



## About the F40 application form

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### Application for orders in relation to transfer of business

#### Who can use this form

Use this form to apply for an order to vary the effect of a transferable instrument when there is a transfer of business within the meaning of section 311 of the [Fair Work Act 2009](#).

#### About applications for orders in relation to a transfer of business

If there is a transfer of business within the meaning of section 311 of the Fair Work Act, any enterprise agreement, workplace determination or named employer award (a modern award that expressly covers one or more employers) that previously covered an employee of the old employer will transfer to cover that employee and become binding on the new employer.

Usually, an instrument that transfers under the Fair Work Act will displace any agreement or award that would otherwise apply to the transferring employee. There is no limit on the period for which any instrument that transfers will apply. In addition, new employees (non-transferring employees) engaged by the new employer to perform the same type of work as transferring employees may also be covered by the transferring instrument if there is no other agreement or award that would otherwise cover them.

The Fair Work Commission (Commission) may on application make orders to vary the effect of a transferable instrument under sections 318 (that relates to transferring employees) or 319 (that relates to non-transferring employees) of the Fair Work Act so that:

- it does not or will not cover a new employer and transferring employee(s)
- an instrument (enterprise agreement or named employer award) that covers the new employer covers or will cover transferring employee(s)
- it does not or will not cover non-transferring employee(s)
- it does cover or will cover a non-transferring employee who performs or is likely to perform the transferring work of the new employer
- an enterprise agreement or modern award that covers the new employer does not or will not cover a non-transferring employee who performs or is likely to perform the transferring work for the new employer.

In determining the orders that you are seeking, the Commission must consider (see sub-section 318(3) and 319(3) of the Fair Work Act):

- the views of the new employer or likely new employer and employees who would be affected by the order
- whether any employees would be disadvantaged by the order considering their terms and conditions of employment
- if the order relates to an enterprise agreement, the nominal expiry date of the agreement

- whether the transferable instrument would negatively impact on the new employer’s workplace productivity
- if the new employer would be significantly economically disadvantaged should the transferable instrument cover the new employer
- the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer, and
- the public interest in making the order.

An order must only commence operating at the later of either:

- the time when, the transferring employee becomes employed by the new employer, or when the non-transferring employee starts to perform the transferring work for the new employer, or
- the day on which the order is made.

## Lodging and serving your completed form

1. Lodge with the Commission:

- this **application** and any supporting documents, and
- a copy of the **transferable instrument** the application is about.

You can lodge:

- by email to [lodge@fwc.gov.au](mailto:lodge@fwc.gov.au), or
- by post or in person at the [Commission’s office](#) in your state or territory.

2. **As soon as practicable** after lodging, **serve** a copy of all documents you lodged with the Commission on:

- the other parties to the instrument, and
- any employee organisation that ordinarily represents the industrial interests of the transferring employee(s), and
- the new employer (or likely new employer).

You can serve documents several ways, including by email, express post or registered post.

An easy way to serve documents is to copy the organisation and people you are serving into the email you send to the Commission when you lodge your application.

## Where to get help

### Commission staff & resources

Commission staff cannot provide legal advice. However, staff can give you information on:

- processes in the Commission
- how to make an application to the Commission
- how to fill out forms
- where to find useful documents such as legislation and decisions
- other organisations that may be able to assist you.

The Commission's website [www.fwc.gov.au](http://www.fwc.gov.au) also contains a range of information that may assist.

## Throughout this form



This icon appears throughout the form. It indicates information to help you answer the question following.

## Legal or other representation

Representation is where another person speaks or acts on your behalf, or assists you in certain other ways in relation to a Commission case. A representative could be a lawyer, paid agent, officer or employee of a union, employer organisation or an association of employers, a peak council, or a not-for-profit association or body that provides support, advice or advocacy in relation to employment matters.

You do not need to be represented in a case at the Commission.

There are some rules about being represented by a lawyer or paid agent.

Unless the Commission decides otherwise in a particular case, a lawyer or paid agent can represent you without permission to:

- prepare and lodge this application,
- prepare and lodge submissions with the Commission, or
- write to the Commission and other people involved in the case on your behalf.

Generally, you must give notice to the Commission and seek permission from the Commission Member dealing with your case if you wish to have a **lawyer or paid agent** represent you in a **conference** or a **hearing**. You do not, however, need to give notice or ask permission if the lawyer or paid agent is:

- an employee or officer (for a business), or
- a bargaining representative that is representing you, or
- an employee or officer of a union or employer organisation, or an association of employers, or a peak council, that is representing you.

You can notify the Commission that you have a lawyer or paid agent using this form – provide their details at ‘Do you have a representative?’.

