



ORDER

Fair Work Act 2009

s.319 - Application for an order relating to instruments covering new employer and non-transferring employees

Dawsons Engineering (NQ) Pty Ltd
(AG2021/6172)

**DAWSONS MAINTENANCE CONTRACTORS ENTERPRISE
AGREEMENT 2018**
(ODN AG2018/4807) [AE501273]

Manufacturing and associated industries

COMMISSIONER SPENCER

BRISBANE, 14 JULY 2021

Application for an order relating to instruments covering new employer and non-transferring employees.

[1] Further to the Decision issued 14 July 2021 in [2021] FWC 4108, the following Orders are made:

- A. Pursuant to s.319(1)(b) of the *Fair Work Act 2009* (the Act), the *Dawsons Maintenance Contractors Enterprise Agreement 2018* will cover any new or non-transferring employees of Dawson Engineering (NQ) Pty Ltd (the Applicant) who perform, or are likely to perform, transferring work for Applicant post the effective date.
- B. In accordance with s.319(4) of the Act, this Order shall take effect in respect of each non-transferring employee on and from 14 July 2021.



COMMISSIONER

Printed by authority of the Commonwealth Government Printer



DECISION

Fair Work Act 2009

s.319 - Application for an order relating to instruments covering new employer and non-transferring employees

Dawsons Engineering (NQ) Pty Ltd
(AG2021/6172)

Manufacturing and associated industries

COMMISSIONER SPENCER

BRISBANE, 14 JULY 2021

Application for an order relating to instruments covering new employer and non-transferring employees.

INTRODUCTION

[1] An application pursuant to s.319 of the *Fair Work Act 2009* (the Act) was made by Dawsons Engineering (NQ) Pty Ltd (the Applicant/the new employer) for an Order under s.319(1)(b), that the *Dawsons Maintenance Contractors Enterprise Agreement 2018* (the Agreement/the transferable instrument) cover non-transferring employees who perform, or are likely to perform, transferring work for the Applicant.

[2] In accordance with s.319(1)(b) of the Act, the Applicant sought an Order to be made, to permit the transferable instrument to cover any non-transferring employees who perform, or are likely to perform, the transferring work covered by the Agreement.

[3] Section 313(1) provides that a transferrable instrument that covered Dawsons Maintenance Contractors Pty Ltd (the old employer) and the transferring employees immediately before the termination of the employment will cover the new employer (being the Applicant). The operation of these sections means that the Applicant would be covered by the Agreement in relation to the transferring employees.

[4] The Applicant sought an Order that the Agreement will cover any non-transferring employees of the Applicant who perform, or are likely to perform, the transferring work, pursuant to s.319(1)(b) of the Act.

RELEVANT PROVISIONS

[5] Pursuant to s.319 of the Act:

“319 Orders relating to instruments covering new employer and non-transferring employees

Orders that the FWC may make

(1) The FWC may make the following orders:

- (a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a non-transferring employee because of subsection 314(1) does not, or will not, cover the non-transferring employee;
- (b) an order that a transferable instrument that covers, or is likely to cover, the new employer, because of a provision of this Part, covers, or will cover, a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
- (c) an order that an enterprise agreement or a 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.

Who may apply for an order

(2) The FWC may make the order only on application by any of the following:

- (a) the new employer or a person who is likely to be the new employer;
- (b) a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
- (c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;
- (d) if the application relates to a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

(3) In deciding whether to make the order, the FWC must take into account the following:

- (a) the views of:
 - (i) the new employer or a person who is likely to be the new employer; and
 - (ii) the employees who would be affected by the order;
- (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
- (c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;
- (d) whether the transferable instrument would have a negative impact on the productivity of the new employer’s workplace;
- (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;
- (f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;
- (g) the public interest.

Restriction on when order may come into operation

- (4) The order must not come into operation in relation to a particular non-transferring employee before the later of the following:
- (a) the time when the non-transferring employee starts to perform the transferring work for the new employer;
 - (b) the day on which the order is made.”

SUMMARY OF THE APPLICANT’S SUBMISSIONS AND EVIDENCE

[6] Ms Sharon Dawson, Chief Executive Officer of the Applicant, provided a statutory declaration in support of the application.

[7] Ms Dawson stated that the old employer and the new employer are related entities. Ms Dawson stated that both employers had been known collectively as ‘Dawsons’ by both employees and clients for more than 35 years. Ms Dawson further stated that Dawsons provides maintenance, repairs, fabrication, shutdown, construction and mill relining services to clients throughout Australia, in the mining, marine, sugar, power and defence industries from workshops in Cairns, Townsville and Mt Isa.

