of the employee's continuous service.

(3A) Regulations made for the purposes of paragraph (2)(c) may prescribe different kinds of periods for the purposes of different provisions of this Act (other than provisions to which subsection (4) applies). If they do so, subsection (3) applies accordingly.

Meaning for Divisions 4 and 5, and Subdivision A of Division 11, of Clause 2-2

(4) For the purposes of Divisions 4 ***(SBL note: flexible work arrangements)*** and 5 ***(SBL note: parental leave)***, and Subdivision A of Division 11 ***(SBL note: notice of termination or payment in lieu)***, of Clause 2-2:

(a) a period of **service** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include:

(i) any period of unauthorised absence; or

(ii) any other period of a kind prescribed by the regulations; and

(b) a period referred to in subparagraph (a)(i) or (ii) does not break a national system employee's **continuous service** with his or her national system employer, but does not count towards the length of the employee's continuous service; and

(c) subsections (1), (2) and (3) do not apply.

Note: Divisions 4 and 5, and Subdivision A of Division 11, of Clause 2-2 deal, respectively, with requests for flexible working arrangements, parental leave and related entitlements, and notice of termination or payment in lieu of notice.

(4A) Regulations made for the purposes of subparagraph (4)(a)(ii) may prescribe different kinds of periods for the purposes of different provisions to which subsection (4) applies. If they do so, paragraph (4)(b) applies accordingly.

When service with one employer counts as service with another employer

(5) If there is a transfer of employment (see subsection (7)) in relation to a national system employee:

(a) any period of service of the employee with the first employer counts as service of the employee with the second employer; and

(b) the period between the termination of the employment with the first employer and the start of the employment with the second employer does not break the employee's continuous service with the second employer (taking account of the effect of paragraph (a)), but does not count towards the length of the employee's continuous service with the second employer.

Note: This subsection does not apply to a transfer of employment between non-associated entities, for the purpose of Division 6 of Clause 2-2 (which deals with annual leave ***SBL note: and being sections 86 to 94***) or Subdivision B of Division 11 of Clause 2-2 (which deals with redundancy pay ***SBL note: and being sections 119 to 122***), if the second employer decides not to recognise the employee's service with the first employer for the purpose of that Division or Subdivision (see subsections 91(1) and 122(1)).

(6) If the national system employee has already had the benefit of an entitlement the amount of which was calculated by reference to a period of service with the first employer, subsection (5) does not result in that period of service with the first employer being counted again when calculating the employee's entitlements of that kind as an employee of the second employer.

Note: For example:

(a) the accrued paid annual leave to which the employee is entitled as an employee of the second employer does not include any period of paid annual leave that the employee has already taken as an employee of the first employer; and

(b) if an employee receives notice of termination or payment in lieu of notice in relation to a period of service with the first employer, that period of service is not counted again in calculating the amount of notice of termination, or payment in lieu, to which the employee is entitled as an employee of the second employer.

Meaning of transfer of employment etc.

(7) There is a **transfer of employment** of a national system employee from one national system employer (the **first employer**) to another national system employer (the **second employer**) if:

(a) the following conditions are satisfied:

(i) the employee becomes employed by the second employer not more than 3 months after the termination of the employee's employment with the first employer;

(ii) the first employer and the second employer are associated entities when the employee becomes employed by the second employer; or

(b) the following conditions are satisfied:

(i) the employee is a transferring employee in relation to a transfer of business from the first employer to the second employer;

(ii) the first employer and the second employer are not associated entities when the employee becomes employed by the second employer.

Note: Paragraph (a) applies whether or not there is a transfer of business from the first employer to the second employer.

(8) A transfer of employment:

(a) is a **transfer of employment between associated entities** if paragraph (7)(a) applies; and

(b) is a **transfer of employment between non-associated entities** if paragraph (7)(b) applies.

Commonwealth Consolidated Acts

FAIR WORK ACT 2009 - SECT 90

Payment for annual leave

(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

Commonwealth Consolidated Acts

FAIR WORK ACT 2009 - SECT 91

Transfer of employment situations that affect entitlement to payment for period of untaken paid annual leave

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

(1) Subsection 22(5) does not apply (for the purpose of this Division) to a transfer of employment between non-associated entities in relation to an employee, if the second employer decides not to recognise the employee's service with the first employer (for the purpose of this Division).

Employee is not entitled to payment for untaken annual leave if service with first employer counts as service with second employer

(2) If subsection 22(5) applies (for the purpose of this Division) to a transfer of employment in relation to an employee, the employee is not entitled to be paid an amount under subsection 90(2) for a period of untaken paid annual leave.