If you need to notify the Commission that you have a lawyer or paid agent after you have lodged this form, or if you need to ask permission for a lawyer or paid agent to take part in a **conference or hearing**, use [Form F53](#).

Rule 13(2) of the [Fair Work Commission Rules 2024](#) sets out further exceptions to the requirement to give notice and seek permission.

For more information about representation by lawyers and paid agents, see section 596 of the [Fair Work Act 2009](#), rules 11, 12, 13 and 14 of the [Fair Work Commission Rules 2024](#) and the Commission’s [practice note on representation by lawyers and paid agents](#).

## Glossary of common terms

**Applicant** – This is the person or organisation that is making an application.

**Lawyer** – This is a person who is admitted to the legal profession by a Supreme Court of a State or Territory.

**Paid agent** – In relation to a matter before the Commission, is an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter.

**Party** – A party is a person or organisation involved in a matter or case that is brought to the Commission.

**Respondent** – The person or business responding to an application made by an Applicant.

**Service** – Serving a document means giving a copy of the document to a person or organisation, usually to the other party to the matter. You can serve a document in a number of ways, including by email, express or registered post, or in person. Part 5 of Chapter 1 and Schedule 1 of the [Fair Work Commission Rules 2024](#) deal with service.

## Privacy

The Commission collects the information (including personal information) provided to it in this form for inclusion on the case file, and may disclose this information to the other parties to this matter and to other persons. For more details of the Commission's collection, use and disclosure of this information, please see the [Privacy notice](#) for this form, or ask for a hard copy to be provided to you.



**Remove this cover sheet** and keep it for future reference – it contains useful information.

# Form F40 – Application for orders in relation to a transfer of business

[Fair Work Act 2009](#), sections 318 and 319, [Fair Work Commission Rules 2024](#), rule 63 and Schedule 1

This is an application for orders in relation to a transfer of business under either s.318 or s.319 of the *Fair Work Act 2009*.

## The Applicant



These are the details of the person who is making the application with the Commission.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address			
Suburb			
State or territory		Postcode	
Phone number			
Email address			

### If the Applicant is an organisation please also provide the following details

Legal name of organisation	
Trading name of organisation	
ABN/ACN	
Contact person	

### Do you need an interpreter?



If you have trouble accessing this information, please contact us. We can arrange to provide it in another format. You can find information about [help for non-English speakers](#) on our website.

- Yes – Specify language
- No

**Do you require any special assistance at the hearing or conference (eg a hearing loop)?**

- Yes – Please specify the assistance required
- No

**Do you have a representative?**



A representative is a person or organisation who is representing you. This might be a lawyer or paid agent, a union or employer organisation. There is no requirement to have a representative.

- Yes – Provide representative’s details below
- No

**Your representative**



These are the details of the person or organisation that is representing you (if any).

Name of person			
Firm, organisation, company			
Representative’s ABN (if applicable)			
Postal address			
Suburb			
State or territory		Postcode	
Phone number			
Email address			

**Is your representative a lawyer or paid agent?**

<input type="checkbox"/> Yes – please select:	<input type="checkbox"/> Lawyer <input type="checkbox"/> Paid agent
<input type="checkbox"/> No	

## 1. Preliminary

### 1.1 What is the name of the transferable instrument to which this application for orders relates?



You must also attach a copy of the transferable instrument (*Fair Work Commission Rules 2024*, sub-rule 63 (1)).

Attach additional pages if necessary.

### 1.2 What is the industry of the employer?



Please state the specific industry.

### 1.3 What is the nominal expiry date of the instrument?

## 2. Orders

### 2.1 Please indicate whether you are seeking orders under either s.318 or s.319 of the Fair Work Act.

### 2.2 Please specify the terms of the order(s) that you are seeking.

Attach additional pages if necessary.

**2.3 Please set out the grounds on which you rely in seeking the orders sought.**



The criteria for consideration of the Commission in determining the order(s) sought are set out in s.318 (3) and s.319 (3) of the Fair Work Act. Using numbered paragraphs, you may wish to address any such criteria, in setting out the grounds on which you rely.

Attach additional pages if necessary.

### Authority to sign and signature



For 'Authority to sign':

- If you are the Applicant—insert 'Applicant'
- If you are an employee of a company or organisation that is the Applicant—insert your position title
- If you are the Applicant's representative and have provided your details in this form—insert 'Representative'.

<b>Authority to sign</b>	
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Insert your signature, name and the date. If you are completing this form electronically and do not have an electronic signature, type your name in the signature field.

<b>Signature</b>	
<b>Name</b>	
<b>Date</b>	

**PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS**