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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Fair Work Amendment (Transfer of
Business) Bill 2012**

No. , 2012

(Education, Employment and Workplace Relations)

**A Bill for an Act to amend the law relating to
workplace relations, and for related purposes**

Contents

1	Short title.....	1
2	Commencement.....	1
3	Schedule(s).....	1

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

		3
Part 1—Main amendments		3
<i>Fair Work Act 2009</i>		3
Part 2—Other amendments		47
<i>Fair Work Act 2009</i>		47
<i>Fair Work (Registered Organisations) Act 2009</i>		57
<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>		59

1 **A Bill for an Act to amend the law relating to**
2 **workplace relations, and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Fair Work Amendment (Transfer of*
6 *Business) Act 2012*.

7 **2 Commencement**

8 This Act commences on the day after this Act receives the Royal
9 Assent.

10 **3 Schedule(s)**

11 Each Act that is specified in a Schedule to this Act is amended or
12 repealed as set out in the applicable items in the Schedule

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concerned, and any other item in a Schedule to this Act has effect according to its terms.

1 **Schedule 1—Transfer of business from a State**
2 **public sector employer**

3 **Part 1—Main amendments**

4 *Fair Work Act 2009*

5 **1 After Part 6-3**

6 Insert:

7 **Part 6-3A—Transfer of business from a State**
8 **public sector employer**

9 **Division 1—Introduction**

10 **768AA Guide to this Part**

11 This Part provides for the transfer of certain terms and conditions
12 of employment when there is a transfer of business from a
13 non-national system employer that is a State public sector
14 employer (called “the old State employer”) to a national system
15 employer (called “the new employer”).

16 A transfer of business involves the transfer of employment of one
17 or more employees of the old State employer to the new employer.
18 Each of those employees is a “transferring employee”.

19 If there is a transfer of business, then this Part provides for certain
20 terms and conditions of employment with the old State employer to
21 be transferred to the employment of the transferring employee with
22 the new employer.

23 This Part achieves the transfer of those terms and conditions by
24 creating a new instrument—a “copied State instrument”—for each
25 transferring employee. The new instrument is a federal instrument
26 and is enforceable under this Act.

1 **768AB Meanings of *employee* and *employer***

2 In this Part, *employee* means a national system employee, and
3 *employer* means a national system employer.

4 **Division 2—Copying terms of State instruments when**
5 **there is a transfer of business**

6 **768AC What this Division is about**

7 This Division sets out when there is a transfer of business from the
8 old State employer to the new employer.

9 **768AD When does a transfer of business occur?**

10 *When there is a transfer of business*

- 11 (1) There is a ***transfer of business*** from a non-national system
12 employer that is a State public sector employer of a State (the ***old***
13 ***State employer***) to a national system employer (the ***new employer***)
14 if the following requirements are satisfied:
- 15 (a) the employment of a person who is a State public sector
16 employee of the old State employer has terminated;
 - 17 (b) within 3 months after the termination, the person becomes
18 employed by the new employer;
 - 19 (c) the work (the ***transferring work***) the person performs for the
20 new employer is the same, or substantially the same, as the
21 work the person performed for the old State employer;
 - 22 (d) there is a connection between the old State employer and the
23 new employer as described in subsection (2), (3) or (4).

24 *Transfer of assets from old State employer to new employer*

- 25 (2) There is a connection between the old State employer and the new
26 employer if, in accordance with an arrangement between:
- 27 (a) the old State employer or an associated entity of the old State
28 employer; and
 - 29 (b) the new employer or an associated entity of the new
30 employer;

1 the new employer, or the associated entity of the new employer,
2 owns or has the beneficial use of some or all of the assets (whether
3 tangible or intangible):

4 (c) that the old State employer, or the associated entity of the old
5 State employer, owned or had the beneficial use of; and

6 (d) that relate to, or are used in connection with, the transferring
7 work.

8 *Old State employer outsources work to new employer*

- 9 (3) There is a connection between the old State employer and the new
10 employer if the transferring work is performed by one or more
11 transferring employees, as employees of the new employer,
12 because the old State employer, or an associated entity of the old
13 State employer, has outsourced the transferring work to the new
14 employer or an associated entity of the new employer.

15 *New employer is an associated entity of old employer*

- 16 (4) There is a connection between the old State employer and the new
17 employer if the new employer is an associated entity of the old
18 State employer when the transferring employee becomes employed
19 by the new employer.

20 **768AE Meaning of *transferring employee*, *termination time* and**
21 ***re-employment time***

- 22 (1) The person referred to in paragraphs 768AD(1)(a), (b) and (c) is a
23 ***transferring employee*** in relation to the transfer of business.
- 24 (2) The ***termination time*** of a transferring employee is the start of the
25 day the employment of the employee is terminated by the old State
26 employer.
- 27 (3) The ***re-employment time*** of a transferring employee is the start of
28 the day the employee becomes employed by the new employer.

1 **Division 3—Copied State instruments**

2 **Subdivision A—Guide to this Division**

3 **768AF What this Division is about**

4 If there is a transfer of business, then this Division provides for
5 certain terms and conditions of a transferring employee’s
6 employment with the old State employer to be transferred to the
7 employment with the new employer.

8 The transfer of those terms and conditions is achieved by creating a
9 new instrument—called a “copied State instrument”—for the
10 transferring employee. The new instrument is a federal instrument
11 that is enforceable under this Act.

12 There are 2 types of copied State instruments—a copied State
13 award and a copied State employment agreement.

14 A copied State award copies the terms of a State award that
15 covered the transferring employee and the old State employer
16 immediately before the termination of the employee’s employment
17 with the old State employer.

18 A copied State employment agreement copies the terms of a State
19 employment agreement that covered the transferring employee and
20 the old State employer immediately before the termination of the
21 employee’s employment with the old State employer.

22 **Subdivision B—Copied State instruments**

23 **768AG Contravening a copied State instrument**

24 A person must not contravene a term of a copied State instrument
25 for a transferring employee that applies to the person.

26 Note 1: This section is a civil remedy provision (see Part 4-1).

27 Note 2: For when a copied State instrument for a transferring employee
28 applies to a person, see section 768AM.

1 **768AH What is a copied State instrument?**

2 A *copied State instrument* for a transferring employee is the
3 following:

- 4 (a) a copied State award for the employee;
5 (b) a copied State employment agreement for the employee.

6 **768AI What is a copied State award?**

7 (1) If:

- 8 (a) there is a transfer of business between the old State employer
9 and the new employer; and
10 (b) immediately before the termination time of a transferring
11 employee in relation to the transfer of business:
12 (i) a State award (the *original State award*) was in
13 operation under the State industrial law of the State; and
14 (ii) the original State award covered (however described in
15 the original State award or a relevant law of the State)
16 the old State employer and the transferring employee
17 (whether or not the original State award also covered
18 other persons);

19 then a *copied State award* for the transferring employee is taken to
20 come into operation immediately after the termination time.

21 Note 1: Even though a copied State award comes into operation in relation to
22 the transferring employee, it will not be enforceable by the employee
23 or another person (for example, the new employer) unless and until it
24 applies to the employee or other person. In particular, it will not apply
25 to the employee or new employer before the employee becomes
26 employed by the new employer. For when the copied State award
27 applies to a person, see section 768AM.

28 Note 2: A copied State employment agreement for the transferring employee
29 may also come into operation immediately after the termination time,
30 see subsection 768AK(1). If it does, then the State's interaction rules
31 that were in force immediately before the termination time apply for
32 the purposes of working out the interaction between the copied State
33 award and the copied State employment agreement (see item 11 of
34 Schedule 3A to the Transitional Act as that item applies in a modified
35 way because of section 768BY).

36 (2) The copied State award is taken to include the same terms as were
37 in the original State award immediately before the termination
38 time.

39 Note: The State's instrument content rules that were in force immediately
40 before the termination time apply to the copied State award (see

Schedule 1 Transfer of business from a State public sector employer

Part 1 Main amendments

1 item 10 of Schedule 3A to the Transitional Act as that item applies in
2 a modified way because of section 768BY).

- 3 (3) If the terms of the original State award were affected by an order, a
4 decision or a determination of a State industrial body or a court of
5 the State that was in operation immediately before the termination
6 time, the terms of the copied State award are taken to be similarly
7 affected by the terms of that order, decision or determination.

8 **768AJ What is a State award?**

- 9 (1) A *State award* is an instrument in relation to which the following
10 conditions are satisfied:
11 (a) the instrument regulates terms and conditions of
12 employment;
13 (b) the instrument was made under a State industrial law by a
14 State industrial body;
15 (c) the instrument is referred to in that law as an award.
- 16 (2) However, the regulations may provide that an instrument of a
17 specified kind:
18 (a) is a *State award*; or
19 (b) is not a *State award*.

20 **768AK What is a copied State employment agreement?**

- 21 (1) If:
22 (a) there is a transfer of business between the old State employer
23 and the new employer; and
24 (b) immediately before the termination time of a transferring
25 employee in relation to the transfer of business:
26 (i) a State employment agreement (the *original State*
27 *agreement*) was in operation under a State industrial
28 law of the State; and
29 (ii) the original State agreement covered (however
30 described in the original State agreement or a relevant
31 law of the State) the old State employer and the
32 transferring employee (whether or not the original State
33 agreement also covered other persons);

1 then a *copied State employment agreement* for the transferring
2 employee is taken to come into operation immediately after the
3 termination time.

4 Note 1: Even though a copied State employment agreement comes into
5 operation for the transferring employee, it will not be enforceable by
6 the employee or another person (for example, the new employer)
7 unless and until it applies to the employee or other person. In
8 particular, it will not apply to the employee or new employer before
9 the employee becomes employed by the new employer. For when the
10 copied State employment agreement applies to a person, see
11 section 768AM.

12 Note 2: A copied State award for the transferring employee may also come
13 into operation immediately after the termination time, see subsection
14 768AI(1). If it does, then the State's interaction rules that were in
15 force immediately before the termination time apply for the purposes
16 of working out the interaction between the copied State employment
17 agreement and the copied State award (see item 11 of Schedule 3A to
18 the Transitional Act as that item applies in a modified way because of
19 section 768BY).