Note: Subsection 22(5) provides that, **generally**, if there is a transfer of employment, service with the first employer counts as service with the second employer.

FAIR WORK ACT 2009 - SECT 96

Entitlement to paid personal/carer's leave

Amount of leave

(1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

Accrual of leave

(2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

FAIR WORK ACT 2009 - SECT 117

Requirement for notice of termination or payment in lieu

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2:Sections 28A and 29 of the Acts Interpretation Act 1901 provide how a notice may be given. In particular, the notice may be given to an employee by:

(a) delivering it personally; or

(b) leaving it at the employee's last known address; or

(c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(2) The employer must not terminate the employee's employment unless:

(a) the time between giving the notice and the day of the termination is at least the period (the **minimum period of notice**) worked out under subsection (3); or

(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	**Period**
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

FAIR WORK ACT 2009 - SECT 119

Redundancy pay

Entitlement to redundancy pay

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

Amount of redundancy pay

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	**Redundancy pay period**
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

FAIR WORK ACT 2009 - SECT 122

Transfer of employment situations that affect the obligation to pay redundancy pay

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

(1) Subsection 22(5) does not apply (for the purpose of this Subdivision ***SBL note: ie Subdivision B sections 119 to 122***) to a transfer of employment between non-associated entities in relation to an employee if the second employer decides not to recognise the employee's service with the first employer (for the purpose of this Subdivision).

FAIR WORK ACT 2009 - SECT 22

Meanings of service and continuous service

When service with one employer counts as service with another employer

(5) If there is a transfer of employment (see subsection (7)) in relation to a national system employee:

(a) any period of service of the employee with the first employer counts as service of the employee with the second employer; and

(b) the period between the termination of the employment with the first employer and the start of the employment with the second employer does not break the employee's continuous service with the second employer (taking account of the effect of paragraph (a)), but does not count towards the length of the employee's continuous service with the second employer.

***Note**: This subsection does not apply to a transfer of employment between non-associated entities, for the purpose of Division 6 of Clause 2-2 (which deals with annual leave **SBL note: and being sections 86 to 94**) or Subdivision B of Division 11 of Clause 2-2 (which deals with redundancy pay **SBL note: and being sections 119 to 122**), if the second employer decides not to recognise the employee's service with the first employer for the purpose of that Division or Subdivision (see subsections 91(1) and 122(1)).*

Employee is not entitled to redundancy pay if service with first employer counts as service with second employer

(2) If subsection 22(5) applies (for the purpose of this Subdivision) to a transfer of employment in relation to an employee, the employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with the first employer.

Note Subsection 22(5) provides that, **generally**, if there is a transfer of employment, service with the first employer counts as service with the second employer.

Employee not entitled to redundancy pay if refuses employment in certain circumstances

(3) An employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with an employer (the **first employer**) if:

(a) the employee rejects an offer of employment made by another employer (the **second employer**) that:

(i) is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the first employer immediately before the termination; and

(ii) recognises the employee's service with the first employer, for the purpose of this Subdivision; and

(b) had the employee accepted the offer, there would have been a transfer of employment in relation to the employee.

(4) If the FWC is satisfied that subsection (3) operates unfairly to the employee, the FWC may order the first employer to pay the employee a specified amount of redundancy pay (not exceeding the amount that would be payable but for subsection (3)) that the FWC considers appropriate. The first employer must pay the employee that amount of redundancy pay.

FAIR WORK ACT 2009 - SECT 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;

(b) within 3 months after the termination, 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) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

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.

Old employer outsources work 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, because the old employer, or an associated entity of the old employer, has outsourced the transferring work to the new employer or an associated entity of the new employer.

New employer ceases to outsource work 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 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 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.

Commonwealth Consolidated Acts

FAIR WORK ACT 2009 - SECT 384

Period of employment

(1) An employee's **period of employment** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer.

LONG SERVICE LEAVE ACT 1955 - SECT 4

Long service leave
4 Long service leave

(1) Except as otherwise provided in this Act, every worker shall be entitled to long service leave on ordinary pay in respect of the service of the worker with an employer. Service with the employer before the commencement of this Act as well as service with the employer after such commencement shall be taken into account for the purposes of this section.

