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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAIR WORK AMENDMENT (TRANSFER OF BUSINESS) BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable William Shorten MP)

FAIR WORK AMENDMENT (TRANSFER OF BUSINESS) BILL 2012

OUTLINE

The Fair Work Amendment (Transfer of Business) Bill 2012 (the Bill) will amend the *Fair Work Act 2009* (FW Act) to protect employee entitlements in circumstances where there is a transfer of business from an old State employer (old employer) to a national system employer.

The Bill will, as far as possible, reflect the existing transfer of business provisions in Part 2-8 of the FW Act. In general, Part 2-8 provides that where there is a transfer of business, an enterprise agreement, workplace determination or named employer award that covered employees of an old employer continues to cover those employees if they commence employment with a new employer within three months of their employment terminating with the old employer. For this to occur, there must be a connection between the old and new employers – this can include, relevantly, the transfer of assets from the old employer, certain outsourcing arrangements and where the two employers are associated entities.

Part 2-8 applies to transfers of business between national system employers. This includes transfers of business between Commonwealth, Victorian, Australian Capital Territory or Northern Territory public sector employers and another national system employer. This reflects Victoria’s referral of power to extend the FW Act to most of its public service and the Commonwealth’s power to legislate with respect to territories under the Constitution. However, Part 2-8 does not currently apply to public sectors in other jurisdictions. The Bill will address this by providing for current transfer of business rules to operate in a similar way in those remaining States.

This Bill will ensure that where there is a transfer of business from an old employer to a national system employer, transferring employees will retain the benefit of existing terms and conditions of employment in State awards and agreements and their accrued entitlements. In doing so, it will result, for the first time, in a nationally consistent set of transfer of business rules, as far as possible, for certain employees that transfer to a national system employer.

The Bill will:

- provide for the transfer of employees’ terms and conditions of employment from an old employer to a national system employer where there is a connection between the two employers. This will be achieved through the creation of a new federal instrument that copies the transferring employees’ existing terms and conditions of employment in a relevant State award or agreement;

- enable Fair Work Australia (FWA) to make orders that modify the general effect of the transfer of business rules in these circumstances. In particular, FWA will be able to make orders regarding the coverage of certain instruments and their application to new employers;

- provide for the interaction between the transfer of employees’ terms and conditions of employment and the FW Act, including the National Employment Standards, and other necessary transitional and technical provisions.

Financial Impact Statement

Nil

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Amendment (Transfer of Business) Bill 2012

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

Overview of the Fair Work Amendment (Transfer of Business) Bill 2012

The Fair Work Amendment (Transfer of Business) Bill 2012 (the Bill) will amend the *Fair Work Act 2009* (FW Act) to protect employee entitlements in circumstances where there is a transfer of business from an old State employer (old employer) to a national system employer.

The Bill will:

- provide for the transfer of employees' terms and conditions of employment from an old employer to a national system employer where there is a connection between the two employers. This will be achieved through the creation of a new federal instrument that copies the transferring employees' existing terms and conditions of employment in a relevant State award or agreement;

- enable Fair Work Australia (FWA) to make orders that modify the general effect of the transfer of business rules in these circumstances. In particular, FWA will be able to make orders regarding the coverage of certain instruments and their application to new employers;

- provide for the interaction between the transfer of employees' terms and conditions of employment and the FW Act, including the National Employment Standards, and other necessary transitional and technical provisions.

Human rights implications

The Bill engages with the following human rights:

- The right to work and rights in work including the right to just and favourable conditions of work in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- The right to freedom of association, including the right to form and join trade unions and the right of trade unions to function freely in Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the ICESCR.

<u>The Right to Work and Rights in Work</u>

Article 6(1) of the ICESCR recognises the right to work and obliges States Parties to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights (the UN Committee) has stated that the right to work in article 6(1) of ICESCR encompasses the need to provide the worker with just and favourable conditions of work. Article 7 of the ICESCR sets out the right to just and favourable conditions of work, including, in particular:

- remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work,
- safe and healthy working conditions,
- equal opportunity to be promoted in employment to an appropriate higher level, subject to no considerations other than those of seniority and competence, and
- rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

The Bill promotes the rights to work and to just and favourable working conditions. Currently the FW Act promotes the right to just and favourable working conditions by preserving an employee's terms and conditions of employment if there is a transfer of business between two national system employers (the old employer and the new employer) and the employee transfers from the old employer to the new employer but continues to perform substantively the same work.

The FW Act ensures that the award or agreement that governed a transferring employee's terms and conditions with the old employer transfers with them to continue to cover their employment with the new employer. The FW Act also ensures that there is no break in service between the old and new employer, meaning that entitlements determined by an employee's length of service with an employer (e.g. annual leave) encompass both periods of service.

The Bill extends the FW Act's protection of an employee's entitlements in a transfer of business situation to also cover transfers that occur between non-national system employers and national system employers.

Currently, where a non-national system employee transfers to employment with a national system employer due to a transfer of business (e.g. an outsourcing arrangement due to a restructure or pursuant to an arrangement for the sale of the employer's assets), the employee's terms and conditions of employment are determined by the industrial instrument governing employment with the new employer. This means that the employee loses the benefit of the terms and conditions in the industrial instrument with the non-national system employer. This will be the case even though they are performing the same work. The amendment Bill will ensure that a State public sector employee will continue to enjoy the terms and conditions of employment with the non-national system employer through the preservation of those terms and conditions where they become transferring employees in a transfer of business to a national system employer. The National Employment Standards (NES) apply to transferring State public sector employees as a safety net to ensure that where the terms and conditions in the transferring instrument(s) are less advantageous than those available under the NES, the transferring employee has the benefit of the NES. Further, as with the current rules in Part 2-8, the Bill provides powers for FWA to make orders about the coverage of transferred instruments and their application to new employers.

<u>The Right to Freedom of Association</u>

Article 22 of the ICCPR protects the right to freedom of association with others, including the right to form and join trade unions. Article 8(1)(a) of the ICESCR similarly ensures the right of everyone to form trade unions and to join the trade union of his or her choice. In addition, Australia is a party to a range of International Labour Organisation Conventions, including Convention 87 which deals with freedom of association and protection of the right to organise.

The regulation of employer and employee organisations under the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) regulates the internal affairs of registered organisations in exchange for rights and privileges within the federal workplace relations system.

It is in this context that the Bill modifies the operation of the Registered Organisations Act to ensure that an employee association that is registered under relevant state legislation and which represents non-national system employees can continue to represent those employees in the federal system (subject to the employees' ongoing eligibility for membership of the association), for a transitional period, to ensure that those employees are not deprived of the right to representation.

A State-registered association which obtains transitional recognition under the amendments in the Bill will be able to act in the federal system as a Transitionally Recognised Association (TRA). Whether that particular State-registered employee association will continue to represent employees in the federal system beyond the transitional period will depend on whether it makes a successful application to become a recognised State-registered association (RSRA) under Schedule 2 of the Registered Organisations Act. A State-registered association can only maintain ongoing recognition in the federal system if it can be shown that it does not have a 'federal counterpart' (see Registered Organisations Act s 9A) and is registered under a prescribed state law (Registered Organisations Act clause 1 of Schedule 2). The limitation on ongoing recognition where an association has a federal counterpart is intended to prevent costly and disruptive demarcation disputes.

One of the purposes of the Registered Organisations Act is to reduce the adverse effects of industrial disputation. To this end the Registered Organisations Act regulates the representation rights of employee organisations registered under the Registered Organisations Act in order to reduce demarcation disputes. Registered organisations are not entitled to the rights and privileges of federal registration unless they comply with the provisions of the Registered Organisations Act which deal with who they are entitled to represent.

Currently, there is no ability for a State public sector employee who transfers to the national system to remain represented by their State employee association. In this way, the Bill promotes the rights outlined above through establishing a framework under which a State public sector employee who transfers to employment with a national system employer may, conditional upon certain requirements being met by the State employee association, remain represented by the State employee organisation, at least for a transitional period. This period is intended to give the State association and the employee a period of time to adjust to the effects of being covered by a copied State instrument.

TRAs and RSRAs will also be subject to the power of FWA to make representation orders for workplace groups (Registered Organisations Act, Part 3 of Chapter 4). However, neither TRAs nor RSRAs are required to comply with the other regulation of the internal affairs of organisations registered under the Registered Organisations Act.

Conclusion

The Bill is compatible with human rights because it promotes human rights.

Minister for Employment and Workplace Relations, the Honourable William Shorten MP

NOTES ON CLAUSES

In these notes on clauses, the following abbreviations are used:

FW Act	*Fair Work Act 2009*
FWA	Fair Work Australia
NES	National Employment Standards
Registered Organisations Act	*Fair Work (Registered Organisations) Act 2009*
the Bill	Fair Work Amendment (Transfer of Business) Bill 2012
Transitional Act	*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

Clause 1 – Short title

1. This is a formal provision specifying the short title of the Bill.

Clause 2 – Commencement

2. The Bill will commence on the day after it receives Royal Assent.

Clause 3 – Schedule(s)

3. This clause provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.

Schedule 1 – Transfer of business from a State public sector employer

Part 1 – Main amendments

Fair Work Act 2009

Item 1 – After Part 6-3

4. This item inserts new Part 6-3A into the FW Act to make provision for when there is a transfer of business between a non-national system employer that is a State public sector employer ('the old employer') to a national system employer ('the new employer').

5. Broadly, the effect of the Part is to protect certain terms and conditions of employment for employees that transfer to a national system employer as a result of a transfer of business.

6. The new Part does this by:

- establishing the rules for when a transfer of business occurs between the old employer and the new employer;
- providing for the transfer of certain transferring employees' terms and conditions of employment with the old employer to the employment with the new employer;
- providing rules for the interaction between the transferring employees' terms and conditions of employment and entitlements in the national system, including the National Employment Standards (NES), modern awards and enterprise agreements; and
- enabling FWA to make orders about the coverage of certain instruments.

7. These amendments will provide, as far as possible, a nationally consistent set of rules where a transfer of business occurs that involves public sector employers.

Part 6-3A – Transfer of business from a State public sector employer

New Division 1 – Introduction

8. In this Part, the terms employee and employer mean national system employee and employer (see sections 13 and 14 of the FW Act).

New Division 2 – Copying terms of State instruments when there is a transfer of business

9. New Division 2 sets out when there is a transfer of business from an old employer to a new employer. It is intended to reflect, as far as possible, the provisions in Division 2 of Part 2-8 of the FW Act.