20 (2) The copied State employment agreement is taken to include the
21 same terms as were in the original State agreement immediately
22 before the termination time.

23 Note: The State's instrument content rules that were in force immediately
24 before the termination time apply to the copied State employment
25 agreement (see item 10 of Schedule 3A to the Transitional Act as that
26 item applies in a modified way because of section 768BY).

27 (3) If the terms of the original State employment agreement were
28 affected by an order, a decision or a determination of a State
29 industrial body or a court of the State that was in operation
30 immediately before the termination time, the terms of the copied
31 State employee agreement are taken to be similarly affected by the
32 terms of that order, decision or determination.

33 (4) If the original State agreement is a collective State employment
34 agreement, the copied State employment agreement is a *copied*
35 *State collective employment agreement*.

36 (5) If the original State agreement is an individual State employment
37 agreement, the copied State employment agreement is a *copied*
38 *State individual employment agreement*.

39 **768AL What is a State employment agreement?**

40 (1) A *State employment agreement* is:

Schedule 1 Transfer of business from a State public sector employer

Part 1 Main amendments

- 1 (a) an agreement in relation to which the following conditions
2 are satisfied:
- 3 (i) the agreement is between a non-national system
4 employer and one or more of the employees of the
5 employer, or between a non-national system employer
6 and an association of employees registered under a State
7 industrial law;
- 8 (ii) the agreement determines terms and conditions of
9 employment of one or more employees of the employer;
- 10 (iii) the agreement was made under a State industrial law; or
- 11 (b) a determination in relation to which the following conditions
12 are satisfied:
- 13 (i) the determination determines terms and conditions of
14 employment;
- 15 (ii) the determination was made under a State industrial law
16 by a State industrial body;
- 17 (iii) the determination was made in a situation in which
18 parties who were negotiating for the making of an
19 agreement of a kind described in paragraph (a) had not
20 been able to reach an agreement;
- 21 (iv) the purpose of the determination was to resolve the
22 matters that were at issue in those negotiations.
- 23 (2) However, the regulations may provide that an instrument of a
24 specified kind:
- 25 (a) is a *State employment agreement*; or
26 (b) is not a *State employment agreement*.
- 27 (3) A State employment agreement is a *State collective employment*
28 *agreement* unless:
- 29 (a) it is an agreement of a kind that, under the relevant State
30 industrial law, could only be entered into by a single
31 employee and a single employer; or
32 (b) the agreement is of a kind prescribed by the regulations.
- 33 (4) A State employment agreement referred to in paragraph (3)(a) or
34 (b) is a *State individual employment agreement*.

1 **768AM When does a copied State instrument apply to a person?**

2 *Transferring employee and organisations*

- 3 (1) A copied State instrument for a transferring employee *applies* to
4 the transferring employee or an organisation if:
5 (a) the instrument covers the employee or organisation; and
6 (b) the instrument is in operation; and
7 (c) no other provision of this Act provides, or has the effect, that
8 the instrument does not apply to the employee or
9 organisation; and
10 (d) immediately before the employee's termination time, the
11 employee or organisation would have been:
12 (i) required by the law of the State to comply with terms of
13 the original State award or original State agreement for
14 the instrument; or
15 (ii) entitled under the law of the State to enforce terms of
16 the original State award or original State agreement for
17 the instrument.

18 *New employer and other employers*

- 19 (2) A copied State instrument for a transferring employee *applies* to an
20 employer (whether the new employer or another employer) if:
21 (a) the instrument covers the employer; and
22 (b) the instrument is in operation; and
23 (c) no other provision of this Act provides, or has the effect, that
24 the instrument does not apply to the employer; and
25 (d) immediately before the employee's termination time, the old
26 State employer would have been:
27 (i) required by the law of the State to comply with terms of
28 the original State award or original State agreement for
29 the instrument; or
30 (ii) entitled under the law of the State to enforce terms of
31 the original State award or original State agreement for
32 the instrument.

33 Note: This subsection may operate in relation to an employer that is not the
34 new employer in the situation where there has been a later transfer of
35 business by the new employer (see Part 2-8).

1 *Other circumstances when instrument applies*

- 2 (3) A copied State instrument for a transferring employee also ***applies***
3 to a person if an FWA order made under a provision of this Act
4 provides, or has the effect, that the instrument applies to the
5 person.

6 *Instrument only applies in relation to transferring work*

- 7 (4) A reference in this Act to a copied State instrument for a
8 transferring employee applying to the employee is a reference to
9 the instrument applying to the employee in relation to the
10 transferring work of the employee.

11 **768AN When does a copied State instrument cover a person?**

12 *Transferring employee and new employer*

- 13 (1) A copied State instrument for a transferring employee ***covers*** the
14 employee and the new employer in relation to the transferring work
15 from the employee's re-employment time.

16 *Employee organisation*

- 17 (2) A copied State instrument for a transferring employee ***covers*** an
18 employee organisation in relation to the employee if:
19 (a) the instrument covers the employee because of
20 subsection (1); and
21 (b) immediately before the employee's termination time, the
22 original State award or original State agreement for the
23 instrument covered (however described in the original State
24 award or original State agreement or in a relevant law of the
25 State) the organisation in relation to the employee.

26 *Employer organisation*

- 27 (3) A copied State instrument for a transferring employee ***covers*** an
28 employer organisation in relation to the new employer if:
29 (a) the instrument covers the new employer because of
30 subsection (1); and
31 (b) immediately before the employee's termination time, the
32 original State award or original State agreement for the
33 instrument covered (however described in the original State

1 award or original State agreement or in a relevant law of the
2 State) the organisation in relation to the old State employer.

3 *Other circumstances when a person is covered*

4 (4) A copied State instrument for a transferring employee also **covers** a
5 person if any of the following provides, or has the effect, that the
6 instrument covers the person:

7 (a) a provision of this Act or of the Registered Organisations
8 Act;

9 (b) an FWA order made under a provision of this Act;

10 (c) an order of a court.

11 Example: FWA may make a consolidation order specifying that the instrument
12 covers a person specified in the order (see subsections 768BE(1) and
13 768BH(1)).

14 *Circumstances when a person is not covered*

15 (5) Despite subsections (1), (2), (3) and (4), a copied State instrument
16 for a transferring employee does not **cover** a person if any of the
17 following provides, or has the effect, that the instrument does not
18 cover the person:

19 (a) a provision of this Act;

20 (b) an FWA order made under a provision of this Act;

21 (c) an order of a court.

22 Example: If, after the transferring employee's re-employment time, an enterprise
23 agreement starts to cover the employee, subsection 768AU(2)
24 provides that a copied State instrument for the employee ceases to
25 cover the employee.

26 (6) Despite subsections (1), (2), (3) and (4), a copied State instrument
27 for a transferring employee that has ceased to operate does not
28 **cover** a person.

29 *Covered only in relation to transferring work*

30 (7) A reference to a copied State instrument for a transferring
31 employee covering the employee is a reference to the instrument
32 covering the employee in relation to the transferring work of the
33 employee.

1 **768AO When is a copied State instrument in operation?**

2 *When instrument comes into operation*

- 3 (1) A copied State instrument for a transferring employee comes into
4 operation immediately after the employee's termination time.

5 *When copied State award ceases to operate*

- 6 (2) A copied State award for a transferring employee ceases to operate
7 at the following time:

- 8 (a) unless paragraph (b) applies—the end of the period (the
9 **default period**) that is 5 years or such longer period as is
10 prescribed by the regulations, starting on the day the
11 employee's termination time occurred;
- 12 (b) if the regulations allow FWA to make an order to extend the
13 period of operation of a copied State award for a transferring
14 employee and, in accordance with those regulations, FWA
15 makes an order that the award operates for a period that is
16 longer than the default period—the end of that period.

- 17 (3) The regulations may:

- 18 (a) prescribe circumstances in which FWA may make an order
19 for the purposes of paragraph (2)(b); and
20 (b) prescribe a maximum period that the order may specify; and
21 (c) otherwise make provision in relation to the making of the
22 order.

23 *When copied State agreement ceases to operate*

- 24 (4) A copied State employment agreement for a transferring employee
25 ceases to operate when it is terminated, which may happen before
26 or after the nominal expiry date of the agreement.

27 Note 1: See section 768AY for how the copied State employment agreement
28 can be terminated.

29 Note 2: If, after the transferring employee's re-employment time with the new
30 employer, an enterprise agreement is made that covers the employee
31 and the new employer, then the copied State employment agreement
32 will cease to cover the employee and the new employer and will never
33 cover them again, see section 768AU.

- 34 (5) The **nominal expiry date** of a copied State employment agreement
35 for a transferring employee is:

- 1 (a) the day the original State agreement would nominally have
2 expired under the State industrial law of the State; or
3 (b) if that day falls after the end of 4 years beginning on the day
4 the employee's termination time occurs—the last day of that
5 4-year period.

6 *Once instrument ceases operation, can never operate again*

- 7 (6) A copied State instrument for a transferring employee that has
8 ceased to operate can never operate again.

9 **Division 4—Interaction between copied State instruments**
10 **and the NES, modern awards and enterprise**
11 **agreements**

12 **Subdivision A—Guide to this Division**

13 **768AP What this Division is about**

14 This Division provides for how copied State instruments interact
15 with the National Employment Standards, modern awards and
16 enterprise agreements.

17 **Subdivision B—Interaction with the NES**

18 **768AQ Interaction between the NES and a copied State instrument**

19 To the extent that a term of a copied State instrument for a
20 transferring employee is detrimental to the employee, in any
21 respect, when compared to an entitlement of the employee under
22 the National Employment Standards, the term of the instrument is
23 of no effect.

