



Fair Work Amendment (Transfer of Business) Act 2012

No. 175, 2012

An Act to amend the law relating to workplace relations, and for related purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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No. 175, 2012

An Act to amend the law relating to workplace relations, and for related purposes

[Assented to 4 December 2012]

The Parliament of Australia enacts:

1 Short title

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

2 Commencement

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

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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

Part 1—Main amendments

Fair Work Act 2009

1 After Part 6-3

Insert:

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

Division 1—Introduction

768AA Guide to this Part

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

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

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

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

768AB Meanings of *employee* and *employer*

In this Part, *employee* and *employer* have their ordinary meanings.

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

768AC What this Division is about

This Division sets out when there is a transfer of business from the old State employer to the new employer.
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768AD When does a transfer of business occur?

When there is a transfer of business

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

Transfer of assets from old State employer to new employer

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

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

- (c) that the old State employer, or the associated entity of the old State employer, owned or had the beneficial use of; and
- (d) that relate to, or are used in connection with, the transferring work.

Old State employer outsources work to new employer

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

New employer is an associated entity of old employer

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

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

- (1) The person referred to in paragraph 768AD(1)(a) is a ***transferring employee*** in relation to the transfer of business.
- (2) The ***termination time*** of a transferring employee is the start of the day the employment of the employee is terminated by the old State employer.
- (3) The ***re-employment time*** of a transferring employee is the start of the day the employee becomes employed by the new employer.

Division 3—Copied State instruments

Subdivision A—Guide to this Division

768AF What this Division is about

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

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

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

A copied State award copies the terms of a State award that covered the transferring employee and the old State employer immediately before the termination of the employee's employment with the old State employer.

A copied State employment agreement copies the terms of a State employment agreement that covered the transferring employee and the old State employer immediately before the termination of the employee's employment with the old State employer.

Subdivision B—Copied State instruments

768AG Contravening a copied State instrument

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

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

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

768AH What is a copied State instrument?

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

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

768AI What is a copied State award?

- (1) If, immediately before the termination time of a transferring employee:
- (a) a State award (the *original State award*) was in operation under the State industrial law of the State; and
 - (b) the original State award covered (however described in the original State award or a relevant law of the State) the old State employer and the transferring employee (whether or not the original State award also covered other persons);
- then a *copied State award* for the transferring employee is taken to come into operation immediately after the termination time.

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

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

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

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

- (3) If the terms of the original State award were affected by an order, a decision or a determination of a State industrial body or a court of

the State that was in operation immediately before the termination time, the terms of the copied State award are taken to be similarly affected by the terms of that order, decision or determination.

768AJ What is a State award?

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

768AK What is a copied State employment agreement?

- (1) If, immediately before the termination time of a transferring employee:
 - (a) a State employment agreement (the *original State agreement*) was in operation under a State industrial law of the State; and
 - (b) the original State agreement covered (however described in the original State agreement or a relevant law of the State) the old State employer and the transferring employee (whether or not the original State agreement also covered other persons);

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

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

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

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

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

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

768AL What is a State employment agreement?

- (1) A *State employment agreement* is:
- (a) an agreement in relation to which the following conditions are satisfied:
 - (i) the agreement is between a non-national system employer and one or more of the employees of the employer, or between a non-national system employer and an association of employees registered under a State industrial law;
 - (ii) the agreement determines terms and conditions of employment of one or more employees of the employer;
 - (iii) the agreement was made under a State industrial law; or

- (b) a determination in relation to which the following conditions are satisfied:
 - (i) the determination determines terms and conditions of employment;
 - (ii) the determination was made under a State industrial law by a State industrial body;
 - (iii) the determination was made in a situation in which parties who were negotiating for the making of an agreement of a kind described in paragraph (a) had not been able to reach an agreement;
 - (iv) the purpose of the determination was to resolve the matters that were at issue in those negotiations.
- (2) However, the regulations may provide that an instrument of a specified kind:
 - (a) is a *State employment agreement*; or
 - (b) is not a *State employment agreement*.
- (3) A State employment agreement is a *State collective employment agreement* unless:
 - (a) it is an agreement of a kind that, under the relevant State industrial law, could only be entered into by a single employee and a single employer; or
 - (b) the agreement is of a kind prescribed by the regulations.
- (4) A State employment agreement referred to in paragraph (3)(a) or (b) is a *State individual employment agreement*.