10. New section 768AD is the operative provision of Division 2. It provides a definition of transfer of business and provides for the circumstances in which a transfer of business can occur. It also sets out definitions of old State employer, new employer, and transferring work. These terms are used throughout the Part.

11. There is a transfer of business between the old State employer and a new national system employer if the following requirements are satisfied:

- the employment of a person that is a public sector employee of the old employer has terminated;
- within 3 months after the termination, the person becomes employed by the new employer;
- the person performs the same, or substantially the same, work (the transferring work) for the new employer as she or he performed for the old employer; and
- there is a connection between the old employer and the new employer as described in any of new subsections 768AD(2) to (4).

12. The reference in new paragraph 768AD(1)(a) to an employee's employment terminating is intended to capture all of the circumstances in which an employee ceases to be employed by an employer, including resignation.

13. When the transferring employee becomes employed by the new employer under new paragraph 768AD(1)(b), this is the point at which the employee becomes a national system employee.

14. New paragraph 768AD(1)(c) requires that transferring employees must perform the same, or substantially the same work for the new employer as he or she performed for the old employer. It is intended that this provision not be construed in a technical manner.

15. New subsections 768AD(2) to (4) set out the circumstances in which there is a connection between the old employer and the new employer for the purposes of new paragraph 768AD(1)(d). Broadly, there will be a connection where the old employer transfers assets or outsources work to the new employer, or the new employer is an associated entity of the old employer. The illustrative example following paragraph 1224 of the Explanatory Memorandum to the Fair Work Bill 2008 provides guidance on how the outsourcing connection can arise in a transfer of business and is also relevant to the circumstances set out in new subsections 768AD(3).

16. New Division 2 also provides definitions for transferring employee, termination time and re-employment time. These definitions are used throughout the Part.

New Division 3 – Copied State instruments

17. This new Division sets out the rules to enable certain terms and conditions of a transferring employee's employment with the old employer to be transferred to the employment with the new employer.

18. The transfer of those terms and conditions is achieved by creating a new federal instrument (a copied State instrument), that 'copies' the terms and conditions in the State award and/or State employment agreement for the employee as they were immediately before the time of her or his termination of employment with the old employer.

19. The general rule is that each transferring employee will have his or her own copied State instrument(s) because they may have different terms and conditions to each other at the

time their employment is terminated (e.g. because each termination of employment may occur at different times).

20. This approach ensures that the Commonwealth is not amending the original State award or State employment agreement for that transferring employee.

<u>What is a copied State instrument?</u>

21. A copied State instrument can be either a copied State award or a copied State employment agreement, as defined in the Division. If a State award or State employment agreement (known as the original State award and the original State agreement) was in operation under a State industrial law of a State immediately before the termination time of a transferring employee, a copied State instrument(s) is created immediately after the termination time.

22. Subject to other provisions in new Part 6-3A, the copied State instrument is taken to include the same terms as were in the original State award or agreement immediately before the termination time of the transferring employee.

23. A contravention of a copied State award or agreement is a civil remedy provision.

<u>When a copied State instrument *covers* and *applies* to a person</u>

24. The FW Act and the Transitional Act adopt the concept of *covers* and *applies* in relation to various workplace instruments. These concepts are also used in relation to copied State instruments.

25. Generally, a copied State instrument covers the transferring employee and employer and any employee organisations *covered* by the original State instrument immediately before the termination time of the employee as well as the new employer from the re-employment time of the employee.

26. A copied State instrument *applies* to a transferring employee, and an organisation that was required to comply with, or could enforce, the terms of the original State instrument immediately before the termination time of the employee. It also *applies* to a new employer from the date the transferring employee is employed by that employer if the old employer was required to comply with, or could enforce, the terms of the original State instrument immediately before the termination time of the employee.

27. Copied State instruments can also have the effect of applying to another person by order of FWA.

<u>When a copied State instrument is in operation</u>

28. A copied State instrument is created immediately after the termination time of the employee (i.e. when the employee's employment with the old employer is terminated). However, it will not apply to the employee or new employer before the employee becomes employed by the new employer.

29. A copied State award for a transferring employee ceases to operate at the following time:

- the end of 5 years, or such longer period as prescribed by the regulations, starting on the day on which the termination time of the employee occurred (the default period);
- if FWA makes an order providing for a longer time in accordance with the regulations.

30. A copied State employment agreement ceases to operate when it is terminated, which can be before the nominal expiry date of the agreement. The Division provides for when a copied State employment agreement nominally expires.

New Division 4 – Interaction between copied State instruments and the NES, modern awards and enterprise agreements

31. This new Division contains the rules for how copied State instruments interact with the NES, modern awards and enterprise agreements.

Interaction with the NES

32. A term of a copied State instrument has no effect to the extent that it is detrimental to an employee, in any respect, when compared to an entitlement of the employee under the NES.

33. Certain provisions of the NES have effect as if a reference to a modern award or enterprise agreement included a reference to a copied State instrument. The relevant provisions of the NES are identified in paragraphs (a) to (h) of new subsection 768AR(1).

Treatment of certain terms in copied State instruments

34. If a term in a copied State instrument provides for the cashing out and taking of paid annual leave, or the cashing out of paid personal/carer's leave, that copied State instrument is taken to include the protections in relation to the cashing out of certain entitlements set out in subsections 93(2) or 101(2) of the FW Act, if it does not already provide those protections.

35. For example, in order to cash out annual leave under the provision in the copied State instrument, the employee must retain a minimum balance of four weeks' annual leave, the agreement to cash out must be a separate written agreement and the cashed out leave must be paid at the full amount the employee would have received had the employee taken the leave forgone.

36. Further, subsections 87(3) to (5) of the FW Act apply to a transferring employee to whom a copied State instrument applies on and after the re-employment time, as if the employee was award/agreement free as contemplated by those subsections. This means that a transferring employee meeting the description in the shiftworker definition in section 87 of the FW Act would be entitled to the shiftworker annual leave entitlement provided under that section (which provides five weeks of annual leave for shiftworkers).

Interaction with modern awards

37. New sections 768AS and 768AT provide for interaction rules between modern awards and copied State awards and copied State employment agreements respectively.

38. In relation to the interaction between modern awards and copied State awards, the general rules provide that while a copied State award for a transferring employee that covers the employee or an employer or other person in relation to the employee is in operation, a modern award does not cover the employee or an employer or other person in relation to the employee. The exception to this general rule is for the purposes of determining whether an enterprise agreement passes the better off overall test in relation to a transferring employee, the enterprise agreement is to be compared against that modern award. A legislative note under new subsection 768AS(2) makes this clear.

39. A legislative note makes it clear that when the copied State award for a transferring employee ceases to cover the employee, a modern award will start to cover the employee, or an employer or other person in relation to the employee.

40. A further legislative note alerts the reader that the general rules may also apply where there is a subsequent transfer of business by the new employer.

41. In relation to the interaction between modern awards and copied State employment agreements, the general rules provide that if a copied State employment agreement and a modern award both apply to an employee, or to an employer or other person in relation to the employee, the copied State employment agreement prevails over the modern award to the extent of any inconsistency. This is consistent with the coverage rules in the Transitional Act in relation to the State referral process (see Schedule 3A of the Transitional Act).

42. A legislative note makes it clear that the general rules operate subject to item 17 of Schedule 9 of the Transitional Act as modified (which requires that the base rate of pay under a copied State employment agreement be not less than the modern award rate). A further legislative note alerts the reader that the general rules may also apply where there is a subsequent transfer of business by the new employer.

Interaction with enterprise agreements

43. The general rule is that at the re-employment time, where a new employer is covered by an existing enterprise agreement, that agreement does not cover the employer and a transferring employee in relation to the transferring employee's employment while a copied State instrument covers the employer and that employee.

44. However, if another enterprise agreement (e.g. a new enterprise agreement) starts to cover the new employer and the employee after the re-employment time, the copied State instrument ceases to cover the new employer and the employee and can never cover them again.

New Division 5 – Variation and termination of copied State instruments

45. This Division sets out the circumstances in which a copied State instrument can be varied and/or terminated. It also includes cross-references to Schedules in the Transitional Act where the mechanism for variation is not included in this Schedule.

<u>Variation of copied State instruments</u>

46. A copied State instrument can be varied, including to:

- remove or modify terms that FWA is satisfied are not, or will not be, capable of meaningful operation;
- remove ambiguity or uncertainty in the instrument;
- enable the instrument to operate in a way that is better aligned to the working arrangements of the new employer's enterprise;
- resolve an uncertainty or difficulty relating to the interaction between the instrument and the National Employment Standards, or make the instrument operate effectively with the National Employment Standards; or
- remove or vary terms that are inconsistent with the general protections framework in Part 3-1 of the FW Act.

47. FWA may vary a copied State instrument on its own initiative, on application by a person who is or is likely to be covered by the transferable instrument, or on application by an employee organisation that is entitled to represent the industrial interests of the transferring employee, another transferring employee or a non-transferring employee who is, or is likely to be covered by the copied State instrument.

48. FWA must take into account certain matters when deciding whether to vary a copied State instrument. These matters are:

- the views of the new employer and the transferring employee, other transferring employee(s) who are or will be covered by the instrument, and any non-transferring employee who is covered by the copied State instrument;
- whether those employees would be disadvantaged by the copied State instrument as varied in relation to their terms and conditions of employment;
- if the copied State instrument is a copied State employment agreement – the nominal expiry date of the agreement;
- whether the copied State instrument, without the variation, would have a negative impact on the productivity of the new employer's workplace;
- whether the new employer would incur significant economic disadvantage as a result of the copied State instrument without the variation;
- the degree of business synergy between the copied State instrument, without the variation, and any workplace instrument that already covers the new employer; and
- the public interest.

49. A regulation making power exists to enable the making of regulations to assist in determining for the purposes of new paragraph 768AX(1)(d), whether terms of a copied State instrument are detrimental to an employee, when compared to the NES.

50. A variation may commence operation from the day specified in FWA's determination. This may be a day before the determination is made. However, the variation cannot come into operation before the re-employment time of the transferring employee.

Termination of copied State instruments

51. A copied State instrument can only be terminated in the circumstances set out in items 22-26 of Schedule 3A to the Transitional Act as modified to apply to these instruments.

52. *New Division 6 – FWA orders about coverage of copied State instruments and other instruments*

53. When a transfer of business occurs, the default coverage rule is that a copied State instrument for a transferring employee covers the employee and the new employer.

54. This Division enables FWA to make the following orders that modify the usual coverage rules in relation to a particular employer or employee(s):

- An order that a copied State instrument that has come into operation and would or would be likely to cover the transferring employee and the new employer because of the operation of the general coverage rules for copied State instruments does not cover the new employer and the transferring employee. For example, the copied State instrument may provide terms and conditions of employment which are markedly inconsistent or inferior to an existing enterprise agreement that covers the new employer. The effect of this rule is that FWA can displace the default rule that a copied State instrument covers the new employer and a transferring employee, in relation to the employee covered by that instrument.

- An order that an enterprise agreement or named employer award that covers the new employer at the re-employment time of a transferring employee covers or will cover the transferring employee. For example, this would allow a new employer that is already covered by an existing enterprise agreement or named employer award to apply to FWA for an order that a transferring employee also be covered by that enterprise agreement or named employer award, instead of the copied State instrument.

55. FWA may only make an order on its own initiative, or on application by:

- the transferring employee;

- the new employer;

- an employee organisation that is entitled to represent the industrial interests of the transferring employee.

56. FWA must take into account certain matters when deciding whether to make an order. These matters are essentially replicated from the matters that FWA must take into

account where there is a transfer of business between two national system employers in Part 2-8 of the FW Act. They are:

- the views of the new employer and the transferring employee;
- whether the transferring employees would be disadvantaged by the order in relation to their terms and conditions of employment;
- if the order relates to a copied State employment agreement for the transferring employee or an enterprise agreement – the nominal expiry date of the agreement;
- whether the copied State instrument would have a negative impact on the productivity of the new employer's workplace;
- whether the new employer would incur significant economic disadvantage as a result of the copied State instrument;
- the degree of business synergy between the copied State instrument and any workplace instrument that already covers the new employer; and
- the public interest.

57. An order comes into operation from the day specified in FWA's order, which may be any day before the order is made. However, the order cannot come into operation before the re-employment time of the transferring employee.

58. FWA can also make an order that a copied State instrument for a transferring employee does or does not cover an employee organisation but instead covers, or will cover, another employee organisation. For example, FWA could order that one or more federal counterparts were covered by a copied State instrument where the corresponding State registered organisation(s) no longer has coverage. FWA must have regard to the federal counterpart(s) when making this type of order.

New Division 7 – FWA orders about consolidating copied State instruments etc.

59. The general rule is that a copied State instrument preserves the terms and conditions in the State award or agreement for a transferring employee.

60. However, circumstances may arise where it is in the interests of transferring employees and a new employer to consolidate those terms and conditions of employment, so that they can apply to more than one employee. This could occur, for example, where different instruments set out similar terms and conditions for transferring employees.

61. It may also be appropriate in some circumstances for non-transferring employees of the new employer to be covered by consolidated terms and conditions of employment of transferring employees. For example, the new employer may prefer its existing workforce to be covered by a copied State instrument.

62. This Division enables FWA to consolidate various workplace instruments applying at a workplace. FWA may order that a copied State instrument for a particular transferring employee is also a copied State instrument for both transferring and non-transferring

employees, having regard to the matters listed in new subsections 768BD(3) and 768BG(4) respectively.

63. In relation to transferring employees, FWA may make a consolidation order (as defined) that a copied State instrument for a transferring employee (employee A) is also a copied State instrument for another transferring employee (employee B) (but not necessarily all transferring employees). A legislative note makes it clear that FWA may make a consolidation order that has the effect of applying a copied State instrument to more than one transferring employee.

64. FWA may make a consolidation order on its own initiative, or on application by:

- employee B;
- the new employer;
- an employee organisation that is entitled to represent the industrial interests of employee B.

65. In relation to non-transferring employees, FWA may make a consolidation order that a copied State instrument for a transferring employee (employee A) is also a copied State instrument for a non-transferring employee (employee C) who performs the transferring work. This rule is similar to the position under paragraph 319(1)(b) of the FW Act.

66. FWA may make a consolidation order on its own initiative, or on application by:

- employee C;
- the new employer;
- an employee organisation that is entitled to represent the industrial interests of employee C.

New Division 8 – Special rules for copied State instruments

67. New Division 8 sets out various rules for copied State instruments for transferring employees. These rules deal with:

- what happens when an original State award or agreement doesn't have a procedure for settling disputes;
- the treatment of service, accrued and non-accrued entitlements for transferring employees;
- the ability for FWA to make remedial take-home pay orders where the take-home pay of a transferring employee is reduced because a relevant copied State award sunsets and the employee moves to a modern award;
- necessary modifications to the FW Act, Transitional Act and Registered Organisations Act in relation to copied State instruments.

Terms about disputes

68. If the original State instrument included a procedure for settling disputes then the corresponding copied State instrument retains that mechanism except that a reference to a State industrial body is taken to be a reference to FWA (see new section 768BY).

69. However, if the original State instrument did not include a procedure for settling disputes about matters arising under the instrument then this provision inserts the model dispute resolution term that is prescribed by the regulations into the copied State instrument.

Service and entitlements of a transferring employee

Service for the purposes of this Act

70. As a general rule, a transferring employee's service with an old employer before the employee's termination time counts as service for the purposes of determining entitlements under the NES after the employee's re-employment time.

NES – working out non-accruing entitlements

71. However, this rule does not apply to the calculation of redundancy pay under the NES if an employee's terms and conditions of employment immediately before the employee's termination time did not provide any entitlement to redundancy pay. This is to prevent an employer suddenly incurring a contingent liability to pay redundancy pay when they have not previously been required to make provision in their accounts for this entitlement.