24 **768AR Provisions of the NES that allow instruments to contain**
25 **particular kinds of terms**

26 *Application of particular provisions of the NES*

- 27 (1) The following provisions have effect, on and after the
28 re-employment time of a transferring employee, as if a reference to

Schedule 1 Transfer of business from a State public sector employer

Part 1 Main amendments

- 1 a modern award or an enterprise agreement included a reference to
2 a copied State instrument for the transferring employee:
- 3 (a) section 63 (which allows terms dealing with averaging of
4 hours of work);
 - 5 (b) section 93 (which allows terms dealing with cashing out and
6 taking paid annual leave);
 - 7 (c) section 101 (which allows terms dealing with cashing out
8 paid personal/carer's leave);
 - 9 (d) subsection 107(5) (which allows terms dealing with evidence
10 requirements for paid personal/carer's leave etc.);
 - 11 (e) subsection 115(3) (which allows terms dealing with
12 substitution of public holidays);
 - 13 (f) section 118 (which allows terms dealing with an employee
14 giving notice to terminate his or her employment);
 - 15 (g) subsections 121(2) and (3) (which allow terms specifying
16 situations in which the redundancy pay entitlement under
17 section 119 does not apply);
 - 18 (h) section 126 (which allows terms providing for school-based
19 apprentices and trainees to be paid loadings in lieu).

20 *Terms about paid annual leave and personal/carer's leave*

- 21 (2) If a copied State instrument for a transferring employee:
- 22 (a) includes terms referred to in subsection 93(1) but the terms
23 do not include the requirements referred to in subsection
24 93(2); or
 - 25 (b) includes terms referred to in subsection 101(1) but the terms
26 do not include the requirements referred to in subsection
27 101(2);
- 28 then the instrument is taken to include terms that include the
29 requirements.

30 *Shiftworker annual leave entitlement*

- 31 (3) If a copied State instrument for a transferring employee applies to
32 the employee, then subsections 87(3) to (5) have effect, on and
33 after the employee's re-employment time, in the same way as they
34 apply to an award/agreement free employee.

35 Note: If the transferring employee qualifies for the shiftworker annual leave
36 entitlement under those subsections, the employee will be entitled to 5
37 (rather than 4) weeks of paid annual leave.

1 **Subdivision C—Interaction with modern awards**

2 **768AS Modern awards and copied State awards**

3 (1) While a copied State award for a transferring employee:

- 4 (a) covers the employee, or an employer (whether the new
5 employer or another national system employer) or other
6 person in relation to the employee; and
7 (b) is in operation;

8 a modern award does not cover the employee, or the employer or
9 other person in relation to the employee.

10 Note 1: When the copied State award for a transferring employee ceases to
11 cover the employee, a modern award will start to cover the employee,
12 or an employer or other person in relation to the employee.

13 Note 2: This subsection may operate in relation to an employer that is not the
14 new employer in the situation where there has been a later transfer of
15 business by the new employer (see Part 2-8).

16 (2) Subsection (1) does not apply for the purposes of section 193
17 (which is about the better off overall test for enterprise
18 agreements).

19 Note: For the purposes of determining whether an enterprise agreement that
20 covers a transferring employee passes the better off overall test,
21 subsection (2) allows the enterprise agreement to be compared against
22 a modern award that covers the employee.

23 (3) This section has effect subject to any FWA order about coverage
24 under subsection 768BA(1).

25 **768AT Modern awards and copied State employment agreements**

26 *Copied State collective employment agreements*

27 (1) If a copied State collective employment agreement for a
28 transferring employee and a modern award both apply:

- 29 (a) to the employee; or
30 (b) to an employer (whether the new employer or another
31 national system employer) or another person in relation to the
32 employee;

33 then the copied State collective employment agreement for the
34 employee prevails over the modern award, to the extent of any
35 inconsistency.

Schedule 1 Transfer of business from a State public sector employer
Part 1 Main amendments

- 1 Note 1: This subsection has effect subject to item 17 of Schedule 9 to the
2 Transitional Act as that item applies in a modified way because of
3 section 768BY. That item, as modified, requires that the base rate of
4 pay under the copied State employment agreement must not be less
5 than the modern award rate.
- 6 Note 2: This subsection may operate in relation to an employer that is not the
7 new employer in the situation where there has been a later transfer of
8 business by the new employer (see Part 2-8).

9 *Copied State individual employment agreements*

- 10 (2) While a copied State individual employment agreement for a
11 transferring employee applies:
12 (a) to the employee; or
13 (b) to an employer (whether the new employer or another
14 national system employer) or another person in relation to the
15 employee;
16 a modern award does not apply to the employee, or to the employer
17 or other person in relation to the employee.

18 Note 1: However, a modern award can cover the transferring employee while
19 the copied State individual employment agreement applies.

20 Note 2: This subsection has effect subject to item 17 of Schedule 9 to the
21 Transitional Act as that item applies in a modified way because of
22 section 768BY. That item, as modified, requires that the base rate of
23 pay under the copied State employment agreement must not be less
24 than the modern award rate.

25 Note 3: This subsection may operate in relation to an employer that is not the
26 new employer in the situation where there has been a later transfer of
27 business by the new employer (see Part 2-8).

28 *FWA coverage orders*

- 29 (3) This section has effect subject to any FWA order about coverage
30 under subsection 768BA(1).

31 **Subdivision D—Interaction with enterprise agreements**

32 **768AU Enterprise agreements and copied State instruments**

- 33 (1) While a copied State instrument for a transferring employee covers
34 the employee and the new employer in relation to the transferring
35 work, an enterprise agreement that covers the new employer at the
36 employee's re-employment time does not cover the employee in
37 relation to that work.

1 Note 1: The fact that a copied State collective employment agreement for a
2 transferring employee covers the employee does not prevent the
3 employee and the new employer from replacing that agreement at any
4 time with an enterprise agreement, regardless of whether the
5 employee's copied State collective employment agreement has passed
6 its nominal expiry date.

7 Note 2: Industrial action must not be taken before the nominal expiry date of a
8 copied State collective employment agreement for a transferring
9 employee (see item 4 of Schedule 13 to the Transitional Act as that
10 item applies in a modified way because of section 768BY).

11 (2) However, if after the re-employment time, another enterprise
12 agreement starts to cover the employee and the new employer in
13 relation to the transferring work, then the copied State instrument
14 for the employee ceases to cover the employee and the new
15 employer and can never cover them again.

16 (3) This section has effect subject to any FWA order about coverage
17 under subsection 768BA(1).

18 **Division 5—Variation and termination of copied State** 19 **instruments**

20 **Subdivision A—Guide to this Division**

21 **768AV What this Division is about**

22 This Division sets out when a copied State instrument may be
23 varied or terminated.

24 **Subdivision B—Variation of copied State instruments**

25 **768AW Variation in limited circumstances**

26 A copied State instrument for a transferring employee cannot be
27 varied except under:

- 28 (a) section 768AX; or
29 (b) item 20 of Schedule 3A to the Transitional Act (which deals
30 with variation of discriminatory instruments) as that item has
31 effect because of section 768BY; or

- 1 (c) item 20 of Schedule 9 to the Transitional Act (which deals
2 with variation of instruments in annual wage reviews) as that
3 item has effect because of section 768BY; or
4 (d) Division 4 of Part 3 of Schedule 11 to the Transitional Act
5 (which deals with transfer of business) as that Division has
6 effect because of section 768BY.

7 **768AX Variation of copied State instruments**

8 *Variations that may be made*

- 9 (1) FWA may vary a copied State instrument for a transferring
10 employee:
11 (a) to remove terms that FWA is satisfied are not, or will not be,
12 capable of meaningful operation or to vary those terms so
13 that they are capable of meaningful operation; or
14 (b) to remove an ambiguity or uncertainty in the instrument; or
15 (c) to enable the instrument to operate in a way that is better
16 aligned to the working arrangements of the new employer's
17 enterprise; or
18 (d) to resolve an uncertainty or difficulty relating to the
19 interaction between the instrument and the National
20 Employment Standards, or to make the instrument operate
21 effectively with the National Employment Standards; or
22 (e) if the instrument is a copied State employment agreement—
23 to resolve an uncertainty or difficulty relating to the
24 interaction between the instrument and a modern award; or
25 (f) to remove terms that are inconsistent with Part 3-1 (which
26 deals with general protections), or to vary terms to make
27 them consistent with that Part.

28 Note: Paragraph (d) does not affect a term of the copied State instrument
29 that is permitted by a provision of the National Employment Standards
30 as the provision has effect under section 768AR.

31 *Who may apply for a variation*

- 32 (2) FWA may make a variation under subsection (1):
33 (a) on its own initiative; or
34 (b) on application by a person who is, or is likely to be, covered
35 by the copied State instrument; or

- 1 (c) on application by an employee organisation that is entitled to
2 represent the industrial interests of:
3 (i) the transferring employee; or
4 (ii) another transferring employee or a non-transferring
5 employee who is, or is likely to be, covered by the
6 copied State instrument.

7 Note: The copied State instrument for the transferring employee may also
8 cover another transferring employee or a non-transferring employee if
9 a consolidation order is made.

10 *Matters that FWA must take into account*

- 11 (3) In deciding whether to make a variation under subsection (1),
12 FWA must take into account the following:
13 (a) the views of:
14 (i) the transferring employee; and
15 (ii) any other transferring employee who is, or will be,
16 covered by the copied State instrument; and
17 (iii) any non-transferring employee who is covered by the
18 copied State instrument; and
19 (iv) the new employer;
20 (b) whether those employees would be disadvantaged by the
21 copied State instrument as varied in relation to their terms
22 and conditions of employment;
23 (c) if the copied State instrument is a copied State employment
24 agreement—the nominal expiry date of the agreement;
25 (d) whether the copied State instrument, without the variation,
26 would have a negative impact on the productivity of the new
27 employer's workplace;
28 (e) whether the new employer would incur significant economic
29 disadvantage as a result of the copied State instrument,
30 without the variation;
31 (f) the degree of business synergy between the copied State
32 instrument, without the variation, and any workplace
33 instrument that already covers the new employer;
34 (g) the public interest.

Variation relating to the NES

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2 (4) If there is a dispute about the making of a variation for the
3 purposes of paragraph (1)(d), FWA may compare the entitlements
4 that are in dispute:

- 5 (a) on a “line-by-line” basis, comparing individual terms; or
6 (b) on a “like-by-like” basis, comparing entitlements according
7 to particular subject areas; or
8 (c) using any combination of the above approaches FWA sees
9 fit.

