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Department of Employment

Post implementation review of the Fair Work Amendment (Transfer of Business) Act 2012

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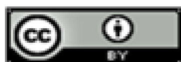

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1 - Background

The *Fair Work Amendment (Transfer of Business) Act 2012* (Transfer of Business Amendment Act) commenced operation on 5 December 2012 and amended the *Fair Work Act 2009* (Fair Work Act) to:

- provide for the transfer of employee terms and conditions of employment where an employee transfers from certain State government employers to a national system employer
- enable the Fair Work Commission to make orders that modify the general effect of the transfer of business rules in these circumstances
- provide for the interaction between the transfer of employees' terms and conditions of employment and the Fair Work Act, including the National Employment Standards, and other necessary transitional and technical provisions.

These amendments were introduced so that state government employees retain their existing entitlements under their industrial instrument, accrued entitlements and service if there is a 'transfer of business' with an employer covered by the national workplace relations system.

The post implementation review (PIR) is required because the decision to legislate was not subject to a regulation impact statement, as the former Prime Minister provided an exceptional circumstances exemption. In accordance with the Australian Government Guide to Regulation, the Department of Employment must complete a PIR within two years of the legislation being implemented.[1]

Consistent with the guidelines issued by the Office of Best Practice Regulation, the purpose of a PIR is *'to test whether the regulation is performing as intended, is still relevant and needed'*.[2] The terms of reference for the review are at Attachment A and provide that:

> *The Post implementation Review (the Review) will examine and report on the regulatory impact of the Fair Work Act, providing rules governing a transfer of business between a state government and national system employer.*

Timing of this review

The timing and focus of this review is set by the Australian Government Guide to Regulation, which was released in March 2014. The Guide states that a post implementation review should be completed within two years after implementation.[3] When the review commenced on 10 February 2014, the then requirement was for the review to begin within one to two years after the announcement of the regulatory proposal,[4] and this requirement was met. The Transfer of Business Amendment has been operational for over 18 months, having commenced on 5 December 2012.

[1] *The Australian Government Guide to Regulation*, March 2014, p. 56, accessible at: http://www.cuttingredtape.gov.au/handbook/australian-government-guide-regulation
[2] Ibid, p. 61
[3] Ibid, p. 56
[4] *Best Practice Regulation Handbook*, July 2013, p. 80

2 - Application of the Transfer of Business Amendment

The Transfer of Business Amendment Act introduced Part 6-3A of the Fair Work Act[5] and applies to former state public sector employees in New South Wales, Queensland, Western Australia, South Australia and Tasmania who become employed by a national system employer through a transfer of business. It does not apply in Victoria, the Australian Capital Territory or Northern Territory as public sector employees in these jurisdictions are already covered by the national system.

Under Part 6-3A of the Fair Work Act, a transfer of business occurs when there is a connection between the state public sector (old) employer and the new employer (such as an outsourcing arrangement, transfer of assets or the new employer is an associated entity of the old employer), and one or more employees:

- have had their employment with the old employer end
- become employed by the new employer within three months after the employment ends, and
- are performing for the new employer substantially the same work she or he performed for the old employer.

The transfer of an employee's entitlements is achieved by the creation of a new federal instrument that copies the transferring employee's existing terms and conditions of employment in a relevant state award or employment agreement.

Generally, a 'copied State instrument' covers the transferring employee, new employer and any employee organisation covered by the original state instrument immediately before the termination time of the employee.

Copied State awards and agreements are binding for different periods of time. Starting on the day a transferring employee's employment is terminated (and unless the instrument is otherwise terminated, replaced or ordered not to cover the transferring employee and the new employer):

- a copied State award ceases to operate at the end of five years, and
- a copied State employment agreement ceases to operate when it is terminated.

Part 6-3A includes provisions for the interaction between copied State instruments and the National Employment Standards, modern awards and enterprise agreements.

An employer can apply to the Fair Work Commission to stop an instrument from covering the new employer and transferring employee or to modify a copied State instrument.

The Transfer of Business Amendment does not apply to intra-state transfers (i.e. transfers between two state government employers neither of whom are in the national system) or to transfers from a local government employer within a state system to a national system employer.

[5] Part 6-3A of the Fair Work Act is accessible at:
http://www.comlaw.gov.au/Details/C2014C00031/Html/Volume_2#_Toc380072429

Further detail is available in the Explanatory Memorandum to the Fair Work Amendment (Transfer of Business) Bill 2012 (Transfer of Business Bill).[6]

3 - Context

Part 2-8 of the Fair Work Act[7] deals generally with transfer of business provisions between national system employers. Part 2-8 has been in the Fair Work Act from its inception. A similar mechanism for transferring industrial instruments, known as transmission of business, was also a feature of the *Workplace Relations Act 1996.*

All employers, including all public sector employers, in Victoria, the Australian Capital Territory, the Northern Territory and the Commonwealth are national system employers. The Fair Work Act applies in Victoria as Victoria's referral of workplace relations powers to the Commonwealth included the power to legislate in relation its public sector (including the public service and local government). As far as State public sector employment is concerned, there is an implied constitutional limitation set out in case law with the effect that high level officials in all states are not covered by the Fair Work Act.[8] The Commonwealth has constitutional power to legislate with respect to the territories[9] and its own employees.[10]

New South Wales, Queensland, South Australia and Tasmania did not refer power to the Commonwealth in relation to their public sector workforces. Consequently, employers and employees in the public sector in these States remain covered by the relevant State industrial relations system.