72. Any period that occurs between the employee's termination time with the old employer and the employee's re-employment time with the new employer does not break the employee's continuity of service (although the period does not count towards the length of an employee's continuous service with the new employer).

73. A period of service will not be counted again for the purposes of calculating a NES entitlement where an employee has already had the benefit of an entitlement of that kind, calculated by reference to that period of service. This is to prevent an employee 'double dipping'. However, this rule does not require an employee to restart an initial qualifying period of service for the purposes of long service leave (new subsection 768BM(3)).

NES – working out accruing entitlements

74. Where a transferring employee has accrued paid annual leave or paid personal/carer's leave under the original State award or original State agreement for the copied State instrument, or under a State industrial law of the State or otherwise, immediately before the employee's termination time, the provisions of the NES relating to the taking of the leave (including payment for the leave) and cashing out of that leave will apply, as a minimum standard, to the leave.

75. This means that paid personal/carer's and paid annual leave that has accrued before the employee's termination time, is treated as if it were accrued under the NES with the NES rules applying to that leave, as a minimum. More favourable arrangements will continue to apply.

76. So, for example, if a transferring employee is entitled to a higher rate of pay than guaranteed by the NES, this will continue to apply.

Copied State instrument - service

77. This new Division provides that, as a general rule, an employee's service with the old employer before the employee's termination time counts as service for the purpose of determining entitlements under the copied State instrument.

Copied State instrument – working out non-accruing entitlements

78. A period of service will not be counted again for the purposes of calculating an entitlement under the copied State instrument where an employee has already had the benefit of an entitlement of that kind, calculated by reference to that period of service. This is to prevent an employee 'double dipping'. However, this rule does not require an employee to restart an initial qualifying period of service for the purposes of long service leave.

Copied State instrument – working out accruing entitlements

79. Where a transferring employee had accrued paid annual leave or paid personal/carer's leave under the original State award, agreement or industrial law, immediately before the employee's termination time, the accrued leave is taken to have been accrued under the copied State instrument for the employee.

Cessation of copied State awards: avoiding reductions in take home pay

80. Where a copied State award ceases to operate because of new subsection 768AO(2) (sunsetting), it is not intended to result in a reduction in take home pay for transferring employees previously covered by the instrument who are then covered by a modern award.

81. This Division sets out the process to be followed where an employee suffers a reduction in take-home pay (as defined).

82. A transferring employee suffers a reduction in take-home pay if:

- the employee becomes covered by a modern award because the copied State award that covered them ceases to operate under new subsection 768AO(2); and
- the employee is employed in the same (or a comparable) position as the one he or she was employed in immediately before the cessation of the copied State award; and
- the amount of the employee's take-home pay for working particular hours or for a particular quantity of work after the cessation of the copied State award is less than the employee would have received immediately before the cessation; and
- the reduction is a direct result of the cessation of the copied State award.

83. To remedy a reduction in take-home pay, FWA may make a take-home pay order. Take-home pay orders may be made by FWA on its own initiative or on an application by a transferring employee who has suffered a reduction in take-home pay, or an organisation entitled to represent such an employee.

84. Civil remedy provisions apply in relation to contravention of a take-home pay order.

85. The Division also sets out the interaction rules as between take-home pay orders and modern awards and enterprise agreements.

Modification of the FW Act, Transitional Act and the Registered Organisations Act

86. This Division also provides for the modification of certain provisions of the FW Act, the Transitional Act and the Registered Organisations Act.

Modification of the FW Act for copied State instruments

87. New section 768BX modifies certain provisions of the FW Act so that they have effect in relation to a transferring employee on and after the employee's re-employment time in a similar way to an employee who was relevantly covered by a modern award or enterprise agreement rather than a copied State instrument. It does this by providing that that references in those provisions to:

- 'modern award' include a reference to a copied State award;
- 'enterprise agreement' include a reference to a copied State employment agreement; and
- 'fair work instrument' include a reference to a copied State instrument.

Modification of the Transitional Act for copied State instruments

88. New section 768BY modifies relevant transitional provisions (as defined in new subsection 768BY(2)) of the Transitional Act in relation to a transferring employee to provide that references to certain terms in those transitional provisions are taken to include a reference to the terms referred to in column 2 of new subsection 768BY(1). Further, the transitional provision as amended has effect from the time specified in column 3 of new subsection 768BY(2).

89. For example, Part 5 of Schedule 9 to the Transitional Act deals with base rates of pay. That Part, among other things, contains references to the term 'Division 2B State award'.

90. New subsection 768BY(1) has the effect that the reference to 'Division 2B State award' is a reference to 'a copied State award for the transferring employee'. That new reference takes effect from the transferring employee's re-employment time (column 3 of item 14 of the table in new subsection 768BY(2)).

Modification of the Registered Organisations Act for copied State instruments

91. New section 768BZ makes clear that the Registered Organisations Act has effect in relation to a transferring employee on and after the employee's termination time and makes certain necessary modification to that Act.

92. The regulations may deal with other matters relating to how the Registered Organisations Act applies in relation to a transferring employee.