10 (5) The regulations may make provisions that apply to determining, for
11 the purposes of paragraph (1)(d), whether terms of a copied State
12 instrument for a transferring employee are, or are not, detrimental
13 in any respect when compared to entitlements under the National
14 Employment Standards.

Restriction on when variation may come into operation

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16 (6) A variation under subsection (1) operates from the day specified in
17 the determination, which may be a day before the determination is
18 made. However, it must not come into operation in relation to a
19 transferring employee before the re-employment time of the
20 transferring employee.

21 **Subdivision C—Termination of copied State instruments**

22 **768AY Termination in limited circumstances**

23 (1) A copied State instrument for a transferring employee cannot be
24 terminated except under items 22, 23, 24, 25 and 26 of
25 Schedule 3A to the Transitional Act (which deal with termination
26 of State employment agreements) as those items have effect
27 because of section 768BY.

28 (2) A copied State instrument for a transferring employee that has been
29 terminated ceases to operate and can never operate again.

30 Note: A copied State instrument that does not operate cannot cover a person
31 (see subsection 768AN(6)).

1 **Division 6—FWA orders about coverage of copied State**
2 **instruments and other instruments**

3 **Subdivision A—Guide to this Division**

4 **768AZ What this Division is about**

5 This Division allows FWA to make an order that a copied State
6 instrument for a transferring employee does not, or will not, cover
7 the employee and that an enterprise agreement or named employer
8 award that covers the new employer covers, or will cover, the
9 employee instead.

10 It also allows FWA to make an order that a copied State instrument
11 for a transferring employee does not, or will not, cover an
12 employee organisation but instead covers, or will cover, another
13 employee organisation.

14 **Subdivision B—Coverage orders**

15 **768BA FWA orders about coverage for transferring employees**

16 *Orders that FWA may make*

- 17 (1) FWA may make the following orders:
- 18 (a) an order that a copied State instrument for a transferring
19 employee that would, or would be likely to, cover the
20 transferring employee and the new employer because of
21 subsection 768AN(1) does not, or will not, cover the
22 transferring employee and the new employer;
- 23 (b) an order that an enterprise agreement or named employer
24 award that covers the new employer at the transferring
25 employee's re-employment time covers, or will cover, the
26 transferring employee.

27 *Who may apply for an order*

- 28 (2) FWA may make an order under subsection (1):
- 29 (a) on its own initiative; or
30 (b) on application by any of the following:

- 1 (i) the transferring employee;
2 (ii) the new employer;
3 (iii) an employee organisation that is entitled to represent the
4 industrial interests of the transferring employee.

5 *Matters that FWA must take into account*

- 6 (3) In deciding whether to make an order under subsection (1), FWA
7 must take into account the following:
8 (a) the views of:
9 (i) the transferring employee; and
10 (ii) the new employer;
11 (b) whether the transferring employee would be disadvantaged
12 by the order in relation to the employee's terms and
13 conditions of employment;
14 (c) if the order relates to a copied State employment agreement
15 for the transferring employee or an enterprise agreement—
16 the nominal expiry date of the agreement;
17 (d) whether the copied State instrument would have a negative
18 impact on the productivity of the new employer's workplace;
19 (e) whether the new employer would incur significant economic
20 disadvantage as a result of the copied State instrument
21 covering the new employer;
22 (f) the degree of business synergy between the copied State
23 instrument and any workplace instrument that already covers
24 the new employer;
25 (g) the public interest.

26 *Restriction on when order may come into operation*

- 27 (4) An order under subsection (1) operates from the day specified in
28 the order, which may be any day before the order is made.
29 However, it must not come into operation before the
30 re-employment time of the transferring employee.

31 **768BB FWA orders about coverage for employee organisations**

- 32 (1) FWA may make an order that:
33 (a) a copied State instrument for a transferring employee that
34 would, or would be likely to, cover an employee organisation
35 (the *first employee organisation*) in relation to the
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- 1 transferring employee because of subsection 768AN(2) does
2 not, or will not, cover the organisation; and
3 (b) another employee organisation (the *second employee*
4 *organisation*) is, or will be, covered by the copied State
5 instrument in relation to the employee.
- 6 (2) When making an order under subsection (1), FWA must consider
7 whether the second employee organisation is a federal counterpart
8 (within the meaning of section 9A of the Registered Organisations
9 Act) of the first employee organisation.
- 10 (3) The regulations may:
11 (a) prescribe circumstances in which FWA may make an order
12 for the purposes of subsection (1); and
13 (b) otherwise make provision in relation to the making of the
14 order.
- 15 (4) An order under subsection (1) must be made in accordance with
16 any regulations that are made for the purposes of subsection (3).

17 **Division 7—FWA orders about consolidating copied State** 18 **instruments etc.**

19 **Subdivision A—Guide to this Division**

20 **768BC What this Division is about**

21 This Division allows FWA to consolidate the various workplace
22 instruments that may apply in the new employer’s workplace. It
23 achieves this by allowing FWA to make an order that a copied
24 State instrument for a particular transferring employee is also a
25 copied State instrument for another transferring employee or for a
26 non-transferring employee.

27 Subdivision B deals with consolidating copied State instruments
28 for transferring employees. Under that Subdivision, FWA may
29 make an order that the copied State instrument for a transferring
30 employee (“employee A”) is also the copied State instrument for
31 another transferring employee (“employee B”). If FWA makes a
32 consolidation order for employee B, then this Act is modified so

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that the copied State instrument for employee A is also the copied State instrument for employee B (see section 768BF).

Subdivision C deals with non-transferring employees. Under that Subdivision, FWA may make an order that the copied State instrument for employee A (who is a transferring employee) is also the copied State instrument for a non-transferring employee (“employee C”). If FWA makes a consolidation order for employee C, then this Act is modified so that the copied State instrument for employee A is also the copied State instrument for employee C (see section 768BI).

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Subdivision B—Consolidation orders in relation to transferring employees

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768BD FWA orders to consolidate copied State instruments

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Consolidation order

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- (1) FWA may make an order (a *consolidation order*) that a copied State instrument for a transferring employee (*employee A*) is also a copied State instrument for another transferring employee (*employee B*).

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Note: In addition to making a consolidation order in relation to employee B, FWA may make a similar order in relation to one or more other transferring employees so that the copied State instrument for employee A is also the copied State instrument for each of them.

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Who may apply for order

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- (2) FWA may make a consolidation order under subsection (1):
- (a) on its own initiative; or
 - (b) on application by any of the following:
 - (i) employee B;
 - (ii) the new employer;
 - (iii) an employee organisation that is entitled to represent the industrial interests of employee B.

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Matters that FWA must take into account

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- (3) In deciding whether to make a consolidation order under subsection (1), FWA must take into account the following:
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- 1 (a) the views of:
2 (i) employee B; and
3 (ii) the new employer;
4 (b) whether making the order would disadvantage employee B in
5 relation to his or her terms and conditions of employment;
6 (c) if the copied State instrument for employee A or the copied
7 State instrument for employee B is a copied State
8 employment agreement—the nominal expiry date of the
9 agreement;
10 (d) whether the copied State instrument for employee A would
11 have a negative impact on the productivity of the new
12 employer's workplace;
13 (e) whether the new employer would incur significant economic
14 disadvantage if the order were not made;
15 (f) the degree of business synergy between the copied State
16 instrument for employee A and any workplace instrument
17 that already covers the new employer;
18 (g) the public interest.

19 *Restriction on when order may come into operation*

- 20 (4) A consolidation order under subsection (1) operates from the day
21 specified in the order, which may be any day before the order is
22 made. However, it must not come into operation before the
23 re-employment time of employee B.

24 **768BE Consolidation order to deal with application and coverage**

- 25 (1) A consolidation order under subsection 768BD(1) must specify
26 when the copied State instrument for employee A applies to, and
27 covers:
28 (a) employee B; and
29 (b) the new employer in relation to employee B; and
30 (c) an employee organisation in relation to employee B;
31 which must not be before employee B's re-employment time.
32 (2) Once the consolidation order is in operation, then the copied State
33 instrument for employee B ceases to operate.

1 **768BF Effect of this Act after consolidation order made**

2 If FWA makes a consolidation order under subsection 768BD(1),
3 then this Act has effect, from the time the order comes into
4 operation, as if a reference in relation to employee B to the copied
5 State instrument for employee B were a reference to the copied
6 State instrument for employee A.

7 **Subdivision C—Consolidation orders in relation to**
8 **non-transferring employees**

9 **768BG Consolidation orders in relation to non-transferring**
10 **employees**

11 *Consolidation order*

12 (1) FWA may make an order (a *consolidation order*) that a copied
13 State instrument for a transferring employee (*employee A*) is also a
14 copied State instrument for a non-transferring employee (*employee*
15 *C*) who performs the transferring work.

16 Note: In addition to making a consolidation order in relation to employee C,
17 FWA may make a similar order in relation to one or more other
18 non-transferring employees who perform the transferring work so that
19 the copied State instrument for employee A is also the copied State
20 instrument for each of them.

21 *Non-transferring employees*

22 (2) A *non-transferring employee* of a new employer is an employee of
23 the new employer who is not a transferring employee.

24 *Who may apply for order*

25 (3) FWA may make a consolidation order under subsection (1):
26 (a) on its own initiative; or
27 (b) on application by any of the following:
28 (i) employee C;
29 (ii) the new employer;
30 (iii) an employee organisation that is entitled to represent the
31 industrial interests of employee C.

1 *Matters that FWA must take into account*

- 2 (4) In deciding whether to make a consolidation order under
3 subsection (1), FWA must take into account the following:
4 (a) the views of:
5 (i) employee C; and
6 (ii) the new employer;
7 (b) whether making the order would disadvantage employee C in
8 relation to his or her terms and conditions of employment;
9 (c) if the copied State instrument for employee A is a copied
10 State employment agreement or an enterprise agreement
11 covers employee C—the nominal expiry date of the
12 agreement;
13 (d) whether the copied State instrument for employee A would
14 have a negative impact on the productivity of the new
15 employer's workplace;
16 (e) whether the new employer would incur significant economic
17 disadvantage if the order were not made;
18 (f) the degree of business synergy between the copied State
19 instrument for employee A and any workplace instrument
20 that already covers the new employer;
21 (g) the public interest.