(2)

(a) Subject to paragraph (a2) and subsection (13) the amount of long service leave to which a worker shall be so entitled shall:

(i) in the case of a worker who has completed at least 10 years service with an employer be:

(A) in respect of 10 years service so completed, 2 months, and

(B) in respect of each 5 years service with the employer completed since the worker last became entitled to long service leave, 1 month, and

(C) on the termination of the worker's services after the completion of 15 years service, in respect of the number of years service with the employer completed since the worker last became entitled to an amount of long service leave, a proportionate amount on the basis of 2 months for 10 years service, and

(ii) in the case of a worker who has completed at least 10 years service but less than 15 years with an employer and whose services with the employer are terminated or cease for any reason, be a proportionate amount on the basis of 3 months for 15 years service, and

(iii) in the case of a worker who has completed with an employer at least five years service, and whose services are terminated by the employer for any reason other than the worker's serious and wilful misconduct, or by the worker on account of illness, incapacity or domestic or other pressing necessity, or by reason of the death of the worker, be a proportionate amount on the basis of 2 months for 10 years service.

(a2) In the case of a worker, whose service with an employer began before the commencement of the Long Service Leave (Amendment) Act 1963 and whose service would entitle the worker to long service leave under this section, the amount of long service leave to which such worker shall be entitled shall be the sum of the following amounts:

(i) an amount calculated on the basis of three months for twenty years service in respect of the period of service of the worker before such commencement, and

(ii) an amount calculated on the basis of 2 months for 10 years service in respect of the period of service of the worker as from such commencement.

(a3) For the purposes of subsections (2), (3) and (3A),

"month" means 4 and one-third weeks.

(b)

(i) A worker entitled under this section to long service leave in respect of a period of service with an employer shall not, except in pursuance of an agreement between the worker and the employer entitling the worker to leave in the nature of long service leave in addition to long service leave under this Act, be entitled otherwise than under the provisions of this Act to leave in the nature of long service leave in respect of that period of service with that employer.

(ii) Where before or after the commencement of this Act:

(A) a worker has otherwise than in pursuance of this section been granted by an employer and taken any leave in the nature of long service leave in respect of a period of service with the employer, or

(B) payment of the monetary value of leave in the nature of long service leave has been made to the worker or other person entitled thereto,

the leave so granted and taken or the leave in respect of which such payment has been made shall, except where such leave has been taken or payment therefor has been made pursuant to an agreement referred to in subparagraph (i), be deducted from any amount of long service leave to which such worker is entitled pursuant to this section in respect of that period of service with that employer.

(3) Subject to subsection (5), where a worker has become entitled to long service leave in respect of the service of the worker with an employer, the employer shall give to the worker and the worker shall take the leave:

(a) as soon as is practicable having regard to the needs of the employer's establishment, or, where the employer and the worker agree that the taking of the leave be postponed until an agreed date, as from that date,

(b) in one continuous period or, if the worker and the employer so agree, in the following separate periods and not otherwise:

(i) where the amount of the leave is 2 months, in two separate periods,

(ii) where the amount of the leave exceeds 2 months and does not exceed nineteen and one-half weeks, in two or three separate periods,

(iii) where the amount of the leave exceeds nineteen and one-half weeks, in two, three or four separate periods:

Provided that where any leave has been given to and taken by the worker pursuant to subsection (3A), this subsection shall apply to and in respect of so much only of the leave to which the worker has become entitled as has not been so given and taken.

(3A) If the employer and the worker so agree, a period of long service leave of not less than one month may be given by the employer, and taken by the worker, wholly or partly in advance before the worker has become entitled to any long service leave or to the amount so agreed to be given and taken. No such agreement shall, for the purposes of subsection (2) (A) (i) (B) or (C), be deemed to confer on the worker an entitlement to long service leave.

(4) The long service leave provided by this section is exclusive of annual holidays occurring during the taking of any period of long service leave.

(4A) Where:

(a) any day appointed by the Governor as a public holiday to be observed generally throughout New South Wales occurs during any period of long service leave taken by a worker under this section, and

(b) the worker is entitled to payment in respect of that day under any Act, award or industrial agreement or under the contract of employment of the worker,

the period of the long service leave shall be increased by one day in respect of that public holiday.

(5)

(a) Where the services of a worker are terminated otherwise than by the worker's death and any long service leave:

(i) to which the worker was entitled has not been taken, or

(ii) accrues to the worker upon such termination and has not been taken,

the worker shall, subject to subsection (13), be deemed to have entered upon the leave from the date of such termination and the employer shall forthwith pay to the worker in full the worker's ordinary pay for the leave less any amount already paid to the worker in respect of that leave.

(b) Where a worker dies and any long service leave:

(i) to which the worker was entitled has not been taken, or

(ii) accrued upon termination of the services of the worker by reason of the worker's death and has not been taken,

the employer shall upon request by the worker's personal representative pay to the worker's personal representative in full the ordinary pay that would have been payable to the worker in respect of long service leave less any amount already paid to the worker in respect of that leave.