[8] Ms Dawson stated that a business review undertaken in January 2021 identified that efficiency and cost savings, essential to ensuring the ongoing viability of Dawsons, would be achieved by restructuring the entities. Mr Dawson stated that effective from 1 July 2021, all employees of the old employer were transferred to the new employer, complete with all of their accrued entitlements.

[9] Ms Dawson stated that in addition to the 154 permanent employees, Dawsons also engages a significant casual workforce. She stated that these casual workers are engaged on a job by job basis, with new employees recruited each week. It was further stated that the new employer wishes to engage any new employees under the same terms and conditions as the transferring workforce.

[10] The Applicant submitted that the Orders were sought to ensure all employees would be engaged on the same terms and conditions and provide for maximum workplace harmony and resultant productivity.

[11] Ms Dawson stated that should the Orders not be made, the non-transferring new employees would be covered by Manufacturing and Associated Industries and Occupations Award 2010, Mining Industry Award 2010, Building and Construction General On-Site Award 2010, Professional Employees Award 2010 and the Clerks - Private Sector Award 2010.

[12] In specifically addressing the criteria in s.319(3) of the Act, Ms Dawson stated the following:

s.319(3)(a)(i) – the views of the new employer

[13] Ms Dawson, as CEO of the new employer, confirmed that the new employer supported the Order being made.

s.319(3)(a)(ii) – the views of the new employees

[14] Ms Dawson confirmed that it was not possible to obtain the views of the new non-transferring employees who would be affected by the Order, because by definition, they are new to the company and yet to be recruited. Ms Dawson further stated that the new employees will be performing the same work alongside transferring employees, and that the workplace harmony would be better served to have them employed under the same instrument.

s.319(3)(b) – whether any employees would be disadvantaged

[15] Ms Dawson's evidence was that under the Order that is sought transferring and new employees would not be disadvantaged in relation to their terms and conditions of employment by the making of an Order, as they will be engaged under the approved Enterprise Agreement. It was further submitted that as the Agreement was required to meet the Better Off Overall Test, the non-transferring employees would not be disadvantaged by the Orders sought.

s.319(3)(c) – the nominal expiry date

[16] The nominal expiry date of the Agreement is 7 January 2023.

s.319(3)(d) – negative impact on productivity

[17] Ms Dawson stated that the Orders that were sought to apply the transferring Agreement, to the new employees, to ensure all employees will be engaged on the same terms and conditions and provide for maximum workplace harmony, and resultant productivity.

s.319(3)(e) – economic disadvantage

[18] It was submitted on behalf the Applicant that the Agreement's coverage of non-transferring new employees will not cause any economic damage. Ms Dawson stated that should the Agreement not cover new employees, there would be significant economic disadvantage in having a separate instrument to cover part of a workforce performing the same duties. She stated that as the business operates on a standard unit cost, having employees engaged under multiple instruments will dramatically increase processing time and erode the integrity of the business estimating system.

s.319(3)(f) – degree of business synergy

[19] Ms Dawson submitted that the new employer, does not currently have an existing workforce nor a registered industrial instrument. She stated that the transfer of the workforce from the older employer, with the Agreement, would provide the industrial framework.

s.319(3)(g) – public interest

[20] Ms Dawson stated that to the extent that a private business transaction is required to be in the public interest, it is confirmed that all employee entitlements will remain intact and the business will continue to trade with a well-established and contracted client base. She stated that nothing will change for employees or clients and the Public Interest would be well served.

[21] The Agreement has a nominal expiry date of 7 January 2023; and subject to the Order being made by the Commission, the effective date for this change would be 14 July 2021, (the effective date).

CONCLUSION

[22] I have taken into account the material provided by the Applicant in support of the application and the matters listed in s.319(3) of the Act. I am satisfied the Order should be issued.

[23] The Order [PR731701] will issue with this Decision and take effect in accordance with s.319(4) of the Act.



COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<AE501273 PR731648 >



FairWork
Commission

Copy of Document Filed

Title of Matter: Application by Dawsons Engineering (NQ) Pty Ltd

Section: s.319 - Application for an order relating to instruments covering new employer and non-transferring employees

Subject:

Matter Number(s): AG2021/6172

In relation to the above matter, please find attached for your information a copy of the document which has been issued by the Fair Work Commission.

PR731701, PR731648

Inquiries:

Any inquiries relating to this notice are to be directed to Mackenzie Barnes, email: chambers.spencer.c@fwc.gov.au.

14 JULY 2021

To:

Notified	Contact details
Ms Sharon Dawson Chief Executive Officer Dawsons Engineering (NQ) Pty Ltd	sharon.dawson@dawsonseng.com.au