New Division 9 – Regulations

93. New section 768CA provides a regulation-making power that includes the power to:

- make transitional provisions related to the transition from State awards and State employment agreements to copied State instruments, and from copied state instruments to modern awards and enterprise agreements;
- provide that provisions of the FW Act or the Transitional Act apply with specified modifications and/or otherwise make provision as to how they apply in relation to transferring employees or new employers; and
- make provision in relation to non-transferring employees and provide that provisions of the FW Act or the Transitional Act apply to non-transferring employees with specified modifications. These provisions are necessary to deal with any consequences relating to transitional arrangements and to ensure a smooth transition in particular for employees transferring to the national system.

94. New subsection 768CA(3) makes clear that this section does not permit regulations to be made that would have the effect of creating offences.

Part 2 – Other amendments

Fair Work Act 2009

Item 2 – After subsection 9(4)

95. This item inserts new subsection 9(4A) which sets out the key elements to new Part 6-3A to the FW Act.

Item 3 – Section 9A (note)

Item 5 – Section 12 (paragraphs (a), (b) and (c) of the definition of *award modernisation process*)

Item 44 – paragraphs 14A(2)(a) and (b)

Item 48 – Paragraph 113(3A)(b)

Item 49 – Subsection 113(7)

Item 50 – Subsection 113A(4)

Item 51 – Subsections 143(8) and (10)

Item 52 – Subsection 168C(1) (note)

Item 53 – Subsection 168G(4)

Item 61 – Subparagraph 789CA(1)(c)(iv)

Item 62 – Paragraphs 789DE(2)(c) and 5(c)

Item 63 – Paragraph 4(1)(b) of Schedule 1

Item 65 – Subclause 7(3) of Schedule 1

Item 66 – Paragraph 7(4)(a) of Schedule 1

96. These items replace references to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* with the term Transitional Act.

Item 4 – Section 12 (at the end of the definition of *applies*)

97. This item amends the definition of *applies* by inserting a new signpost definition for the term copied State instrument.

Item 6 – Section 12

Item 7 – Section 12

Item 8 – Section 12

Item 9 – Section 12

Item 10 – Section 12

Item 11 – Section 12

Item 13 – Section 12

Item 14 – Section 12

Item 15 – Section 12

Item 18 – Section 12

Item 22 – Section 12

Item 24 – Section 12

Item 25 – Section 12

Item 26 – Section 12

Item 27 – Section 12

Item 29 – Section 12

Item 30 – Section 12

Item 31 – Section 12

Item 32 – Section 12

Item 33 – Section 12

Item 36 – Section 12

Item 37 – Section 12

Item 38 – Section 12

98. These items insert signpost definitions into section 12 of the FW Act – that is, provisions that point readers to definitions included in the substantive provisions of the FW Act.

Item 12 – Section 12 (at the end of the definition of *covers*)

99. This item amends the definition of *covers* by inserting a new signpost definition for the term copied State instrument.

Item 16 – Section 12 (paragraph (c) of the definition of *industrial body*)

Item 17 – Section 12 (paragraph (b) of the definition of *industrial law*)

Item 23 – Section 12 (definition of *organisation*)

Item 43 – Section 12 (paragraph (b) of the definition of *workplace law*)

Item 46 – Paragraph 48(2)(a)

Item 47 – Paragraph 53(3)(a)

Item 56 – Section 576 (note)

Item 57 – Subparagraph 596(4)(b)(ii)

Item 58 – Paragraph 604(1)(b)

Item 59 – Subparagraph 613(2)(a)(ii)

100. These items replace references to the *Fair Work (Registered Organisations) Act 2009* with the term Registered Organisations Act.

Item 19 – Section 12 (definition of *new employer*)

101. This item repeals the current definition of *new employer* in section 12 and substitutes a new signpost definition that differentiates between a transfer of business referred to in Part 2-8 and a transfer of business referred to in new Part 6-3A.

Item 20 – Section 12 (at the end of the definition of *nominal expiry date*)

102. This item amends the current definition of *nominal expiry date* in section 12 by inserting a new signpost definition for the term in the context of a copied State employment agreement.

Item 21 – Section 12 (definition of *non-transferring employee*)

103. This item repeals the current definition of *non-transferring employee* in section 12 and substitutes a new signpost definition that differentiates between a transfer of business referred to in Part 2-8 and a transfer of business referred to in new Part 6-3A.

Item 28 – Section 12

104. This item inserts a definition of Registered Organisations Act, which means the *Fair Work (Registered Organisations) Act 2009*.

Item 34 – Section 12

105. This item inserts a new definition of State public sector employee. It provides that a State public sector employee of a State is an employee of a State public sector employer of the State or any other non-national system employee in the State of a kind that is prescribed by the regulations, and specifically includes a law enforcement officer of the State.

Item 35 – Section 12

106. This item inserts a new definition of State public sector employer. It provides that a State public sector employer of a State is a non-national system employer that is:

- the State, the Governor of the State or a Minister of the State;
- a body corporate that is established for a public purposes by or under a law of the State, by the Governor or a Minister of the State;
- a body corporate in which the State has a controlling interest;
- a person who employs individuals for the purposes of an unincorporated body that is established for a public purposes by or under a law of the State, by the Governor or a Minister of the State; or
- any other employer in the State of a kind specified in the regulations.

107. The definition of State public sector employer specifically includes a non-national system employer of law enforcement officers of the State.

Item 39 – Section 12 (definition of *transfer of business*)

108. This item repeals the current definition of transfer of business in section 12 and substitutes a new signpost definition that differentiates between a transfer of business between two national system employers and a transfer of business between a non-national system employer that is a State public sector employer and a national system employer.