(c) On the termination of the services of a worker who had taken any leave pursuant to subsection (3A) the worker's employer may, subject to this paragraph and subsection (13), deduct from any remuneration payable on such termination in respect of the worker's services:

(i) if the worker had not become entitled to any long service leave in the course of or upon the termination of the worker's services-the amount paid to the worker as ordinary pay for the leave so taken, or

(ii) if the worker had become so entitled-the amount paid to the worker as ordinary pay for the excess, if any, over the worker's total entitlement of the period or total of the periods of long service leave on ordinary pay given pursuant to this Act by that employer to and taken by the worker.

(5AA) Notwithstanding subsection (5) (c), the deduction to be made pursuant to subsection (5) (c) shall not exceed the amount of ordinary pay that would have been payable for the period of leave or excess leave, as the case may be, had it been taken on the termination of the services of the worker.

(5A) An employer shall not give to a person who is a registered worker under the Building and Construction Industry Long Service Payments Act 1974 any long service leave or pay to any such person any payment in respect of long service leave unless that person applies to the employer for the leave or payment.

(5B) An employer must not give to a person who is a registered worker under the Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010 any long service leave or pay to any such person any payment in respect of long service leave unless that person applies to the employer for the leave or payment.

(7) Subject to subsection (5), where a worker enters upon a period of long service leave, the employer of the worker shall pay to the worker the ordinary pay to be paid to the worker in respect of the period of leave in one of the following ways:

(a) in full when the worker commences the period of leave, or

(b) at the same time as the worker's ordinary pay would have been paid if the worker had remained on duty, in which case payment shall, if the worker in writing so requires, be made by cheque posted to an address specified by the worker, or

(c) in any other way agreed between the employer and the worker,

and the ordinary pay shall become due to the worker accordingly.

(8) Except as provided in subsection (5), payment shall not be made by an employer to a worker in lieu of any long service leave or part thereof to which the worker is entitled under this Act nor shall any such payment be accepted by the worker.

(9) Any amount payable under this section:

(a) to the personal representative of a worker, shall be recoverable by the personal representative of the worker, or

(b) to a worker who dies before being paid such amount, shall be recoverable by the personal representative of the worker as payment due to the worker,

in like manner as a worker may recover any amount under section 12.

(10) The employer shall give to each worker at least one month's notice of the date from which it is proposed that the worker's long service leave shall be given and taken.

(11) For the purposes of this section:

(a) service of a worker with an employer means continuous service, whether on a permanent, casual, part-time or any other basis, under one or more contracts of employment,

(a1) the service of a worker with an employer shall be deemed to be continuous notwithstanding that the service has been broken by reason only of an interruption or determination thereof:

(i) caused by the absence of the worker under the terms of the worker's employment,

(ii) caused by the absence of the worker on account of illness or injury,

(iii) made by the employer with the intention of avoiding any obligation imposed on the employer by this Act or by any obligation in relation to sick leave imposed on the employer by a State industrial instrument,

(iv) arising directly or indirectly from an industrial dispute,

(iv) made by the employer by reason of slackness of trade,

(v) arising from the absence of the worker for any cause by leave of the employer, or

(vi) caused by the employer for any reason other than those referred to in subparagraphs (iii)-(v) where the worker returns to the service of, or is re-employed by, the employer within 2 months of the date on which the service was interrupted or determined,

but the period during which the service is so interrupted or determined shall not in the circumstances referred to in subparagraphs (iii)-(vii), by reason only of this paragraph, be taken into account in calculating the period of service,

(b) where a worker has entered into a contract of employment with an employer within a period of twelve months after the completion of an apprenticeship with the employer the period of the worker's apprenticeship shall be taken into account for the purpose of ascertaining the period of service of the worker with that employer under that contract of employment,

(c) where a business, undertaking or establishment or any part thereof has, whether before or after the commencement of this Act, been transmitted from an employer (in this paragraph called the transmittor) to another employer (in this paragraph called the transmittee) and a person who at the time of the transmission was a worker in the employ of the transmittor in that business, undertaking, establishment or part thereof becomes a worker in the employ of the transmittee:

(i) the continuity of the period of service of the worker shall be deemed not to have been broken by reason of the transmission, and

(ii) the period of service which the worker has had with the transmittor or any prior transmittor shall be deemed to be service of the worker with the transmittee.