Each referring state excluded certain matters from its referral:

- New South Wales, Queensland and South Australia excluded state public sector and local government employers and employees,
- Tasmania excluded its state public sector employers and employees but referred power in relation to local government employers and employees.

However, some state owned corporations are national system employers. These might be employers engaged in the provision of essential services (e.g. a generator, supplier or distributor of electricity) or those who were already within the national system as constitutional corporations when the state referred power.

[6] Explanatory Memorandum, Fair Work Amendment (Transfer of Business) Bill 2012 (Cth) is available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4915
[7] Part 2-8 of the Fair Work Act is available at: http://www.comlaw.gov.au/Details/C2014C00031/Html/Volume_1#_Toc377043621
[8] There is an implied constitutional limitation set out in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31). The limitation was further discussed by the High Court in the context of State public sector employment in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188. An effect of this limitation is that high level officials in all states (e.g. members of parliament, their staff and judicial officers) are not covered by the Fair Work Act.
[9] Section 122 of the Constitution.
[10] Principally section 52(ii) of the Constitution.

Western Australia did not refer power to the Commonwealth, and its industrial relations system regulates its public sector workforce as well as employers that are not trading or financial corporations.

Many state public sector employers are therefore not national system employers, and transfers of business of those employers to a national system employer are not covered by the Part 2-8 transfer of business provisions.

In 2012, a number of state governments announced plans for outsourcing of services and significant reductions in their public sector workforce. For example, the Queensland Government's 2012-13 Budget announced a reduction of 14,000 (full time equivalent) public sector positions in one year.[11] This followed the New South Wales Government's 2012-13 Budget which had set a 1.2 per cent per annum reduction in labour costs across the public service, estimated to equate to up to 10,000 public sector jobs over four years.[12]

The former federal government said that the Transfer of Business Amendment was a response to increased privatisation and outsourcing activity by state governments (see Attachment B).

The Explanatory Memorandum to the Transfer of Business Bill states that the Amendment:

> *will, as far as possible, reflect the existing transfer of business provisions in Part 2-8 of the [Fair Work] Act*….[and]…..*will ensure that where there is a transfer of business from an old* [state] *employer to a national system employer, transferring employees will retain the benefit of existing terms and conditions of employment in State awards and agreements and their accrued entitlements. In doing so, it will result, for the first time, in a nationally consistent set of transfer of business rules, as far as possible, for certain employees that transfer to a national system employer.*[13]

The case for change

Referring to state public sector employees in New South Wales, Queensland, Western Australia, South Australia and Tasmania, the Second Reading Speech for the Transfer of Business Bill said that:

> *The government does not accept that these employees should be worse off, or that they should have their entitlements put at risk, simply because their jobs are outsourced.*
>
> *The Bill is a necessary response to this challenge – to ensure that these employees generally retain the benefit of their existing terms and conditions of employment which have been negotiated by them in good faith with their employer…*

[11] Queensland Government 2012-13 Budget Speech, September 2012, pp. 6-7, available at: http://www.budget.qld.gov.au/budget-papers/2012-13/bp1-2012-13.pdf
[12] New South Wales 2012-13 Budget Speech, June 2012, pp. 6-7. Available at: http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0004/24565/BP_No_1_Speech.pdf
[13] Explanatory Memorandum, Fair Work Amendment (Transfer of Business) Bill 2012 (Cth), p. 2, available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4915

> *These reforms mean that the Commonwealth will establish, for the first time, a nationally consistent set of transfer of business rules for public sector employees.*[14]

The Second Reading Speech included the following rationale for the transfer of business changes:

- *The [Fair Work Review] Panel considers there is a clear need to protect employees in transfer of business situations. The alternative is to allow employees to be exploited by the structuring of businesses and contracting arrangements, and*
- *The industrial terms and conditions negotiated by state public sector employees—for instance, in Queensland and New South Wales—have been entered into in good faith, and it is the case that frequently the wage outcomes accepted by employees have been discounted because of the promise of job security, and where the promise of job security is unilaterally changed by state governments then a problem arises*.[15]

In closing, the Second Reading Speech provided that '*... the approach which says that this bill is unnecessary fails to reflect the policy intent underlying the Fair Work transfer of business rules. The idea that you can simply transfer people's jobs and cut their pay and conditions is not grounded in fairness, nor does it provide the nationally consistent and transparent set of rules which this bill provides'*.[16]

Policy objectives

The Second Reading Speech for the Transfer of Business Bill included the following policy objective for the changes:

> *Our Bill will protect all state public sector employees who are moving from the state public sector to the national workplace relations system. It does so by putting in place, as far as possible, a nationally consistent set of rules which will protect public sector employees' existing terms and conditions as set out in their industrial instrument where a transfer of business occurs between a former state employer and an employer covered by the national system.*[17]

There is no object described for Part 6-3A in the Fair Work Act. The object of Part 2-8, (the Part on which Part 6-3A is modelled, is set out in section 309:

> *The object of this Part is to provide a balance between:*
>
> *(a) the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and*
>
> *(b) the interests of employers in running their enterprises efficiently;*
>
> *if there is a transfer of business from one employer to another employer.*

[14] House of Representatives, *Fair Work Amendment (Transfer of Business) Bill 2012 Second Reading Speech*, 11 October 2012, available at: http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/326c1d2a-eacb-4d75-8dfe-810eeaf66e7c/0028/hansard_frag.pdf;fileType=application%2Fpdf

[15] Ibid, p. 12035

[16] Ibid, p. 12037

[17] Ibid, p. 12037

The Second Reading Speech stated that the Transfer of Business Amendment will, as far as possible, mirror the transfer provisions in Part 2-8 which:

- *reflect the government's clear policy intention to protect employees' existing terms and conditions of employment where their employer changed in a transfer of business but their work stayed the same,* and
- *are designed to balance the protection of employee terms and conditions of employment with the interests of employers in structuring their assets and operations efficiently.*[18]

The department is not aware of any alternative proposals that may have been considered in the development of the Transfer of Business Amendment.