22 *Restriction on when order may come into operation*

- 23 (5) A consolidation order under subsection (1) operates from the day
24 specified in the order, which may be a day before the order is
25 made.

26 **768BH Consolidation order to deal with application and coverage**

- 27 (1) A consolidation order under subsection 768BG(1) must specify
28 when the copied State instrument for employee A applies to, and
29 covers:
30 (a) employee C; and
31 (b) the new employer in relation to employee C; and
32 (c) an employee organisation in relation to employee C;
33 in relation to the transferring work.

- 1 (2) If an enterprise agreement covers employee C and the new
2 employer in relation to the transferring work, the order must also
3 specify that the agreement does not cover:
4 (a) employee C; or
5 (b) the new employer in relation to employee C; or
6 (c) an employee organisation in relation to employee C;
7 in relation to that work.

8 **768BI Effect of this Act after consolidation order made**

9 If FWA makes a consolidation order under subsection 768BG(1),
10 then this Act has effect in relation to employee C, from the time the
11 order comes into operation, as if:

- 12 (a) the copied State instrument for employee A were also the
13 copied State instrument for employee C; and
14 (b) employee C were a transferring employee in relation to that
15 copied State instrument.

16 **Division 8—Special rules for copied State instruments**

17 **Subdivision A—Guide to this Division**

18 **768BJ What this Division is about**

19 This Division has a collection of special rules for copied State
20 instruments for transferring employees.

21 Subdivision B deals with the case where a copied State instrument
22 for a transferring employee does not have a term about settling
23 disputes about matters arising under the instrument. In that case,
24 the model term prescribed by the regulations is taken to be a term
25 of the instrument.

26 Subdivision C is about working out service and entitlements of a
27 transferring employee. This is particularly relevant for working out
28 the employee's entitlements under the National Employment
29 Standards and the copied State instrument for the employee.

30 Subdivision D deals with the case where a copied State award for a
31 transferring employee ceases to operate and the employee suffers a

1 reduction in take home pay. That Subdivision allows FWA to make
2 a take-home pay order to compensate the employee.

3 Subdivision E modifies particular provisions of this Act in relation
4 to copied State instruments.

5 Subdivision F modifies particular provisions of the Transitional
6 Act in relation to copied State instruments.

7 Subdivision G modifies particular provisions of the Registered
8 Organisations Act in relation to copied State instruments.

9 **Subdivision B—Terms about disputes**

10 **768BK Where no term dealing with disputes**

- 11 (1) If a copied State instrument for a transferring employee does not
12 include a term that provides a procedure for settling disputes about
13 matters arising under the instrument, then the instrument is taken to
14 include the model term that is prescribed by the regulations for
15 settling disputes about matters arising under a copied State
16 instrument for a transferring employee.

17 Note: This section deals with the situation where the original State award or
18 original State agreement for the copied State instrument did not
19 include a term about settling disputes about matters arising under the
20 award or agreement.

- 21 (2) For the purposes of subsection (1), the model term prescribed for a
22 copied State award for a transferring employee may be the same or
23 different from the model term prescribed for a copied State
24 employment agreement for a transferring employee.

25 **Subdivision C—Service and entitlements of a transferring 26 employee**

27 **768BL Service for the purposes of this Act**

28 *General rule*

- 29 (1) Service of a transferring employee with the old State employer that
30 occurred before the employee's termination time also counts as
31 service of the employee with the new employer for the purposes of

1 this Act (including for the purposes of determining the employee's
2 entitlements under the National Employment Standards) after the
3 employee's re-employment time.

4 *Gap between termination time and re-employment time*

- 5 (2) If there is a period of time between the employee's termination
6 time with the old State employer and the employee's
7 re-employment time with the new employer, then that period:
8 (a) does not break the employee's continuous service with the
9 new employer (taking account of the effect of
10 subsection (1)); but
11 (b) does not count towards the length of the employee's
12 continuous service with the new employer.

13 **768BM NES—working out non-accruing entitlements**

14 *Application of this section*

- 15 (1) This section applies for the purposes of determining the
16 entitlements of a transferring employee under the National
17 Employment Standards, other than entitlements to:
18 (a) paid annual leave; or
19 (b) paid personal/carer's leave.

20 Note: For entitlements to paid annual leave and paid personal/carer's leave
21 under the National Employment Standards, see section 768BN.

22 *No double entitlement*

- 23 (2) If, before or after the employee's termination time, the employee
24 has the benefit of an entitlement, the amount of which is calculated
25 by reference to a period of service, then subsection 768BL(1) does
26 not result in that period of service with the old State employer
27 being counted again when calculating the employee's entitlements
28 of that kind under the National Employment Standards.
- 29 (3) To avoid doubt, subsection (2) does not require the employee to
30 serve any initial qualifying period of service for long service leave
31 again.

1 *Limitation on application of general rule to redundancy pay*

- 2 (4) If the terms and conditions of employment that applied to the
3 employee's employment by the old State employer immediately
4 before the employee's termination time did not provide for an
5 entitlement to redundancy pay, then subsection 768BL(1) does not
6 apply in relation to the employee and the new employer for the
7 purposes of Subdivision B of Division 11 of Part 2-2 (which deals
8 with redundancy pay).
- 9 (5) If a State industrial body could have made an order giving the
10 employee an entitlement to redundancy pay (however described),
11 had the employee's employment been terminated for redundancy
12 (however described) before the employee's termination time, then:
13 (a) the terms and conditions of the employee's employment
14 referred to in subsection (4) are taken to have provided for an
15 entitlement to redundancy pay; and
16 (b) paragraph 121(1)(b) does not apply in relation to the
17 employee during the 12 months starting at the employee's
18 re-employment time.

19 Note: Because of paragraph (b), the employee may therefore be entitled to
20 redundancy pay under section 119 if the employee's employment is
21 terminated by the new employer during the 12-month period starting
22 at the employee's termination time, even if the new employer is a
23 small business employer.

24 **768BN NES—working out accruing entitlements**

25 *Application of this section*

- 26 (1) This section applies for the purposes of determining the
27 entitlements of a transferring employee under the National
28 Employment Standards to:
29 (a) paid annual leave; or
30 (b) paid personal/carer's leave;
31 if the employee had, immediately before the employee's
32 termination time, an accrued entitlement to an amount of:
33 (c) paid annual leave (however described); or
34 (d) paid personal or carer's leave (however described).

35 Note: For other entitlements under the National Employment Standards, see
36 section 768BM.

1 *Leave accrued for purposes of the NES*

- 2 (2) The provisions of the National Employment Standards relating to:
3 (a) taking that kind of leave (including rates of pay while taking
4 leave); or
5 (b) cashing-out that kind of leave;
6 apply as a minimum standard to the accrued leave, after the
7 employee's re-employment time, as if it had accrued under the
8 National Employment Standards.

9 *No double entitlement*

- 10 (3) However, if before or after the employee's termination time, the
11 old State employer paid the employee an amount in relation to
12 some or all of the accrued leave, then for the purposes of
13 subsection (2), the amount of accrued leave is reduced accordingly.

14 *Working out whether leave accrued*

- 15 (4) For the purposes of subsection (1), it does not matter whether the
16 entitlement to leave accrued under:
17 (a) the original State award or original State agreement for the
18 copied State instrument for the employee; or
19 (b) a State industrial law of the State.

20 **768BO Copied State instrument—service**

21 *General rule*

- 22 (1) Service of a transferring employee with the old State employer
23 that:
24 (a) occurred before the employee's termination time; and
25 (b) counted for the purposes of the application to the employee
26 of the original State award or original State agreement for the
27 copied State instrument for the employee;
28 also counts as service of the employee with the new employer for
29 the purposes of the application to the employee of the copied State
30 instrument after the employee's re-employment time.

1 *Gap between termination time and re-employment time*

- 2 (2) If there is a period of time between the employee's termination
3 time with the old State employer and the employee's
4 re-employment time with the new employer, then that period:
5 (a) does not break the employee's continuous service with the
6 new employer (taking account of the effect of
7 subsection (1)); but
8 (b) does not count towards the length of the employee's
9 continuous service with the new employer.

10 *Effect of consolidation order*

- 11 (3) If FWA makes a consolidation order under subsection 768BD(1),
12 then, despite section 768BF, the original State award or original
13 State agreement referred to in paragraph (1)(b) of this section is the
14 original State award or original State agreement for the copied
15 State instrument for the employee before the consolidation order
16 was made.

17 **768BP Copied State instrument—working out non-accruing**
18 **entitlements**

19 *Application of this section*

- 20 (1) This section applies for the purposes of determining the
21 entitlements of a transferring employee under a copied State
22 instrument for the employee, other than entitlements to:
23 (a) annual leave (however described); or
24 (b) personal leave or carer's leave (however described).

25 Note: For entitlements to annual leave or personal leave or carer's leave
26 under the copied State instrument, see section 768BQ.

27 *No double entitlement*

- 28 (2) If, before or after the employee's termination time, the employee
29 has the benefit of an entitlement, the amount of which is calculated
30 by reference to a period of service, then subsection 768BO(1) does
31 not result in that period of service with the old State employer
32 being counted again when calculating the employee's entitlements
33 of that kind under the copied State instrument for the employee.

- 1 (3) To avoid doubt, subsection (2) does not require the employee to
2 serve any initial qualifying period of service for long service leave
3 again.

4 **768BQ Copied State instrument—working out accruing entitlements**

5 *Application of this section*

- 6 (1) This section applies for the purposes of determining the
7 entitlements of a transferring employee under the copied State
8 instrument for the employee to:
9 (a) annual leave (however described); or
10 (b) personal leave or carer's leave (however described).