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

Transferring employee and organisations

- (1) A copied State instrument for a transferring employee *applies* to the transferring employee or an organisation if:
 - (a) the instrument covers the employee or organisation; and
 - (b) the instrument is in operation; and
 - (c) no other provision of this Act provides, or has the effect, that the instrument does not apply to the employee or organisation; and
 - (d) immediately before the employee's termination time, the employee or organisation would have been:

- (i) required by the law of the State to comply with terms of the original State award or original State agreement for the instrument; or
- (ii) entitled under the law of the State to enforce terms of the original State award or original State agreement for the instrument.

New employer and other employers

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

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

Other circumstances when instrument applies

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

Instrument only applies in relation to transferring work

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

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

Transferring employee and new employer

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

Employee organisation

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

Employer organisation

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

Other circumstances when a person is covered

- (4) A copied State instrument for a transferring employee also **covers** a person if any of the following provides, or has the effect, that the instrument covers the person:
- (a) a provision of this Act or of the Registered Organisations Act;
 - (b) an FWA order made under a provision of this Act;
 - (c) an order of a court.

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

Circumstances when a person is not covered

- (5) Despite subsections (1), (2), (3) and (4), a copied State instrument for a transferring employee does not **cover** a person if any of the following provides, or has the effect, that the instrument does not cover the person:
- (a) a provision of this Act;
 - (b) an FWA order made under a provision of this Act;
 - (c) an order of a court.

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

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

Covered only in relation to transferring work

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

768AO When is a copied State instrument in operation?

When instrument comes into operation

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

When copied State award ceases to operate

- (2) A copied State award for a transferring employee ceases to operate at the following time:
- (a) unless paragraph (b) applies—the end of the period (the **default period**) that is 5 years or such longer period as is prescribed by the regulations, starting on the day the employee's termination time occurred;

- (b) if the regulations allow FWA to make an order to extend the period of operation of a copied State award for a transferring employee and, in accordance with those regulations, FWA makes an order that the award operates for a period that is longer than the default period—the end of that period.
- (3) The regulations may:
 - (a) prescribe circumstances in which FWA may make an order for the purposes of paragraph (2)(b); and
 - (b) prescribe a maximum period that the order may specify; and
 - (c) otherwise make provision in relation to the making of the order.

When copied State agreement ceases to operate

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

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

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

- (5) The *nominal expiry date* of a copied State employment agreement for a transferring employee is:
 - (a) the day the original State agreement would nominally have expired under the State industrial law of the State; or
 - (b) if that day falls after the end of 4 years beginning on the day the employee's termination time occurs—the last day of that 4-year period.

Once instrument ceases operation, can never operate again

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

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

Subdivision A—Guide to this Division

768AP What this Division is about

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

Subdivision B—Interaction with the NES

768AQ Interaction between the NES and a copied State instrument

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

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

Application of particular provisions of the NES

- (1) The following provisions have effect, on and after the re-employment time of a transferring employee, as if a reference to a modern award or an enterprise agreement included a reference to a copied State instrument for the transferring employee:
 - (a) section 63 (which allows terms dealing with averaging of hours of work);
 - (b) section 93 (which allows terms dealing with cashing out and taking paid annual leave);
 - (c) section 101 (which allows terms dealing with cashing out paid personal/carer's leave);
 - (d) subsection 107(5) (which allows terms dealing with evidence requirements for paid personal/carer's leave etc.);

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Part 1 Main amendments

- (e) subsection 115(3) (which allows terms dealing with substitution of public holidays);
- (f) section 118 (which allows terms dealing with an employee giving notice to terminate his or her employment);
- (g) subsections 121(2) and (3) (which allow terms specifying situations in which the redundancy pay entitlement under section 119 does not apply);
- (h) section 126 (which allows terms providing for school-based apprentices and trainees to be paid loadings in lieu).

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

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

Shiftworker annual leave entitlement

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

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

Subdivision C—Interaction with modern awards

768AS Modern awards and copied State awards

- (1) While a copied State award for a transferring employee:
 - (a) covers the employee, or an employer (whether the new employer or another national system employer) or other person in relation to the employee; and
 - (b) is in operation;
-

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

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

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

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

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

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

768AT Modern awards and copied State employment agreements

Copied State collective employment agreements

- (1) If a copied State collective employment agreement for a transferring employee and a modern award both apply:
- (a) to the employee; or
 - (b) to an employer (whether the new employer or another national system employer) or another person in relation to the employee;

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

Note 1: This subsection has effect subject to item 17 of Schedule 9 to the Transitional Act as that item applies in a modified way because of section 768BY. That item, as modified, requires that the base rate of pay under the copied State employment agreement must not be less than the modern award rate.

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

Copied State individual employment agreements

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

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

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

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

FWA coverage orders

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

Subdivision D—Interaction with enterprise agreements

768AU Enterprise agreements and copied State instruments

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

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

Note 2: Industrial action must not be taken before the nominal expiry date of a copied State collective employment agreement for a transferring

employee (see item 4 of Schedule 13 to the Transitional Act as that item applies in a modified way because of section 768BY).

- (2) However, if after the re-employment time, another enterprise agreement starts to cover the employee and the new employer in relation to the transferring work, then the copied State instrument for the employee ceases to cover the employee and the new employer and can never cover them again.
- (3) This section has effect subject to any FWA order about coverage under subsection 768BA(1).

Division 5—Variation and termination of copied State instruments

Subdivision A—Guide to this Division

768AV What this Division is about

<p>This Division sets out when a copied State instrument may be varied or terminated.</p>

Subdivision B—Variation of copied State instruments

768AW Variation in limited circumstances

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

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

768AX Variation of copied State instruments

Application of this section

- (1A) This section applies if there is, or is likely to be, a transfer of business.

Variations that may be made

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

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

Who may apply for a variation

- (2) FWA may make a variation under subsection (1):
- (a) on its own initiative; or
 - (b) on application by a person who is, or is likely to be, covered by the copied State instrument; or
 - (c) on application by an employee organisation that is entitled to represent the industrial interests of an employee who is, or is likely to be, covered by the copied State instrument.

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

Matters that FWA must take into account

- (3) In deciding whether to make a variation under subsection (1), FWA must take into account the following:
- (a) the views of:
 - (i) the employees who would be affected by the copied State instrument as varied; and
 - (ii) the new employer or a person who is likely to be the new employer;
 - (b) whether any employees would be disadvantaged by the copied State instrument as varied in relation to their terms and conditions of employment;
 - (c) if the copied State instrument is a copied State employment agreement—the nominal expiry date of the agreement;
 - (d) whether the copied State instrument, without the variation, would have a negative impact on the productivity of the new employer’s workplace;
 - (e) whether the new employer would incur significant economic disadvantage as a result of the copied State instrument, without the variation;
 - (f) the degree of business synergy between the copied State instrument, without the variation, and any workplace instrument that already covers the new employer;
 - (g) the public interest.

Variation relating to the NES

- (4) If there is a dispute about the making of a variation for the purposes of paragraph (1)(d), FWA may compare the entitlements that are in dispute:
- (a) on a “line-by-line” basis, comparing individual terms; or
 - (b) on a “like-by-like” basis, comparing entitlements according to particular subject areas; or
 - (c) using any combination of the above approaches FWA sees fit.
- (5) The regulations may make provisions that apply to determining, for the purposes of paragraph (1)(d), whether terms of a copied State

instrument for a transferring employee are, or are not, detrimental in any respect when compared to entitlements under the National Employment Standards.

When variation may be made

- (6) A variation may be made under subsection (1) in relation to a copied State instrument of a transferring employee:
- (a) before the copied State instrument comes into operation, if it is likely that the instrument will come into operation; and
 - (b) before the employee is a transferring employee, if it is likely that the employee will become a transferring employee.

Restriction on when variation may come into operation

- (7) A variation under subsection (1) operates from the day specified in the variation, which may be a day before the variation is made.