4 - Consultation

Consultations in the development of the legislation

On 21 September 2012, the previous Minister wrote to state and territory workplace relations ministers and members of the National Workplace Relations Consultative Council (NWRCC) inviting comments on the previous government's intention to amend the transfer of business provisions of the Fair Work Act. The previous Minister also issued a media release on that day (Attachment B).

On 2 October 2012 departmental officers met via teleconference with state and territory officers to discuss a consultation draft of the Transfer of Business Bill. On 3 October 2012 departmental officers provided a briefing to the Australian Council of Trade Unions (ACTU) and key employee organisations about the Bill also via teleconference. On 11 October 2012 departmental officers met via teleconference with the Australian Chamber of Commerce and Industry (ACCI), the Australian Industry Group (Ai Group) and the ACTU to brief them on the Transfer of Business Bill as introduced into Parliament earlier that day. Departmental officials also met via teleconference with representatives of the then Fair Work Australia and the Fair Work Ombudsman on 15 October 2012 to brief them on the Bill as introduced.

Usual practice of the previous government was to provide industrial legislation to the Committee on Industrial Legislation (COIL), a sub-committee of NWRCC, for review before introducing it into Parliament. The NWRCC is chaired by the Minister for Employment and includes employer and union peak bodies. The NWRCC is underpinned by legislation which requires it to meet twice a year. The Transfer of Business Bill was however not subject to scrutiny by COIL.

State governments have consistently expressed concern that the consultation process was inadequate and contravened protocols established under the *Inter-government Agreement for a National Workplace Relations System for the Private Sector* (IGA). Under the IGA, the Commonwealth is required to consult with the state and territory governments on proposals to amend the Fair Work legislation (as defined), as well as draft amendments to the legislation. The IGA provides that the Commonwealth is to give the states three months' notice in writing of its intention to consult or '*in the event that urgent or unforeseen amendments are required, the Commonwealth will notify* [states] *as soon as possible'*.[19]

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[18] Ibid, p. 12035

[19] *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*, 2009, p. 4

For the Transfer of Business Bill there was a period of three weeks between the state governments being notified of the intention to make the changes and the Bill being introduced in the House of Representatives. State governments were not consulted on the draft legislation.

Stakeholder views were polarised and can be broadly summarised as employee representatives supported the Transfer of Business Bill while state governments and employer groups opposed it. For example, the ACTU said the following in a submission to a Senate inquiry in March 2013:

> *The ACTU welcomed the Fair Work (Transfer of Business) Act 2012. We believe these amendments go some way in protecting the terms and conditions of employment of workers in Queensland, New South Wales, South Australia, Tasmania and Western Australia where they transfer from a state public sector employer to the national workplace relations system as a result of a transfer of business.*[20]

An example of employer's views on the legislation was provided in a publicly released letter of 6 November 2012 to the previous Minister from Innes Willox, Chief Executive of the Ai Group:

> *I am writing to communicate Ai Group's strong concerns about the Fair Work Amendment (Transfer of Business) Bill 2012 which was introduced into Parliament without any consultation with industry, despite the fact that the legislative amendments will have a major impact upon many Ai Group member companies and other private sector employers.*[21]

The Transfer of Business Bill was passed on 27 November 2012 and received Royal Assent on 4 December 2012.

Consultations for the post implementation review

On 10 February 2014, Senator the Hon. Eric Abetz, Minister for Employment, invited submissions about the Transfer of Business Amendment from the New South Wales, Queensland, Western Australian, South Australian and Tasmanian workplace relations ministers and treasurers; members of NWRCC; and the Community and Public Sector Union. As the Transfer of Business Amendment does not apply to the Victorian or the territories' public sectors, these governments were not consulted.

Submissions closed on 13 March 2014 although a number of submissions were lodged up until 3 April 2014. A letter from Dr Ken Baker, Chief Executive, National Disability Services, to Minister Abetz dated 24 June 2014 was also accepted as a submission. All submissions received were accepted.

The targeted consultation process reflects the narrow coverage of the legislation and ensured that the parties affected by the provisions had the opportunity to input into the review. Consultations were limited to written submissions.

[20] *The conditions of employment of state public sector employees and the adequacy of protection of their rights at work as compared with other employees: ACTU Response to the Senate Education, Employment and Workplace Relations Committee*, para. 101, 1 March 2013.

[21] Letter available on the Ai Group at: http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE_CONTENT/Policy%2520and%2520Representation/Submissions/Workplace%2520Relations/2012/letter_ministershorten_Transferofbusiness_nov12_Final.pdf

The list of the thirteen submissions received is at Attachment F and copies of them are available on the Department of Employment website.[22] Due to Caretaker Conventions in place at the time, the South Australian Government did not provide a submission and the Tasmanian Department of Premier and Cabinet provided background information.