11 Note: For other entitlements under the copied State instrument, see
12 section 768BP.

13 *Leave accrued for purposes of the instrument*

- 14 (2) If the employee had, immediately before the employee's
15 termination time, an accrued entitlement to an amount of:
16 (a) annual leave (however described); or
17 (b) personal leave or carer's leave (however described);
18 then the accrued leave is taken to have accrued under the copied
19 State instrument for the employee.

20 *No double entitlement*

- 21 (3) However, if before or after the employee's termination time, the
22 old State employer paid the employee an amount in relation to
23 some or all of the accrued leave, then for the purposes of
24 subsection (2), the amount of accrued leave is reduced accordingly.

25 *Working out whether leave accrued*

- 26 (4) For the purposes of subsection (2), it does not matter whether the
27 leave accrued under:
28 (a) the original State award or original State agreement for the
29 copied State instrument; or
30 (b) a State industrial law of the State.

1 **Subdivision D—Cessation of copied State awards: avoiding**
2 **reductions in take-home pay**

3 **768BR Cessation not intended to result in reduction in take-home**
4 **pay**

- 5 (1) If a copied State award for a transferring employee ceases to
6 operate because of subsection 768AO(2), the cessation is not
7 intended to result in a reduction in the take-home pay of the
8 employee.
- 9 (2) A transferring employee's *take-home pay* is the pay the employee
10 actually receives:
11 (a) including wages and incentive-based payments, and
12 additional amounts such as allowances and overtime; but
13 (b) disregarding the effect of any deductions that are made as
14 permitted by section 324.

15 Note: Deductions permitted by section 324 may (for example) include
16 deductions under salary sacrificing arrangements.

- 17 (3) A transferring employee suffers a *reduction in take-home pay* if,
18 and only if:
19 (a) when the copied State award for the employee ceases to
20 operate because of subsection 768AO(2), the employee
21 becomes a person to whom a modern award applies; and
22 (b) the employee is employed in the same position as (or a
23 position that is comparable to) the position he or she was
24 employed in immediately before the cessation of the copied
25 State award; and
26 (c) the amount of the employee's take-home pay for working
27 particular hours or for a particular quantity of work after the
28 cessation of the copied State award is less than what would
29 have been the employee's take-home pay for those hours or
30 that quantity of work immediately before the cessation; and
31 (d) that reduction in the employee's take-home pay is
32 attributable to the cessation of the copied State award.

33 **768BS Orders remedying reductions in take-home pay**

- 34 (1) If FWA is satisfied that a transferring employee to whom a modern
35 award applies has suffered a reduction in take-home pay, FWA

1 may make any order (a *take-home pay order*) requiring, or relating
2 to, the payment of an amount or amounts to the employee that
3 FWA considers appropriate to remedy the situation.

4 (2) FWA may make a take-home pay order:

5 (a) on its own initiative; or

6 (b) on application by either of the following:

7 (i) a transferring employee who has suffered a reduction in
8 take-home pay;

9 (ii) an organisation that is entitled to represent the industrial
10 interests of the employee.

11 (3) FWA must not make a take-home pay order if:

12 (a) FWA considers that the reduction in take-home pay is minor
13 or insignificant; or

14 (b) FWA is satisfied that the employee has been adequately
15 compensated in other ways for the reduction.

16 (4) FWA must ensure that a take-home pay order is expressed so that:

17 (a) it does not apply to a transferring employee unless the
18 employee has actually suffered a reduction in take-home pay;
19 and

20 (b) if the take-home pay payable to the employee under the
21 modern award increases after the order is made, there is a
22 corresponding reduction in any amount payable to the
23 employee under the order.

24 (5) If FWA is satisfied that an application for a take-home pay order
25 has already been made in relation to a transferring employee, FWA
26 may dismiss any later application that is made under these
27 provisions in relation to the same employee.

28 **768BT Contravening a take-home pay order**

29 A person must not contravene a term of a take-home pay order that
30 applies to the person.

31 Note: This section is a civil remedy provision (see Part 4-1).

32 **768BU How long a take-home pay order continues to apply**

33 A take-home pay order made in relation to a transferring employee
34 to whom a particular modern award applies continues to apply in

1 relation to the employee (subject to the terms of the order) for so
2 long as the modern award continues to cover the employee.

3 Note: It does not matter if the modern award stops applying to the employee
4 because an enterprise agreement starts to apply.

5 **768BV Interaction of take-home pay orders with modern awards**
6 **and enterprise agreements**

7 A term of a modern award or an enterprise agreement has no effect
8 in relation to a transferring employee to the extent that it is less
9 beneficial to the employee than a term of a take-home pay order
10 that applies to the employee.

11 **768BW Application of this Act to take-home pay orders**

12 This Act applies as if the following provisions included a reference
13 to a take-home pay order:

- 14 (a) subsection 675(2) (which is about FWA orders);
- 15 (b) subsection 706(2) (which is about powers of inspectors).

16 **Subdivision E—Modification of this Act**

17 **768BX Modification of this Act for copied State instruments**

18 This Act has effect in relation to a transferring employee on and
19 after the employee’s re-employment time as if a reference in a
20 provision referred to in column 1 to a term referred to in column 2
21 included a reference to the term referred to in column 3.

22

Modification of this Act for copied State instruments

Item	Column 1 Provision of this Act	Column 2 Current term	Column 3 New term
1	Division 2 of Part 2-9 (payment of wages)	modern award	copied State award for the transferring employee
2	Division 2 of Part 2-9 (payment of wages)	enterprise agreement	copied State employment agreement for the transferring employee
3	Division 3 of Part 2-9 (guarantee of annual earnings)	modern award	copied State award for the transferring employee

Schedule 1 Transfer of business from a State public sector employer**Part 1** Main amendments

Modification of this Act for copied State instruments			
Item	Column 1 Provision of this Act	Column 2 Current term	Column 3 New term
4	Division 3 of Part 2-9 (guarantee of annual earnings)	enterprise agreement	copied State employment agreement for the transferring employee
5	Part 3-2 (unfair dismissal)	modern award	copied State award for the transferring employee
6	Part 3-2 (unfair dismissal)	enterprise agreement	copied State employment agreement for the transferring employee
7	Division 9 of Part 3-3 (payments relating to periods of industrial action)	modern award	copied State award for the transferring employee
8	Division 9 of Part 3-3 (payments relating to periods of industrial action)	enterprise agreement	copied State employment agreement for the transferring employee
9	subsection 481(1) (right of entry)	fair work instrument	copied State instrument for the transferring employee
10	subsection 524(2) (stand down)	enterprise agreement	copied State instrument for the transferring employee
11	Part 4-1 (compliance)	fair work instrument	copied State instrument for the transferring employee
12	section 657 (General Manager)	fair work instrument	copied State instrument for the transferring employee
13	Part 5-2 (Fair Work Ombudsman)	fair work instrument	copied State instrument for the transferring employee
14	Part 5-2 (Fair Work Ombudsman)	modern award	copied State award for the transferring employee
15	Part 5-2 (Fair Work Ombudsman)	enterprise agreement	copied State employment agreement for the transferring employee
16	Part 6-2 (dealing with disputes)	modern award	copied State award for the transferring employee
17	Part 6-2 (dealing with disputes)	enterprise agreement	copied State employment agreement for the transferring employee

Modification of this Act for copied State instruments

Item	Column 1 Provision of this Act	Column 2 Current term	Column 3 New term
18	Part 6-2 (dealing with disputes)	fair work instrument	copied State instrument for the transferring employee

1

2 **Subdivision F—Modification of the Transitional Act**

3 **768BY Modification of the Transitional Act for copied State**
4 **instruments**

5 (1) Each relevant transitional provision (see subsection (2)) has effect
6 in relation to a transferring employee as if a reference to a term
7 referred to in column 1 were a reference to the term referred to in
8 column 2. The provision has effect from the time specified in
9 column 3 of the table in subsection (2).

10

Modification of the Transitional Act and regulations for copied State instruments

Item	Column 1 Current term	Column 2 New term
1	Division 2B State instrument	copied State instrument for the transferring employee
2	Division 2B State award	copied State award for the transferring employee
3	Division 2B State award applying (within the meaning of the Transitional Act) to a person	copied State award for the transferring employee applying (within the meaning of this Act) to a person
4	Division 2B State award covering (within the meaning of the Transitional Act) a person	copied State award for the transferring employee covering (within the meaning of this Act) a person
5	Division 2B State employment agreement	copied State employment agreement for the transferring employee
6	collective Division 2B State employment agreement	copied State collective employment agreement for the transferring employee

Schedule 1 Transfer of business from a State public sector employer

Part 1 Main amendments

Modification of the Transitional Act and regulations for copied State instruments

Item	Column 1 Current term	Column 2 New term
7	individual Division 2B State employment agreement	copied State individual employment agreement for the transferring employee
8	Division 2B State employment agreement applying (within the meaning of the Transitional Act) to a person	copied State employment agreement for the transferring employee applying (within the meaning of this Act) to a person
9	Division 2B State employment agreement covering (within the meaning of the Transitional Act) a person	copied State employment agreement for the transferring employee covering (within the meaning of this Act) a person
10	nominal expiry date of a Division 2B State employment agreement	nominal expiry date of a copied State employment agreement for the transferring employee
11	Division 2B referral commencement	transferring employee's termination time
12	Division 2B State reference employee	transferring employee
13	Division 2B referring State	the State of the old State employer
14	source State	the State of the old State employer

1

(2) For the purposes of subsection (1), the *relevant transitional provisions* are:

3

4

5

6

7

(a) the provisions of the Transitional Act that are listed in column 1; and

(b) the regulations made for the purposes of those provisions.