Subdivision C—Termination of copied State instruments

768AY Termination in limited circumstances

- (1) A copied State instrument for a transferring employee cannot be terminated except under items 22, 23, 24, 25 and 26 of Schedule 3A to the Transitional Act (which deal with termination of State employment agreements) as those items have effect because of section 768BY.
- (2) A copied State instrument for a transferring employee that has been terminated ceases to operate and can never operate again.

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

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

Subdivision A—Guide to this Division

768AZ What this Division is about

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

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

768AZA Orders in relation to a transfer of business

- (1) This Division provides for orders to be made if there is, or is likely to be, a transfer of business.
- (2) An order may be made under this Division in relation to a copied State instrument of a transferring employee:
 - (a) before the copied State instrument comes into operation, if it is likely that the instrument will come into operation; and
 - (b) before the employee is a transferring employee, if it is likely that the employee will become a transferring employee.

Subdivision B—Coverage orders

768BA FWA orders about coverage for transferring employees

Orders that FWA may make

- (1) FWA may make the following orders:
 - (a) an order that a copied State instrument for a transferring employee that would, or would be likely to, cover the transferring employee and the new employer because of

subsection 768AN(1) does not, or will not, cover the transferring employee and the new employer;

- (b) an order that an enterprise agreement or named employer award that covers the new employer at the transferring employee's re-employment time covers, or will cover, the transferring employee.

Who may apply for an order

- (2) FWA may make an order under subsection (1):
 - (a) on its own initiative; or
 - (b) on application by any of the following:
 - (i) a transferring employee or an employee who is likely to be a transferring employee;
 - (ii) the new employer or a person who is likely to be the new employer;
 - (iii) an employee organisation that is entitled to represent the industrial interests of an employee referred to in subparagraph (i);
 - (iv) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement.

Matters that FWA must take into account

- (3) In deciding whether to make an order under subsection (1), FWA must take into account the following:
 - (a) the views of:
 - (i) the employees who would be affected by the order; and
 - (ii) the new employer or a person who is likely to be the new employer;
 - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
 - (c) if the order relates to a copied State employment agreement or an enterprise agreement—the nominal expiry date of the agreement;
 - (d) whether the copied State instrument would have a negative impact on the productivity of the new employer's workplace;

- (e) whether the new employer would incur significant economic disadvantage as a result of the copied State instrument covering the new employer;
- (f) the degree of business synergy between the copied State instrument and any workplace instrument that already covers the new employer;
- (g) the public interest.

Restriction on when order may come into operation

- (4) An order under subsection (1) must not come into operation in relation to a particular transferring employee before the later of the following:
 - (a) the transferring employee's re-employment time;
 - (b) the day on which the order is made.

768BB FWA orders about coverage for employee organisations

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

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

Subdivision A—Guide to this Division

768BC What this Division is about

This Division allows FWA to consolidate the various workplace instruments that may apply in the new employer’s workplace. It achieves this by allowing FWA to make an order that a copied State instrument for a particular transferring employee is also a copied State instrument for one or more other transferring employees or non-transferring employees.

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

768BCA Orders in relation to a transfer of business

- (1) This Division provides for orders to be made if there is, or is likely to be, a transfer of business.
- (2) An order may be made under this Division in relation to a copied State instrument of a transferring employee:

- (a) before the copied State instrument comes into operation, if it is likely that the instrument will come into operation; and
- (b) before the employee is a transferring employee, if it is likely that the employee will become a transferring employee.

Subdivision B—Consolidation orders in relation to transferring employees

768BD Consolidation orders in relation to transferring employees

Consolidation order

- (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 one or more other transferring employees.

Who may apply for order

- (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) a transferring employee, or an employee who is likely to be a transferring employee;
 - (ii) the new employer or a person who is likely to be the new employer;
 - (iii) an employee organisation that is entitled to represent the industrial interests of an employee referred to in subparagraph (i).

Matters that FWA must take into account

- (3) In deciding whether to make a consolidation order under subsection (1), FWA must take into account the following:
 - (a) the views of:
 - (i) the employees who would be affected by the order; and
 - (ii) the new employer or a person who is likely to be the new employer;
 - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;

- (c) if the order relates to a copied State employment agreement—the nominal expiry date of the agreement;
- (d) whether the copied State instrument for employee A would have a negative impact on the productivity of the new employer’s workplace;
- (e) whether the new employer would incur significant economic disadvantage if the order were not made;
- (f) the degree of business synergy between the copied State instrument for employee A and any workplace instrument that already covers the new employer;
- (g) the public interest.