Submissions received indicate that stakeholder views remain polarised, as they were in 2012. Unions strongly support the Transfer of Business Amendment and its continuation while state governments that provided a submission and employer groups see it as an unnecessary, costly and unreasonable intrusion on business by the Commonwealth.

Entity	Principal position expressed in their 2014 submission
New South Wales Government	*No Commonwealth transfer of business laws should apply to the New South Wales government as an employer.... Part 6-3A of the Fair Work Act is flawed in its purpose and operation* [and should be repealed].
Queensland Government	*The Transfer of Business Amendment is an unnecessary and unwelcome intrusion into the business of the state…and provides suboptimal outcomes and negative consequences for all participants in government service delivery.*
Western Australian Government	*The Transfer of Business Amendment unduly interferes with the State's ability to effectively manage its financial affairs and delivery of public services.*
Tasmanian Department of Premier and Cabinet	*The imposition of the new rules became an unforeseen issue in the transition of an entity from the public to the private sector in Tasmania.*
ACTU	*The ACTU and our affiliates strongly support the Transfer of Business Amendment … [it] puts state public services on an equal footing with their national system colleagues.* *This PIR should be delayed until the provisions of the* [Amendment] *have had the opportunity to be implemented and tested* [by large scale privatisation and outsourcing plans announced by the New South Wales and Queensland governments in March 2014].
Unions NSW	*Unions NSW support the Transfer of Business Amendment to ensure public sector workers are provided with the same rights as those afforded to private sector employees under the Fair Work Act* [and it should be strengthened].
CPSUCSA WA Branch	*The Transfer of Business Amendment should be left unchanged.*

[22] Copies of the 13 submissions received on the Department of Employment's website.

Entity	Principal position expressed in their 2014 submission
ACCI	*Recommends that the Transfer of Business Amendment not be found to succeed in its post-implementation review.*
Master Builders Australia (MBA)	*Previous transmission of business rules, based on the actual transfer of a business, must be reinstated. The Transfer of Business Amendment should be repealed.*
Ai Group	*The Transfer of Business Amendment is operating against the interests of employers (public sector and private sector), employees and the broader community. Accordingly, the Act needs to be repealed without delay.*
Victorian Employers Chamber of Commerce and Industry (VECCI)	*The Transfer of Business Amendment and the broader transfer of business rules do not operate in the best interests of a productive, efficient and prosperous economy.*

5 - Transfer of Business Amendment – Operation over the past 18 months

Coverage

Using Australian Bureau of Statistics data, the department estimates that the Transfer of Business Amendment has potential coverage of almost 80 per cent of state public sector employees in New South Wales, Queensland, Western Australia, South Australia and Tasmania. In 2012-13, this equated to around 843,000 state public sector employees in these states (Attachment C explains this estimate). The remaining state public sector employees are covered by the national workplace relations system.

However, the Transfer of Business Amendment has practical application to a much smaller number of employees. The main reason for this is that a significant proportion of state public sector 'business' is unlikely to ever transfer to a national system employer because of the inherent nature of the work i.e. while some state governments are willing to outsource or transfer elements of service delivery, they are highly unlikely to outsource core policy advising functions. The Transfer of Business Amendment does not impact every outsourcing or transfer of assets. It only applies to those outsourcing/asset transfers in circumstances where:

- an employee has had their employment with their old employer end
- the employee becomes employed by the new employer within three months of their employment ending, and
- the employee performs for the new employer substantially the same work they performed for the old employer.

Other employees may be affected if they are treated differently than they might otherwise have been in an outsourcing or asset transfer scenario because of the Transfer of Business Amendment

being in place. For example an employee may be made redundant if the new employer is unwilling to hire them due to the effect of the Transfer of Business Amendment.

Cases so far

There have been only a few cases under the Transfer of Business Amendment brought before the Fair Work Commission. The department is aware of the following Fair Work Commission applications and decisions in relation to varying transferable instruments or to make other orders under Part 6-3A. All applications have been granted:

1. Forestry Corporation of New South Wales (8 April 2013, Cargill C) – for orders to vary a copied State instrument and a consolidation order in relation to non-transferring employees. Granted.
2. Lifehouse at RPA as trustee for Lifehouse at RPA Trust (12 September 2013, Watson VP) – for an order that transferring employees would be covered by a Lifehouse greenfields agreement. Granted.

3-6. Lifehouse at RPA as trustee for Lifehouse at RPA Trust (13 September 2013, Booth DP) – for orders on four applications that transferring employees be covered by a number of Lifehouse enterprise agreements. Granted.

7. Transit (New South Wales) Services Pty Ltd (16 September 2013, Sams DP) – for an order that transferring employees would be covered by a Transit greenfields agreement. Granted.
8. Leighton Boral Amey NSW Pty Ltd (28 March 2014, Drake SDP) – for orders to vary a copied state award and a consolidation order in relation to non-transferring employees. Granted.
9. University of Southern Queensland (25 June 2014 Booth C) – for an order about coverage for transferring employees under a state instrument. Granted.
10. Central Queensland University (Booth C, 26 June 2014) – to vary copied State instruments, to consolidate orders in relation to transferring employees and to consolidate orders in relation to non-transferring employees. Granted.
11. Central Queensland University (Booth C, 26 June 2014) – to vary copied State instruments, to consolidate orders in relation to transferring employees and to consolidate orders in relation to non-transferring employees. Granted.

Brief summaries of these cases are at Attachment E.

The department's view is that the provisions are generally operating as intended, with cases being dealt with by the Commission in an expedient and cost effective manner. However, the absence thus far of more complex or contested applications means that an assessment cannot be made as to how the provisions perform in such circumstances. Further analysis of the potential cost of hearings to the parties is included later in this report.

Difficulty in measuring application

Data on actual numbers of employees impacted by the Transfer of Business Amendment are not available. The department has not been able to identify any source that records or reports on state government outsourcing or asset transfers, or numbers of employees transferring to the national

workplace relations system as a result of such activities. A wide-ranging literature search undertaken by the department did not produce useful material to further inform the review.

State government submissions also did not include quantitative material on the number of employees who have been, or may in the future be, affected by the Transfer of Business Amendment. The department did not expect such data to be provided given the potential for it to be both commercially and politically sensitive.

There are a range of reasons why the application of the Transfer of Business Amendment cannot be quantified. They include:

- the department is not aware of any register maintained by individual state governments detailing outsourcing and asset transfer initiatives which record numbers of public servants impacted by such initiatives
- outsourcing and asset transfers can result in a range of outcomes for affected employees, which are not quantifiable without very specific and detailed information being supplied by state governments for every individual initiative. For example:
  - the state government may make the outsourcing or asset transfer dependent on the new employer taking on former state government employees. In this case the Transfer of Business Amendment would apply to all affected employees
  - the state government may choose to redeploy all affected employees rather than seeking to have them transfer to the new employer and the Transfer of Business Amendment would not apply
  - a new employer may choose not to engage any of the state government employees as a result of the Transfer of Business Amendment, with the potential for all, some or none of them being made redundant by the state government as a result. In such cases the Transfer of Business Amendment would not apply
  - a new employer may choose to engage some or all of the former state government employees within the three month period following their employment ending, and the Transfer of Business Amendment would apply, and
  - a new employer may wait three months to engage former state government employees so as to avoid application of the provisions.

The diverse range of outcomes that may occur as a result of the provisions clearly impacts the capacity for any meaningful data to be collected on the application of the Transfer of Business Amendment.

In addition, raw data on its own is not likely to be particularly useful in measuring the impact of the provisions. For data to be useful in a review of the legislation, it would need to include detailed information on how the Transfer of Business Amendment did or did not impact decisions on the future of affected employees by both state governments and potential employers. The department is of the view that such information is unlikely to be compiled by any entity.

For the reasons discussed above, the department has relied on qualitative information and case studies provided in stakeholder submissions to examine the impact of the Transfer of Business Amendment, as well as analysis of the cases heard so far by the Fair Work Commission. The

department is of the view that defensible analysis and conclusions can be drawn from this information and appreciates the efforts of stakeholders in preparing submissions.

6 - Impact – Employees

Advice from submissions

As noted previously, union submissions to the review strongly support the Transfer of Business Amendment and its continuation. The ACTU submits:

> *The Transfer of Business [Amendment] puts state public servants on an equal footing with their national system colleagues in relation to transfer of business.*[23]
>
> *We consider that the Transfer of Business Act provides enhanced protection to employees who are outsourced from a State public sector employer to a national system employer. The provisions of the Transfer of Business Act are valuable provisions which provide flexibility and certainty to employers as well as potentially reducing their regulatory burden while also protecting the working conditions of outsourced State public sector employees.*[24]

Unions NSW argue that the Transfer of Business Amendment is necessary due to state and territory governments seeking to reduce budget deficits by reducing the employment conditions of public sector workers through asset sales, outsourcing and job cuts.[25] Unions NSW submit that the Transfer of Business Amendment provides the same certainty for public sector workers that the Fair Work Act affords to private sector employees and that it provides the best mechanism to retain staff and maintain high quality service when there is a transfer of business to private providers.[26]

By way of example, Unions NSW state that:

> *…the implementation of the National Disability Insurance Scheme (NDIS) will have significant implications for public sector workers who provide care and support in the disability sector. The* [New South Wales] *NDIS enabling legislation will see the transfer of approximately 10,000 state government employees into the national employment system. The* [Transfer of Business] *Amendment will play a significant role in the orderly transition of these employees to the national employment system while maintaining consistency of service levels during this time for thousands of clients.*[27]

The ACTU also argue that the importance of the provisions will be highlighted when the NDIS arrangements commence operation.[28] The ACTU notes that it has not directly received feedback on whether the provisions have been used to date.[29] The ACTU did however note anecdotal evidence of situations where the provisions potentially would apply; however employees did not transfer to the new employer as the employer had hired their own employees.[30]

Pointing to findings in relation to Part 2-8 made in the Fair Work Act Review 2012, the ACTU suggests that the following finding is relevant to the (later) Transfer of Business Amendment:

[23] ACTU submission, para. 9
[24] Ibid, para. 21
[25] Unions NSW submission, para. 10
[26] Ibid, paras 12 & 17
[27] Ibid, para. 13
[28] ACTU submission, para. 20
[29] Ibid, para. 18
[30] Ibid, para. 17

> *…the Panel went on to say that it considered there is a clear need to protect employees in transfer of business situations. The alternative is to allow employees to be exploited by the structuring of businesses and contracting arrangements.*[31]

It is noted that this finding of the Fair Work Act Review 2012 relates to the transfer of business rules under Part 2-8 of the Fair Work Act. The Review Panel's report did not include any consideration of the possibility of transfer of business provisions applying in the case of employee transfers between state system and national system employers.

The Civil Service Association of Western Australia and Community and Public Sector Union WA Branch (CPSUCSA) identified a particular example where the Transfer of Business Amendment has apparently caused some uncertainty. The CPSUCSA reports that the Government Employees Superannuation Board proposes to outsource parts of its administration to the private sector. Transition payments to compensate for loss of entitlements may have been payable to transitioning staff under the *Public Sector Management (Redeployment and Redundancy) Regulations 1994* (WA). However, because the Transfer of Business Amendment preserves entitlements and service, the CPSUCSA reports that the Western Australia government has argued that the transition payment should not be paid.[32]

Unions NSW submit that prior to the Transfer of Business Amendment, members of the Public Sector Association '*had been acutely disadvantaged by the absence of these provisions'*.[33] The following case study was provided.

<u>Case Study (a): National Art School, New South Wales 2009. (Source: Unions NSW)</u>[34]

The National Art School was previously a unit of the New South Wales Department of Education and Training. In 2009, the New South Wales government announced that the School was to be registered as a public company limited by guarantee.[35] *It now operates as an independent higher education provider and as a national system employer.*

At the time of the transition, there were no procedures under which employees could retain the conditions of their state based instrument when they transferred to the 'new employer'. Administrative and technical staff were initially retained for six months as government employees while performing work for the new employer. At the end of this time, a competitive recruitment process resulted in offers of employment to some of these employees at inferior salary and conditions (compared to those of the former government employer).

[31] ACTU submission, para. 6
[32] CPSUCSA submission, p. 1
[33] Unions NSW submission, para. 41
[34] Ibid, pp. 10-11
[35] History of the National Art School, http://www.nas.edu.au/about/our-history

The employees had the option to either decline the job offer and seek redeployment in the public sector or resign from the public sector and accept inferior conditions in taking up the job offer from the new employer.

The Public Sector Association (PSA) sought the making of an Award in the New South Wales Industrial Relations Commission to entitle transfer payments to be made to two employees. A payment of 13 weeks' salary resulted from a full bench decision. In the view of the PSA, this was insufficient to ameliorate for loss of salary and conditions of employment experienced by the employees.

While this example contends that the employees taken on by the new employer received inferior salary and conditions, it also notes that a Full Bench of the New South Wales tribunal awarded transfer payments to those employees, presumably to compensate for any loss in entitlements. It further notes the employees had the option of seeking redeployment within the public sector.

The Western Australian Government contends that new employers are likely to have a preference for recruiting state public sector employees already working within the transferred business due to their existing skills, knowledge and experiences relevant to that particular business.[36] It further argues that the *'legislation reduces flexibility when making these initial recruitment decisions and could create a perverse incentive for the new organisation to avoid hiring public sector employees'*.[37]

The position of the Western Australian Government is supported by the state governments of New South Wales and Queensland, who argue that the Transfer of Business Amendment disadvantages state public sector employees and that it:

- acts as a disincentive for national system employers to employ public sector employees,[38] and
- creates a competitive disadvantage for a state public sector employee relative to others in the job market.[39]

The New South Wales, Western Australian and Queensland governments submit that the legislation is unnecessary and point to their previous experience in outsourcing arrangements and to the state provisions that dealt with transfer of business and/or redundancy prior to the implementation of the Amendment. Reflecting other states' sentiment, the New South Wales government submits that prior to the Transfer of Business Amendment, it *'made appropriate provisions for employee rights and entitlements when it engaged in outsourcing or asset sales and continues to do so'* and *'…comprehensive employee protections have been a long standing feature of public sector transactions in New South Wales'*.[40] This issue is further discussed in the analysis of the impact of the provisions on state governments.

[36] WA Government submission, p. 2
[37] Ibid, p. 2
[38] NSW Government submission, paras 27-29; Qld Government submission, p. 3; WA Government submission, p. 1
[39] WA Government submission, p. 2
[40] NSW Government submission, paras 15 & 43

The Queensland Government further contends that '*the best protection for employees includes a well managed process of contestability, and a planned and methodical approach to managing workforce impacts where the full suite of options are available'.*[41]

Employer representatives submit that the Transfer of Business Amendment:

- has compounded the complexity associated with engaging a state public sector employee,[42]
- is a disincentive for national system employers to employ state public sector employees,[43] and/or
- is the reason that some potential transfers are not entered into, resulting in retrenchments from the state public sector employer.[44]

The Australian Chamber of Commerce and Industry questions whether the legislation has protected state public sector employees as intended. They submit that generalist or low skilled employees are particularly at risk of not transferring to the new employer:

> *Whether these* [transferred] *state public sector employees both continued in their work and did so under the same terms and conditions would be seen to depend on the particular skills of the potential transferees; and any contractual arrangement negotiated by the state public sector employer requiring the new [employer] to take or seriously consider taking its employees.*
>
> *…The most vulnerable state public sector employees would seem to be those with few, or easily substitutable, skills where their conditions under the relevant state public sector instrument differ significantly from those applying at the new supplier's enterprise.*[45]

Analysis

The department has identified the following groups of employees who are impacted by the Transfer of Business Amendment, in addition to transferring employees (as defined by the legislation):