Modification of the Transitional Act and regulations for copied State instruments

Item	Column 1 Relevant transitional provision	Column 2 Which is about	Column 3 Relevant time
1	item 10 of Schedule 3A	instrument content rules	the transferring employee's

Modification of the Transitional Act and regulations for copied State instruments			
Item	Column 1 Relevant transitional provision	Column 2 Which is about	Column 3 Relevant time
			termination time
2	item 11 of Schedule 3A	instrument interaction rules	the transferring employee's termination time
3	item 13 of Schedule 3A	references to State industrial bodies	the transferring employee's termination time
4	item 17 of Schedule 3A	no loss of accrued rights etc. when instrument terminates	the transferring employee's re-employment time
5	item 20 of Schedule 3A	variation of discriminatory instruments	the transferring employee's termination time
6	item 22 of Schedule 3A	collective agreements— termination by agreement	the transferring employee's re-employment time
7	item 23 of Schedule 3A	collective agreements— termination by FWA	the transferring employee's re-employment time
8	item 24 of Schedule 3A	individual agreements— termination by agreement	the transferring employee's re-employment time
9	item 25 of Schedule 3A	individual agreements— termination conditional on enterprise agreement	the transferring employee's re-employment time
10	item 26 of Schedule 3A	individual agreements— unilateral termination by FWA	the transferring employee's re-employment time
11	item 47 of Schedule 3A	employee not award/agreement free	the transferring employee's re-employment time
12	item 48 of Schedule 3A	calculating an employee's ordinary hours of work	the transferring employee's re-employment time
13	items 19, 20 and 21 of	interaction with the NES	the transferring

Schedule 1 Transfer of business from a State public sector employer**Part 1** Main amendments

Modification of the Transitional Act and regulations for copied State instruments			
Item	Column 1 Relevant transitional provision	Column 2 Which is about	Column 3 Relevant time
	Schedule 4		employee's re-employment time
14	Part 5 of Schedule 9	base rates of pay	the transferring employee's re-employment time
15	Division 4 of Part 3 of Schedule 11	transfer of business	the transferring employee's re-employment time
16	item 4 of Schedule 12	general protections	the transferring employee's termination time
17	items 2, 3, 4 and 17 of Schedule 13	industrial action	the transferring employee's re-employment time
18	item 4B of Schedule 16 (as that item relates to subitems 25(6) and (7) of Schedule 3A) and item 16 of Schedule 16 (as that item relates to item 4B of Schedule 16)	compliance relating to conditional terminations of individual employment agreements	the transferring employee's re-employment time
19	items 12 and 13 of Schedule 16 and item 16 of Schedule 16 (as that item relates to those items)	compliance relating to non-disclosure obligations	the transferring employee's re-employment time

1 **Subdivision G—Modification of the Registered Organisations**
2 **Act**

3 **768BZ Modification of the Registered Organisations Act for copied**
4 **State instruments**

- 5 (1) The Registered Organisations Act has effect in relation to a
6 transferring employee on and after the employee's termination time
7 as if:
8 (a) a reference in that Act to a modern award included a
9 reference to a copied State award for the employee; and
10 (b) a reference in that Act to an enterprise agreement included a
11 reference to a copied State employment agreement for the
12 employee.
- 13 (2) The regulations may deal with other matters relating to how the
14 Registered Organisations Act applies in relation to a transferring
15 employee.

16 **Division 9—Regulations**

17 **768CA Regulations**

- 18 (1) The regulations may:
19 (a) make provision in relation to the transition from State awards
20 and State employment agreements to copied State
21 instruments; and
22 (b) make provision in relation to the transition from copied State
23 instruments to modern awards and enterprise agreements; and
24 (c) deal with how this Act applies in relation to copied State
25 instruments for transferring employees; and
26 (d) provide that provisions of this Act or the Transitional Act
27 apply in relation to transferring employees or new employers
28 with specified modifications; and
29 (e) otherwise make provision relating to how provisions of this
30 Act or the Transitional Act apply in relation to transferring
31 employees or new employers; and
32 (f) make provision in relation to non-transferring employees of
33 the new employer; and

Schedule 1 Transfer of business from a State public sector employer

Part 1 Main amendments

- 1 (g) provide that provisions of this Act or the Transitional Act
2 apply in relation to the non-transferring employees with
3 specified modifications; and
4 (h) make other provision in relation to the matters dealt with in
5 this Part.
- 6 (2) Without limiting subsection (1), the regulations may:
7 (a) modify provisions of this Act or the Transitional Act, or
8 provide for the application (with or without modifications) of
9 provisions of this Act or the Transitional Act to matters to
10 which they would otherwise not apply; and
11 (b) provide differently for the purposes of different provisions, or
12 in relation to different situations.
- 13 (3) However, this section does not allow regulations to:
14 (a) modify a provision so as to impose an obligation which, if
15 contravened, constitutes an offence; or
16 (b) include new provisions that create offences.
- 17 (4) The provisions of this Part (including this section) that provide for
18 regulations to deal with matters do not limit each other.
19

1 **Part 2—Other amendments**

2 ***Fair Work Act 2009***

3 **2 After subsection 9(4)**

4 Insert:

5 (4A) Part 6-3A provides for the transfer of terms and conditions of
6 employment that are provided for in particular State industrial
7 instruments if there is a transfer of business from a non-national
8 system employer that is a State public sector employer of the State
9 to a national system employer.

10 **3 Section 9A (note)**

11 Omit “*Fair Work (Transitional Provisions and Consequential*
12 *Amendments) Act 2009*”, substitute “Transitional Act”.

13 **4 Section 12 (at the end of the definition of *applies*)**

14 Add:

15 ; and (c) in relation to a copied State instrument: see section 768AM.

16 **5 Section 12 (paragraphs (a), (b) and (c) of the definition of**
17 ***award modernisation process*)**

18 Omit “*Fair Work (Transitional Provisions and Consequential*
19 *Amendments) Act 2009*”, substitute “Transitional Act”.

20 **6 Section 12**

21 Insert:

22 ***consolidation order:***

23 (a) in relation to a transferring employee—see subsection
24 768BD(1); and

25 (b) in relation to a non-transferring employee—see subsection
26 768BG(1).

27 **7 Section 12**

28 Insert:

29 ***copied State award:*** see subsection 768AI(1).

1 **8 Section 12**

2 Insert:

3 *copied State collective employment agreement*: see subsection
4 768AK(4).

5 **9 Section 12**

6 Insert:

7 *copied State employment agreement*: see subsection 768AK(1).

8 **10 Section 12**

9 Insert:

10 *copied State individual employment agreement*: see subsection
11 768AK(5).

12 **11 Section 12**

13 Insert:

14 *copied State instrument*: see section 768AH.

15 **12 Section 12 (at the end of the definition of covers)**

16 Add:

17 ; and (d) in relation to a copied State instrument: see section 768AN.

18 **13 Section 12**

19 Insert:

20 *employee A*, in relation to a transfer of business referred to in
21 Part 6-3A: see subsections 768BD(1) and 768BG(1).

22 **14 Section 12**

23 Insert:

24 *employee B*, in relation to a transfer of business referred to in
25 Part 6-3A: see subsection 768BD(1).

26 **15 Section 12**

27 Insert:

1 *employee C*, in relation to a transfer of business referred to in
2 Part 6-3A: see subsection 768BG(1).

3 **16 Section 12 (paragraph (c) of the definition of *industrial***
4 ***body*)**

5 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
6 “Registered Organisations Act”.

7 **17 Section 12 (paragraph (b) of the definition of *industrial***
8 ***law*)**

9 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
10 “Registered Organisations Act”.

11 **18 Section 12**

12 Insert:

13 *law enforcement officer* has the same meaning as in subsection
14 30K(1).

15 **19 Section 12 (definition of *new employer*)**

16 Repeal the definition, substitute:

17 *new employer*:

18 (a) in relation to a transfer of business referred to in Part 2-8—
19 see subsection 311(1); and

20 (b) in relation to a transfer of business referred to in Part 6-3A—
21 see subsection 768AD(1).

22 **20 Section 12 (at the end of the definition of *nominal expiry***
23 ***date*)**

24 Add:

25 ; or (d) of a copied State employment agreement: see subsection
26 768AO(5).

27 **21 Section 12 (definition of *non-transferring employee*)**

28 Repeal the definition, substitute:

29 *non-transferring employee*:

30 (a) in relation to a transfer of business referred to in Part 2-8—
31 see subsection 314(2); and

1 (b) in relation to a transfer of business referred to in Part 6-3A—
2 see subsection 768BG(2).

3 **22 Section 12**

4 Insert:

5 *old State employer*: see subsection 768AD(1).

6 **23 Section 12 (definition of *organisation*)**

7 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
8 “Registered Organisations Act”.

9 **24 Section 12**

10 Insert:

11 *original State agreement*, in relation to a copied State employment
12 agreement: see subparagraph 768AK(1)(b)(i).

13 **25 Section 12**

14 Insert:

15 *original State award*, in relation to a copied State award: see
16 subparagraph 768AI(1)(b)(i).

17 **26 Section 12**

18 Insert:

19 *reduction in take-home pay*: see subsection 768BR(3).

20 **27 Section 12**

21 Insert:

22 *re-employment time*, in relation to a transferring employee covered
23 by a transfer of business referred to in Part 6-3A: see subsection
24 768AE(3).

25 **28 Section 12**

26 Insert:

27 *Registered Organisations Act* means the *Fair Work (Registered*
28 *Organisations) Act 2009*.

1 **29 Section 12**

2 Insert:

3 *State award*: see section 768AJ.

4 **30 Section 12**

5 Insert:

6 *State collective employment agreement*: see subsection 768AL(3).

7 **31 Section 12**

8 Insert:

9 *State employment agreement*: see subsections 768AL(1) and (2).

10 **32 Section 12**

11 Insert:

12 *State individual employment agreement*: see subsection
13 768AL(4).

14 **33 Section 12**

15 Insert:

16 *State industrial law* means a law of a State that is a State or
17 Territory industrial law.

18 **34 Section 12**

19 Insert:

20 *State public sector employee*, of a State, means:

21 (a) an employee of a State public sector employer of the State; or

22 (b) any other non-national system employee in the State of a
23 kind specified in the regulations;

24 and includes a law enforcement officer of the State.

25 **35 Section 12**

26 Insert:

27 *State public sector employer*, of a State, means a non-national
28 system employer that is:

Schedule 1 Transfer of business from a State public sector employer

Part 2 Other amendments

- 1 (a) the State, the Governor of the State or a Minister of the State;
2 or
3 (b) a body corporate that is established for a public purpose by or
4 under a law of the State, by the Governor of the State or by a
5 Minister of the State; or
6 (c) a body corporate in which the State has a controlling interest;
7 or
8 (d) a person who employs individuals for the purposes of an
9 unincorporated body that is established for a public purpose
10 by or under a law of the State, by the Governor of the State or
11 by a Minister of the State; or
12 (e) any other employer in the State of a kind specified in the
13 regulations;
14 and includes a non-national system employer of law enforcement
15 officers of the State.