Restriction on when order may come into operation

- (4) A consolidation order under subsection (1) must not come into operation in relation to a particular transferring employee (other than employee A) before the later of the following:
 - (a) the transferring employee’s re-employment time;
 - (b) the day on which the order is made.

768BE Consolidation order to deal with application and coverage

- (1) A consolidation order under subsection 768BD(1) must specify when the copied State instrument for employee A applies to, and covers:
 - (a) another transferring employee; and
 - (b) the new employer in relation to the other transferring employee; and
 - (c) an employee organisation in relation to the other transferring employee;which must not be before the other transferring employee’s re-employment time.
- (2) Once the consolidation order comes into operation in relation to the other transferring employee, the copied State instrument for the other transferring employee ceases to operate.

768BF Effect of this Act after a consolidation order is made

If FWA makes a consolidation order under subsection 768BD(1), then this Act has effect in relation to a particular transferring

employee (other than employee A), from the time the order comes into operation in relation to that employee, as if a reference in relation to that employee to the copied State instrument for that employee were a reference to the copied State instrument for employee A.

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

768BG Consolidation orders in relation to non-transferring employees

Consolidation order

- (1) FWA may make an order (a *consolidation order*) that a copied State instrument for a transferring employee (*employee A*) also is, or will be, a copied State instrument for one or more non-transferring employees who perform, or are likely to perform, the transferring work.

Non-transferring employees

- (2) A *non-transferring employee* of a new employer is a national system employee of the new employer who is not a transferring employee.

Who may apply for order

- (3) FWA may make a consolidation order under subsection (1):
 - (a) on its own initiative; or
 - (b) on application by any of the following:
 - (i) a non-transferring employee who performs, or is likely to perform, the transferring work;
 - (ii) the new employer or a person who is likely to be the new employer;
 - (iii) an employee organisation that is entitled to represent the industrial interests of an employee referred to in subparagraph (i);
 - (iv) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement.

Matters that FWA must take into account

- (4) In deciding whether to make a consolidation order under subsection (1), FWA must take into account the following:
- (a) the views of:
 - (i) the employees who would be affected by the order; and
 - (ii) the new employer or a person who is likely to be the new employer;
 - (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
 - (c) if the order relates to a copied State employment agreement or an enterprise agreement—the nominal expiry date of the agreement;
 - (d) whether the copied State instrument for employee A would have a negative impact on the productivity of the new employer’s workplace;
 - (e) whether the new employer would incur significant economic disadvantage if the order were not made;
 - (f) the degree of business synergy between the copied State instrument for employee A and any workplace instrument that already covers the new employer;
 - (g) the public interest.

Restriction on when order may come into operation

- (5) A consolidation order under subsection (1) must not come into operation in relation to a particular non-transferring employee before the later of the following:
- (a) the time when the non-transferring employee starts to perform the transferring work for the new employer;
 - (b) the day on which the order is made.

768BH Consolidation order to deal with application and coverage

- (1) A consolidation order under subsection 768BG(1) must specify when the copied State instrument for employee A applies to, and covers:
- (a) a non-transferring employee; and
 - (b) the new employer in relation to the non-transferring employee; and

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

768BI Effect of this Act after a consolidation order is made

If FWA makes a consolidation order under subsection 768BG(1), then this Act has effect in relation to a particular non-transferring employee, from the time the order comes into operation in relation to that employee, as if:

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

Division 8—Special rules for copied State instruments

Subdivision A—Guide to this Division

768BJ What this Division is about

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

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

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

Subdivision D deals with the case where a copied State award for a transferring employee ceases to operate and the employee suffers a reduction in take home pay. That Subdivision allows FWA to make a take-home pay order to compensate the employee.

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

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

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

Subdivision B—Terms about disputes

768BK Where no term dealing with disputes

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

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

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

Subdivision C—Service and entitlements of a transferring employee

768BL Service for the purposes of this Act

General rule

- (1) Service of a transferring employee with the old State employer that occurred before the employee's termination time also counts as service of the employee with the new employer for the purposes of this Act (including for the purposes of determining the employee's entitlements under the National Employment Standards) after the employee's re-employment time.

Gap between termination time and re-employment time

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

768BM NES—working out non-accruing entitlements

Application of this section

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

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

No double entitlement

- (2) If, before or after the employee's termination time, the employee has the benefit of an entitlement, the amount of which is calculated by reference to a period of service, then subsection 768BL(1) does

not result in that period of service with the old State employer being counted again when calculating the employee's entitlements of that kind under the National Employment Standards.

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

Limitation on application of general rule to redundancy pay

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

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

768BN NES—working out accruing entitlements

Application of this section

- (1) This section applies for the purposes of determining the entitlements of a transferring employee under the National Employment Standards to:
- (a) paid annual leave; or
 - (b) paid personal/carer's leave;

if the employee had, immediately before the employee's termination time, an accrued entitlement to an amount of:

- (c) paid annual leave (however described); or
- (d) paid personal or carer's leave (however described).

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

Leave accrued for purposes of the NES

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

No double entitlement

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

Working out whether leave accrued

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

768BO Copied State instrument—service

General rule

- (1) Service of a transferring employee with the old State employer that:
 - (a) occurred before the employee's termination time; and
 - (b) counted for the purposes of the application to the employee of the original State award or original State agreement for the copied State instrument for the employee;

also counts as service of the employee with the new employer for the purposes of the application to the employee of the copied State instrument after the employee's re-employment time.

Gap between termination time and re-employment time

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

Effect of consolidation order

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

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

Application of this section

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

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

No double entitlement

- (2) If, before or after the employee's termination time, the employee has the benefit of an entitlement, the amount of which is calculated by reference to a period of service, then subsection 768BO(1) does

not result in that period of service with the old State employer being counted again when calculating the employee's entitlements of that kind under the copied State instrument for the employee.

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

768BQ Copied State instrument—working out accruing entitlements

Application of this section

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

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

Leave accrued for purposes of the instrument

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

No double entitlement

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

Working out whether leave accrued

- (4) For the purposes of subsection (2), it does not matter whether the leave accrued under:
- (a) the original State award or original State agreement for the copied State instrument; or

(b) a State industrial law of the State.

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

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

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

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

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

768BS Orders remedying reductions in take-home pay

- (1) If FWA is satisfied that a transferring employee to whom a modern award applies has suffered a reduction in take-home pay, FWA may make any order (a *take-home pay order*) requiring, or relating to, the payment of an amount or amounts to the employee that FWA considers appropriate to remedy the situation.
- (2) FWA may make a take-home pay order:
 - (a) on its own initiative; or
 - (b) on application by either of the following:
 - (i) a transferring employee who has suffered a reduction in take-home pay;
 - (ii) an organisation that is entitled to represent the industrial interests of the employee.
- (3) FWA must not make a take-home pay order if:
 - (a) FWA considers that the reduction in take-home pay is minor or insignificant; or
 - (b) FWA is satisfied that the employee has been adequately compensated in other ways for the reduction.
- (4) FWA must ensure that a take-home pay order is expressed so that:
 - (a) it does not apply to a transferring employee unless the employee has actually suffered a reduction in take-home pay; and
 - (b) if the take-home pay payable to the employee under the modern award increases after the order is made, there is a corresponding reduction in any amount payable to the employee under the order.
- (5) If FWA is satisfied that an application for a take-home pay order has already been made in relation to a transferring employee, FWA may dismiss any later application that is made under these provisions in relation to the same employee.

768BT Contravening a take-home pay order

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

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

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

A take-home pay order made in relation to a transferring employee to whom a particular modern award applies continues to apply in relation to the employee (subject to the terms of the order) for so long as the modern award continues to cover the employee.