- state public sector employees whose employment was terminated as a result of a transfer of business and who:
  - were employed by the new employer later than three months after the termination explicitly to avoid the application of the Transfer of Business Amendment, or
  - were not employed by the new employer explicitly because of the obligations under the Transfer of Business Amendment, and
- existing employees of the new employer whose terms and conditions of employment:
  - were changed to align with a copied State instrument or because a new federal agreement was negotiated to cover all employees, or

[41] Qld Government submission, p. 3
[42] ACCI submission, pp. 6-8; MBA submission, p. 2-3
[43] ACCI submission, p. 6; Ai Group submission, p. 5; MBA submission, p. 3
[44] ACCI submission, pp. 15-16; Ai Group submission, p. 4; MBA submission, p. 3
[45] ACCI submission, p. 6

- remained unchanged while they performed the same or similar work alongside transferred employees on more advantageous terms and conditions. This group could potentially include new hires after the transfer.

Where an employee's old arrangements are more generous than those that would otherwise apply at the new employer, the transferring employee receives a benefit. Where the new employer has higher wages and conditions in place the transferring employee may be worse off than if the Transfer of Business Amendment did not apply.

Submissions indicate that terms and conditions of employment for public sector employees are often more generous than for comparable positions in the private sector. While this is not always the case, where public sector arrangements are more generous and employees are transferred in an outsourcing or asset transfer, they are likely to achieve better outcomes as a result of the Transfer of Business Amendment. For this reason, such employees are likely to be more willing to transfer to a new employer in an outsourcing or asset transfer scenario, which would assist the new employer in terms of continuity of employment consistent with the observation of union submissions.

A comparison of terms and conditions between a copied State instrument and a modern award or enterprise agreement that applies to a new employer is complex. Employment terms and conditions for many state public service agencies have developed over many years, reflect policy and bargained outcomes and are made pursuant to state legislation. Comparison to a modern award or enterprise agreement would be achieved, at best, by analysis on a case by case basis and by making assumptions on the wages and conditions that would have applied had the Transfer of Business Amendment not been in place. There is little scope to draw general conclusions from such analysis.

Unions NSW provide a case study on outsourced home care services to illustrate the terms and conditions that may be preserved by the Transfer of Business Amendment.

Case study (b) Home Care Service of New South Wales (Source: Unions NSW)[46]

The New South Wales Government has legislated for the transfer of Home Care Service of New South Wales (part of Ageing, Disability and Home Care or ADHC) to private and community based organisations over the period until 2018.

Unions NSW conclude that 'without the [Transfer of Business Amendment], home care workers would see a reduction in their workplace pay and conditions [and] *this will most likely result in a significant exodus of workers from the industry'.*

The Unions NSW submission includes a comparison of the Care Worker Employees – Department of Family and Community Services ADHC (State) Award to the Social Community Home Care and Disability Services Award 2010. Some conditions in the State award that the Union argues are more advantageous than the modern award and that the Transfer of Business Amendment could allow transferring home care workers to carry across to a national system employer are:

- *different classifications and wage rates*

[46] Unions NSW submission, pp. 5-8

- *an excess travel allowance, paid if a worker visits a client's residence that is more than 20 km from the Home Care branch office and the visit is at either the beginning or end of a day. Excess travel payments are not provided for in the modern award*
- *certain flexibility for the employer to alter rosters on an ongoing basis. In comparison, the modern award requires that employees be advised of the day of the week and times the work is to be performed and there is no subsequent alteration without agreement, and*
- *certain capacity for workers to alter hours of client service by agreement between themselves and clients. There is no such provision in the modern award.*

While the Unions NSW comparison notes differences between the state and federal awards that may impact workers, some of them are notional entitlements that may or may not apply to workers. It is also not clear whether the modern award includes entitlements that are more generous than the state award. In addition, if the national system employer is covered by an enterprise agreement, any comparison with the relevant modern award would be irrelevant.

This example highlights the difficulty in making comparisons between state and federal instruments that may apply in particular workplaces.

While noting that employees may have an increased capacity to retain more generous state public wages and conditions, submissions have indicated that the Transfer of Business Amendment did not 'fill a void' – it replaced state regulation and policy that had provided protections and other considerations for employees impacted by government outsourcing arrangements.[47]

Privatisation and outsourcing of public services has occurred in all jurisdictions over many years. Submissions have not provided evidence that state regulations had manifestly failed to provide protections for employees impacted by government outsourcing or asset transfers. It is therefore not possible to quantify potential benefits to transferring employees subject to the Transfer of Business Amendment due to the difficulty in comparing state and federal industrial instruments and the uncertainty as to the benefits transferring employees may have been entitled to under previous state arrangements.

A potential disadvantage to a former state public sector employee under the Transfer of Business Amendment occurs if they face redundancy as a consequence of the provisions. This could occur if a new employer determines that the cost and/or complexity of applying public sector employment terms and conditions, or otherwise seeking orders from the Fair Work Commission to modify or stop an instrument transferring, outweighs the benefits from employing staff who formerly provided the function in the public sector. This circumstance would be attributable to the legislation. The ACTU's submission notes anecdotal evidence of more than one situation which could have involved state government employees transferring to the new private sector employer, however they were not

[47] NSW Government submission, p. 4; WA Government submission, p. 1; Qld Government submission, p. 1; Tasmanian Department of Premier and Cabinet submission, p. 1

transferred due to the new employer hiring other employees.[48] It is not clear whether these employees did not transfer as a result of the Transfer of Business Amendment.