In this paragraph **"transmission"** , without limiting its ordinary meaning, includes transfer, conveyance, assignment or succession, whether by agreement or operation of law and **"transmitted"** has a corresponding meaning

(d) any period during which a person served as a member of the naval, military or air forces of the Commonwealth or of the Civil Construction Corps established under the National Security Act 1939 , as amended by subsequent Acts, of the Parliament of the Commonwealth, shall, subject to subsection (12), be deemed to be service of that person as a worker in the employ of the employer by whom that person was last employed before that person commenced to serve as such member.

(12)

(a) Subsection (11) (d) shall not, where the period during which a person served as a member of the naval, military or air forces of the Commonwealth commenced by enlistment or appointment in any such force after the second day of September one thousand nine hundred and forty-five apply to and in respect of that period unless, pursuant to an Act of the Parliament of the Commonwealth of Australia enacted before or after the commencement of the Long Service Leave (Amendment) Act 1967 , that person was entitled to apply to be reinstated in that person's former civil employment on the termination of that person's period of service as such a member and that person did not, at the expiration of the period during which that right subsisted, continue as a member of such a force.

(b) For the purposes of this subsection, the former employer to whom application for reinstatement is required to be made pursuant to an Act of the Parliament of the Commonwealth of Australia referred to in paragraph (a) shall, notwithstanding anything contained in any such Act, be deemed to be and always to have been the employer by whom the member of the naval, military or air forces of the Commonwealth was last employed before the commencement of the service, as such a member, entitling the person to apply to be reinstated in civil employment.

(13)

(a) In this subsection:

"Award" includes:

(a) an agreement, and

(b) a modern award in force under the Fair Work Act 2009 of the Commonwealth, and

(c) a Division 2B State award under Schedule 3A to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 of the Commonwealth.

"Corporation" means any body corporate formed or incorporated in or outside New South Wales.

"Holding company" and **"subsidiary"** have the same meanings as they have in the Corporations Act 2001 of the Commonwealth.

"Termination" means termination by any person or by any cause.

(b) For the purposes of this subsection:

(i) where a corporation is:

(A) the holding company, or

(B) a subsidiary, or

(C) a subsidiary of the holding company,

of another corporation, the first mentioned corporation and that other corporation shall, and no two corporations shall in any other case, be deemed to be related to each other,

(ii) a worker shall be deemed to have transferred from the service of an employer to the service of another employer, only if before, concurrently with or within a period of two months after the termination of the worker's services with the first mentioned employer the worker entered into a contract of employment with that other employer, and the transfer shall be deemed to have occurred at the time of that termination.

(c) Where before or after the commencement of the Long Service Leave (Amendment) Act 1967 a worker has transferred from the service of an employer (in this paragraph called the first employer) being a corporation to the service of another employer being a corporation related to the first employer at the time of that transfer, then for the purposes of this section:

(i) the continuity of the period of service of the worker shall be deemed not to have been broken by reason of the transfer, and

(ii) the period of service which the worker has had with the first employer before the commencement of the service of the worker with that other employer (including any service which by reason of a prior transfer or prior transfers or for any other reason the worker is deemed by this section or, for the purposes of long service leave for such service, the worker is deemed by any Act or award to have had with the first employer) shall be deemed to be service of the worker with that other employer.

(d) Where before or after the commencement of the Long Service Leave (Amendment) Act 1967 a worker has entered into a contract of employment with an employer, being a corporation, within a period of twelve months after the completion of an apprenticeship with another employer, being a corporation which at the time of such entry into employment was related to the first mentioned employer, the period of the worker's apprenticeship shall be taken into account for the purpose of ascertaining the period of service of the worker with the first mentioned employer under that contract of employment.

(e) Where the services of a worker with an employer are terminated and that employer is a corporation to which any other corporation is related at the time of that termination, the services of the worker shall not, for the purposes of subsections (2) and (5), be deemed to have been so terminated if the worker transfers to the employment of any such related corporation.

(f) A worker or the worker's personal representative shall not be entitled by virtue of this subsection to long service leave or payment therefor in respect of any period of service if in respect of that period of service an employer was required by any other provisions of this Act, or by any other Act or any award, to give to the worker any long service leave and to pay wages or other remuneration therefor, or to pay wages or other remuneration for long service leave deemed to have been given to the worker, and if the obligations of that employer in that behalf have been fully satisfied and discharged.

Note: An offence against this Act arising under this section committed by a corporation is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation-see section 10A.

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Level 16 55 Clarence Street Sydney NSW 2000 | GPO Box 7082 Sydney NSW 2001

T 02 8915 4900 | F 02 9290 2998 | E mail@sydneybl.com.au

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