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

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

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

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

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

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

Subdivision E—Modification of this Act

768BX Modification of this Act for copied State instruments

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

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

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

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
17	Part 6-2 (dealing with disputes)	enterprise agreement	copied State employment agreement for the transferring employee
18	Part 6-2 (dealing with disputes)	fair work instrument	copied State instrument for the transferring employee

Subdivision F—Modification of the Transitional Act

768BY Modification of the Transitional Act for copied State instruments

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

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

Modification of the Transitional Act and regulations for copied State instruments

Item	Column 1 Current term	Column 2 New term
6	collective Division 2B State employment agreement	copied State collective employment agreement for the transferring employee
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

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

- (a) the provisions of the Transitional Act that are listed in column 1; and
- (b) the regulations made for the purposes of those provisions.

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
1	item 10 of Schedule 3A	instrument content rules	the transferring employee's termination time
2	item 11 of Schedule 3A	instrument interaction rules	the transferring employee's termination time
3	item 13 (other than note 1 and note 2) 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	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
		hours of work	re-employment time
13	items 19, 20 and 21 of Schedule 4	interaction with the NES	the transferring 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

Subdivision G—Modification of the Registered Organisations Act

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

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

Division 9—Regulations

768CA Regulations

- (1) The regulations may:
 - (a) make provision in relation to the transition from State awards and State employment agreements to copied State instruments; and
 - (b) make provision in relation to the transition from copied State instruments to modern awards and enterprise agreements; and
 - (c) deal with how this Act applies in relation to copied State instruments for transferring employees; and
 - (d) provide that provisions of this Act or the Transitional Act apply in relation to transferring employees or new employers with specified modifications; and
 - (e) otherwise make provision relating to how provisions of this Act or the Transitional Act apply in relation to transferring employees or new employers; and
 - (f) make provision in relation to non-transferring employees of the new employer; and

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

Part 2—Other amendments

Fair Work Act 2009

2 After subsection 9(4)

Insert:

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

3 Section 9A

Repeal the section, substitute:

9A Application, transitional and saving provisions for amendments (Schedules)

The Schedules contain application, transitional and saving provisions relating to amendments of this Act.

Note: Application, transitional and saving provisions relating to the enactment of this Act, and States becoming referring States, are in the Transitional Act.

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

Add:

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

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

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

6 Section 12

Insert:

consolidation order:

- (a) in relation to a transferring employee—see subsection 768BD(1); and
- (b) in relation to a non-transferring employee—see subsection 768BG(1).

7 Section 12

Insert:

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

8 Section 12

Insert:

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

9 Section 12

Insert:

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

10 Section 12

Insert:

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

11 Section 12

Insert:

copied State instrument: see section 768AH.

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

Add:

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

13 Section 12

Insert:

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

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

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

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

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

18 Section 12

Insert:

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

18A Section 12

Insert:

local government employee has the same meaning as in subsection 30K(1).

18B Section 12

Insert:

local government employer has the same meaning as in subsection 30K(1).

19 Section 12 (definition of *new employer*)

Repeal the definition, substitute:

new employer:

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

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

Add:

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

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

Repeal the definition, substitute:

non-transferring employee:

- (a) in relation to a transfer of business referred to in Part 2-8—
see subsection 314(2); and
- (b) in relation to a transfer of business referred to in Part 6-3A—
see subsection 768BG(2).

22 Section 12

Insert:

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

23 Section 12 (definition of *organisation*)

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

24 Section 12

Insert:

original State agreement, in relation to a copied State employment agreement: see paragraph 768AK(1)(a).

25 Section 12

Insert:

original State award, in relation to a copied State award: see paragraph 768AI(1)(a).

26 Section 12

Insert:

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

27 Section 12

Insert:

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

28 Section 12

Insert:

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

29 Section 12

Insert:

State award: see section 768AJ.

30 Section 12

Insert:

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

31 Section 12

Insert:

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

32 Section 12

Insert:

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

33 Section 12

Insert:

State industrial law means a law of a State that is a State or Territory industrial law.

34 Section 12

Insert:

State public sector employee, of a State, means:

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

- (b) any other non-national system employee in the State of a kind specified in the regulations;
and includes a law enforcement officer of the State but does not include a local government employee of the State.

35 Section 12

Insert:

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

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

and includes a non-national system employer of a law enforcement officer of the State but does not include a local government employer of the State.