16 **36 Section 12**

17 Insert:

18 *take-home pay*: see subsection 768BR(2).

19 **37 Section 12**

20 Insert:

21 *take-home pay order*: see subsection 768BS(1).

22 **38 Section 12**

23 Insert:

24 *termination time*, in relation to a transferring employee covered by
25 a transfer of business referred to in Part 6-3A: see subsection
26 768AE(2).

27 **39 Section 12 (definition of *transfer of business*)**

28 Repeal the definition, substitute:

29 *transfer of business*:

- 30 (a) for a transfer of business between a national system employer
31 and another national system employer—see subsection
32 311(1); and

- 1 (b) for a transfer of business between a non-national system
2 employer that is a State public sector employer and a national
3 system employer—see subsection 768AD(1).

4 **40 Section 12 (definition of *transferring employee*)**

5 Repeal the definition, substitute:

6 ***transferring employee:***

- 7 (a) in relation to a transfer of business referred to in Part 2-8—
8 see subsection 311(2); and
9 (b) in relation to a transfer of business referred to in Part 6-3A—
10 see subsection 768AE(1).

11 **41 Section 12 (definition of *transferring work*)**

12 Repeal the definition, substitute:

13 ***transferring work:***

- 14 (a) in relation to a transfer of business referred to in Part 2-8—
15 see paragraph 311(1)(c); and
16 (b) in relation to a transfer of business referred to in Part 6-3A—
17 see paragraph 768AD(1)(c).

18 **42 Section 12**

19 Insert:

20 ***Transitional Act*** means the *Fair Work (Transitional Provisions*
21 *and Consequential Amendments) Act 2009*.

22 **43 Section 12 (paragraph (b) of the definition of *workplace***
23 ***law*)**

24 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
25 “Registered Organisations Act”.

26 **44 Paragraphs 14A(2)(a) and (b)**

27 Omit “*Fair Work (Transitional Provisions and Consequential*
28 *Amendments) Act 2009*”, substitute “Transitional Act”.

29 **45 At the end of subsection 43(1)**

30 Add:

1 Note 3: Copied State instruments provide the main terms and conditions of
2 employment for an employee to whom the instrument applies. See
3 Part 6-3A generally for the rules about those instruments.

4 **46 Paragraph 48(2)(a)**

5 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
6 “Registered Organisations Act”.

7 **47 Paragraph 53(3)(a)**

8 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
9 “Registered Organisations Act”.

10 **48 Paragraph 113(3A)(b)**

11 Omit “*Fair Work (Transitional Provisions and Consequential*
12 *Amendments) Act 2009*”, substitute “Transitional Act”.

13 **49 Subsection 113(7)**

14 Omit “*Fair Work (Transitional Provisions and Consequential*
15 *Amendments) Act 2009*”, substitute “Transitional Act”.

16 **50 Subsection 113A(4)**

17 Omit “*Fair Work (Transitional Provisions and Consequential*
18 *Amendments) Act 2009*”, substitute “Transitional Act”.

19 **51 Subsections 143(8) and (10)**

20 Omit “*Fair Work (Transitional Provisions and Consequential*
21 *Amendments) Act 2009*”, substitute “Transitional Act”.

22 **52 Subsection 168C(1) (note)**

23 Omit “*Fair Work (Transitional Provisions and Consequential*
24 *Amendments) Act 2009*”, substitute “Transitional Act”.

25 **53 Subsection 168G(4)**

26 Omit “*Fair Work (Transitional Provisions and Consequential*
27 *Amendments) Act 2009*”, substitute “Transitional Act”.

28 **54 Section 307 (at the end of the first paragraph)**

29 Add “(For a transfer of business from a non-national system employer
30 that is a State public sector employer to a national system employer, see
31 Part 6-3A.)”.

1 **55 Subsection 539(2) (after table item 34)**

2 Insert:

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

34A	768AG	(a) the transferring employee; (b) an employer; (c) an employee organisation; (d) an employer organisation; (e) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	60 penalty units
34B	768BT	(a) the transferring employee; (b) an employer; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	60 penalty units

4
5 **56 Section 576 (note)**

6 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
7 “Registered Organisations Act”.

8 **57 Subparagraph 596(4)(b)(ii)**

9 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
10 “Registered Organisations Act”.

11 **58 Paragraph 604(1)(b)**

12 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
13 “Registered Organisations Act”.

14 **59 Subparagraph 613(2)(a)(ii)**

15 Omit “*Fair Work (Registered Organisations) Act 2009*”, substitute
16 “Registered Organisations Act”.

17 **60 After paragraph 789BA(1)(e)**

18 Insert:

1 (ea) Part 6-3A (transfer of business from a State public sector
2 employer);

3 **61 Subparagraph 789CA(1)(c)(iv)**

4 Omit “*Fair Work (Transitional Provisions and Consequential*
5 *Amendments) Act 2009*”, substitute “Transitional Act”.

6 **62 Paragraphs 789DE(2)(c) and 5(c)**

7 Omit “*Fair Work (Transitional Provisions and Consequential*
8 *Amendments) Act 2009*”, substitute “Transitional Act”.

9 **63 Paragraph 4(1)(b) of Schedule 1**

10 Omit “*Fair Work (Transitional Provisions and Consequential*
11 *Amendments) Act 2009*”, substitute “Transitional Act”.

12 **64 Subclause 7(3) of Schedule 1 (heading)**

13 Repeal the heading, substitute:

14 *Application to TCF outworkers of provisions of the Transitional*
15 *Act*

16 **65 Subclause 7(3) of Schedule 1**

17 Omit “*Fair Work (Transitional Provisions and Consequential*
18 *Amendments) Act 2009*”, substitute “Transitional Act”.

19 **66 Paragraph 7(4)(a) of Schedule 1**

20 Omit “*Fair Work (Transitional Provisions and Consequential*
21 *Amendments) Act 2009*”, substitute “Transitional Act”.

22 **67 After Part 1 of Schedule 1**

23 Insert:

1 **Part 2—Amendments made by the Fair Work**
2 **Amendment (Transfer of Business) Act**
3 **2012**
4

5 **8 Definitions**

6 In this Part:

7 *amended Act* means this Act as amended by the amending Act.

8 *amending Act* means the *Fair Work Amendment (Transfer of*
9 *Business) Act 2012*.

10 *commencement* means the commencement of this Part.

11 **9 Application of the amendments made by the amending Act**

12 The amendments made by the amending Act apply in relation to a
13 transfer of business referred to in Part 6-3A of the amended Act,
14 but only if the connection between the old State employer and the
15 new employer referred to in paragraph 768AD(1)(d) of the
16 amended Act occurs on or after commencement.

17 ***Fair Work (Registered Organisations) Act 2009***

18 **68 After subclause 2(1) of Schedule 1**

19 Insert:

20 (1A) A State-registered association may also apply to the General
21 Manager for transitional recognition under this Schedule if:

- 22 (a) it has at least one member who is a transferring employee
23 (within the meaning of the *Fair Work Act 2009*) and who is,
24 or is likely to be, covered by a copied State instrument for the
25 employee (within the meaning of that Act); and
26 (b) immediately before the employee's termination time (within
27 the meaning of that Act), it was entitled to represent the
28 industrial interests of the employee in relation to the
29 transferring work of the employee (within the meaning of
30 that Act); and

- 1 (c) it is not also an organisation, or a branch of an organisation;
2 and
3 (d) it is not, or has not been, transitionally recognised under this
4 Schedule; and
5 (e) the application is made before:
6 (i) the fifth anniversary of the day the *Fair Work*
7 *Amendment (Transfer of Business) Act 2012*
8 commenced; or
9 (ii) if the regulations prescribe a later day—that day.

10 **69 Paragraph 2(2)(a) of Schedule 1**

11 After “subclause (1)”, insert “or (1A)”.

12 **70 Subclause 2(3) of Schedule 1**

13 After “subclause (1)”, insert “or (1A)”.

14 **71 After subclause 5(1) of Schedule 1**

15 Insert:

- 16 (1A) A reference in subclause (1), in relation to a transitionally
17 recognised association that has been granted transitional
18 recognition in relation to an application under subclause 2(1A), to
19 the reform commencement is taken to be a reference to the day the
20 *Fair Work Amendment (Transfer of Business) Act 2012*
21 commenced.

22 **72 Subclause 6(1) of Schedule 1**

23 Before “ends”, insert “that has been granted transitional recognition in
24 relation to an application under subclause 2(1)”.

25 **73 After subclause 6(1) of Schedule 1**

- 26 (1A) The recognition under this Schedule of a transitionally recognised
27 association that has been granted transitional recognition in relation
28 to an application under subclause 2(1A) ends:
29 (a) when it is cancelled under clause 5; or
30 (b) when the association becomes an organisation; or
31 (c) in any other case—at the end of the latest of the following
32 days:

- 1 (i) the day (the *default day*) that is the later of the fifth
2 anniversary of the day the *Fair Work Amendment*
3 (*Transfer of Business*) Act 2012 commenced and a day
4 prescribed by the regulations;
5 (ii) if FWA grants the association an extension under
6 subclause (2)—the anniversary of the default day;
7 (iii) if FWA grants the association a further extension under
8 subclause (3)—the second anniversary of the default
9 day.

10 **74 Subclause 6(2) of Schedule 1**

11 After “subparagraph (1)(c)(ii)”, insert “or (1A)(c)(ii)”.

12 **75 Subclause 6(3) of Schedule 1**

13 After “subparagraph (1)(c)(iii)”, insert “or (1A)(c)(iii)”.

14 ***Fair Work (Transitional Provisions and Consequential***
15 ***Amendments) Act 2009***

16 **76 Paragraph 11(1)(b) of Schedule 3A**

17 Omit “transitional”.