Item 40 – Section 12 (definition of *transferring employee*)

109. This item repeals the current definition of transferring employee in section 12 and substitutes a new signpost definition that differentiates between a transfer of business referred to in Part 2-8 and a transfer of business referred to in new Part 6-3A.

Item 41 – Section 12 (definition of *transferring work*)

110. This item repeals the current definition of transferring work in section 12 and substitutes a new signpost definition that differentiates between a transfer of business referred to in Part 2-8 and a transfer of business referred to in new Part 6-3A.

Item 42 – Section 12

111. This item inserts a definition of Transitional Act, which means the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Item 45 – At the end of subsection 43(1)

112. This item inserts a new note to subsection 43(1) which alerts the reader that copied State instruments provide the main terms and conditions of employment for an employee to whom the instrument applies.

Item 54 – Section 307 (at the end of the first paragraph)

113. This item amends section 307, which is the guide to Part 2-8 of the FW Act. It adds a signpost to new Part 6-3A for a transfer of business from a non-national system employer that is a State public sector employer to a national system employer.

Item 55 – Subsection 539(2) (after table item 34)

114. This item amends subsection 539(2), which sets out a table of civil remedy provisions. In relation to each civil remedy provision, the table identifies who has standing to apply for an order; the courts to which an application for an order may be made; and the maximum penalty that may be imposed by a court. This item inserts two new civil remedy provisions in respect of transfers of business under new Part 6-3A to the FW Act.

Item 60 – After paragraph 789BA(1)(e)

115. This item inserts a new paragraph 789BA(1)(ea) into Division 2 of Part 6-4A to the FW Act, which deems certain textile clothing and footwear contract outworkers to be employees in certain circumstances.

116. New paragraph 789BA(1)(ea) provides that Division 2 of Part 6-4A to the FW Act does not cover new Part 6-3A to the FW Act.

Item 64 – Subclause 7(3) of Schedule 1 (heading)

117. This item repeals the current heading and replaces it with ‘Application to TCF outworkers of provisions of the Transitional Act’.

Item 67 – After Part 1 of Schedule 1

118. This item inserts a new Part 2 into Schedule 1 to the FW Act, which deals with application, saving and transitional provisions relating to amendments of the FW Act.

119. New Part 2 of Schedule 1 to the FW Act will provide that the amendments to the FW Act made by this Bill will only apply in relation to a transfer of business referred to in

new Part 6-3A if the connection between the old State employer and the new employer referred to in paragraph 768AD(1)(d) of the amended Act occurs on or after commencement.

Fair Work (Registered Organisations) Act 2009

Item 68 – After subclause 2(1) of Schedule 1

120. Item 68 inserts new subclause 2(1A) into Schedule 1 of the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) to enable certain State-registered associations to apply to the General Manager of FWA for transitional recognition in the federal workplace relations system. Provision for a new category of transitional recognition in Schedule 1 is intended to provide State-registered associations, subject to the limitations set out in new subparagraphs 2(1A)(a) to (e) and the relevant eligibility rules, with the opportunity to be transitionally recognised in the federal system because they are, or are likely to be, covered by a copied State instrument. State-registered associations will be able to make application under this provision within five years of commencement or such later time prescribed by regulation.

121. New subparagraph 2(1A)(d) makes clear that State-registered associations which are already transitionally recognised under subclause 2(1) of Schedule 1 cannot apply for transitional recognition under new subclause 2(1A).

Item 69 – Paragraph 2(2)(a) of Schedule 1

Item 70 – Subclause 2(3) of Schedule 1

122. Items 69 and 70 make amendments to paragraph 2(2)(a) and subclause 2(3)) which are consequential upon the insertion of new subclause 2(1A) by item 68.

Item 71 – After subclause 5(1) of Schedule 1

123. Item 71 inserts new subclause 5(1A) which provides that a reference in subclause 5(1) in relation to a transitionally recognised association that has received transitional recognition under new subclause 2(1A) to the reform commencement is taken to be a reference to the day of the commencement of the *Fair Work Amendment (Transfer of Business) Act 2012*.

Item 72 – Subclause 6(1) of Schedule 1

124. Item 72 makes an amendment to subclause 6(1) to make clear that the clause relates to the end of transitional recognition arising from an application under subclause 2(1).

Item 73 – After subclause 6(1) of Schedule 1

125. Item 72 inserts new subclause 6(1A) which provides for the expiration of transitional recognition which has been granted in relation to an application under new subclause 2(1A) as inserted by item 68.

126. Under new subclause 6(1A) transitional recognition granted in relation to an application under new subclause 2(1A) will end:

- when it is cancelled under clause 5 of Schedule 1 of the Registered Organisations Act;

- when the association becomes an organisation;
- in any other case, at the end of the latest of the day that is the fifth anniversary of the day the *Fair Work Amendment (Transfer of Business) Act 2012* commenced and a day prescribed by the regulations, or if an extension is granted under subclause 6(2) or 6(3), the anniversary or second anniversary of the default day respectively.

Item 74 – Subclause 6(2) of Schedule 1

Item 75 – Subclause 6(3) of Schedule 1

127. Items 74 and 75 make amendments to subclause 6(2) and subclause 6(3) which are consequential upon the insertion of new paragraph 6(1A)(c) by item 73.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Item 76 – Paragraph 11(1)(b) of Schedule 3A

128. This item omits the word ‘transitional’ to correct an error.