36 Section 12

Insert:

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

37 Section 12

Insert:

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

38 Section 12

Insert:

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

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

Repeal the definition, substitute:

transfer of business:

- (a) for a transfer of business between a national system employer and another national system employer—see subsection 311(1); and
- (b) for a transfer of business between a non-national system employer that is a State public sector employer and a national system employer—see subsection 768AD(1).

40 Section 12 (definition of *transferring employee*)

Repeal the definition, substitute:

transferring employee:

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

41 Section 12 (definition of *transferring work*)

Repeal the definition, substitute:

transferring work:

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

42 Section 12

Insert:

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

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

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

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

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

45 At the end of subsection 43(1)

Add:

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

46 Paragraph 48(2)(a)

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

47 Paragraph 53(3)(a)

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

48 Paragraph 113(3A)(b)

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

49 Subsection 113(7)

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

50 Subsection 113A(4)

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

51 Subsections 143(8) and (10)

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

52 Subsection 168C(1) (note)

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

53 Subsection 168G(4)

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

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

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

54A Subsection 341(5)

Omit “Part 2-8 (which deals”, substitute “Part 2-8 or 6-3A (which deal”.

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

Insert:

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

56 Section 576 (note)

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

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

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

58 Paragraph 604(1)(b)

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

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

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

60 After paragraph 789BA(1)(e)

Insert:

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

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

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

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

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

62A Section 795A

Repeal the section, substitute:

795A The Schedules

The Schedules have effect.

Note: The Schedules contain application, transitional and saving provisions relating to amendments of this Act.

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

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

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

Repeal the heading, substitute:

Application to TCF outworkers of provisions of the Transitional Act

65 Subclause 7(3) of Schedule 1

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

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

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

67 After Schedule 1

Insert:

Schedule 2—Amendments made by the Fair Work Amendment (Transfer of Business) Act 2012

Note: See section 795A.

1 Definitions

In this Schedule:

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

commencement means the commencement of this Schedule.

2 Application of the amendments made by the amending Act

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

Fair Work (Registered Organisations) Act 2009

68 After subclause 2(1) of Schedule 1

Insert:

- (1A) A State-registered association may also apply to the General Manager for transitional recognition under this Schedule if:
- (a) it has at least one member who is a transferring employee (within the meaning of the *Fair Work Act 2009*) and who is, or is likely to be, covered by a copied State instrument for the employee (within the meaning of that Act); and
 - (b) immediately before the employee's termination time (within the meaning of that Act), it was entitled to represent the industrial interests of the employee in relation to the transferring work of the employee (within the meaning of that Act); and
 - (c) it is not also an organisation, or a branch of an organisation; and
 - (d) it is not, or has not been, transitionally recognised under this Schedule; and
 - (e) the application is made before:
 - (i) the fifth anniversary of the day the *Fair Work Amendment (Transfer of Business) Act 2012* commenced; or
 - (ii) if the regulations prescribe a later day—that day.

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

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

70 Subclause 2(3) of Schedule 1

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

71 After subclause 5(1) of Schedule 1

Insert:

- (1A) A reference in subclause (1), in relation to a transitionally recognised association that has been granted transitional recognition in relation to an application under subclause 2(1A), to the reform commencement is taken to be a reference to the day the

Fair Work Amendment (Transfer of Business) Act 2012
commenced.

72 Subclause 6(1) of Schedule 1

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

73 After subclause 6(1) of Schedule 1

(1A) The recognition under this Schedule of a transitionally recognised association that has been granted transitional recognition in relation to an application under subclause 2(1A) ends:

- (a) when it is cancelled under clause 5; or
- (b) when the association becomes an organisation; or
- (c) in any other case—at the end of the latest of the following days:
 - (i) the day (the *default day*) that is the later of the fifth anniversary of the day the *Fair Work Amendment (Transfer of Business) Act 2012* commenced and a day prescribed by the regulations;
 - (ii) if FWA grants the association an extension under subclause (2)—the anniversary of the default day;
 - (iii) if FWA grants the association a further extension under subclause (3)—the second anniversary of the default day.

74 Subclause 6(2) of Schedule 1

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

75 Subclause 6(3) of Schedule 1

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

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

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

Omit “transitional”.

*[Minister's second reading speech made in—
House of Representatives on 11 October 2012
Senate on 1 November 2012]*

(188/12)

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