Unions have argued that the maintenance of employee terms and conditions aids in continuity of service as employees are more likely to accept positions with the new employer. The fact that an employee's accrued entitlements and certain terms and conditions of employment would transfer with them to a national system employer does not however make it any more likely that the person will be taken on by the new employer. In addition, the department agrees with the observation of ACCI that lower skilled employees are probably less likely to be transferred to a new employer as a result of the Transfer of Business Amendment due to the relative ease of replacing such employees, thereby avoiding application of the legislation.[49] Such employees may be redeployed by the relevant state government although, given undertakings of state governments to reduce public sector employment, may alternatively be subject to redundancy. As noted previously, state government submissions also argue that the provisions are likely to increase the incidence of redundancies.[50]

The extent and cost of any unemployment attributable to the Transfer of Business Amendment cannot be calculated, primarily because there is no data on how many state public sector employees have become unemployed as a result of transfers of business and, of these, how many would have transferred to the new employer if the Transfer of Business Amendment had not been in place. Also, the cost to employees of unemployment is variable, influenced by (inter alia):

- the availability of alternative employment opportunities, which affects duration of unemployment, and
- the differential impact of redundancy/unemployment on individuals' capacities to support their housing, health and family needs until they are next employed.

Acknowledging that there is no quantitative data source available to measure the impact of the provisions, it is arguable that there are likely to be fewer transferring employees under the Transfer of Business Amendment than would have occurred without it. That is, while the Amendment has protected the conditions of transferring employees (as intended), the department's view is that there may be fewer transferring employees and higher public sector redundancies as a consequence.

7 - Impact – State governments

Advice from submissions

All state government submissions contend that the Transfer of Business Amendment has impacted business transfers in their state. New South Wales, Queensland and Western Australian governments do not support the Transfer of Business Amendment and argue that it should not apply to them as employers.[51] The New South Wales Government argues, for example, that:

[48] ACTU submission, para. 17
[49] ACCI Submission, p. 6
[50] NSW Government submission, p. 7; Qld Government submission, p. 3; WA Government submission, p. 1
[51] NSW Government submission, p. 2; Qld Government submission, p. 1; WA Government submission, p. 1

> *The operation of the Part 6-3A provisions has significant implications for the ability of the New South Wales Government to effectively conduct commercial operations, including the outsourcing of its staff and assets and to carry out the general management of its industrial relations policies unhindered.*[52]

State governments submit that the Transfer of Business Amendment is unnecessary and that they have experience over many years in managing employment outcomes from outsourcing arrangements. They also refer to their own state regulation and policies that guided employee transfers and/or redundancy negotiations prior to the implementation of the Transfer of Business Amendment:

- *Western Australia's existing Public Sector Management Act 1994 already has provisions to provide protection to staff who are transferred from the public sector to non-government organisations or made redundant.*[53]
- *Prior to the introduction of the Commonwealth amendments, the NSW Government made appropriate provisions for employee rights and entitlements when it engaged in outsourcing or asset sales and continues to do so… The NSW Government has demonstrated that it can negotiate with unions and agree on a range of measures for public sector employees transferring to private sector … These have included, as and when appropriate, transfer payments, job security guarantees, continuation of employment conditions, recognition of prior service.*[54]
- *The Queensland Government has implemented a fair, balanced and supportive process for the management of employees whose roles are no longer required as a result of changes within their workplace. This may mean supporting employees into another job within the public service, or ….a job in another sector, or employees being offered a voluntary redundancy package.*[55]
- Tasmania's submission notes that: *In circumstances where a new employer was bound by an award made under the Industrial Relations Act 1984* [Tas]*, the former awards and agreements… continued to have application after the transfer*,..' and [in circumstances where a new employer was bound by the former Workplace Relations Act 1996], '*the operation of Part II – Transmission of Business rules of that Act were deemed to govern State employees as though it had application….* [if additional considerations were added through negotiations, these would be] '*registered as an agreement pursuant to the provisions of the Industrial Relations Act 1984 or would be included in the terms of settlement with the new employer.*[56]

State government submissions variously submit that the Transfer of Business Amendment:

- constrains strategies to reform public administration and creates impediments to the delivery of flexible client-based services[57]
- unduly interferes with the rights of state governments to effectively manage their financial affairs and deliver public services[58]

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[52] NSW Government submission, p. 4
[53] WA Government submission, p. 1
[54] NSW Government submission, p. 4
[55] Qld Government submission, p. 1
[56] Tasmania Department of Premier and Cabinet submission, p. 1
[57] NSW Government submission, p. 4

- has resulted in additional costs or reduced value for money,[59] and/or
- extends protections beyond those provided for in Part 2-8 of the Fair Work Act (that apply to the Commonwealth, Victoria and the territories) by introducing a different treatment of the termination of transferring New South Wales awards.[60]

The New South Wales Government also argues that the process for implementing the amendment contravened the *Inter-governmental Agreement for a National Workplace Relations System for the Private Sector,* [61] consistent with views previously expressed by other state governments.

State governments did not provide specific examples of finalised transfer of business processes where the Transfer of Business Amendment had applied to negotiations with new employers. Examples where negotiations are continuing or planned were provided.

The Queensland Government submits that the Transfer of Business Amendment has forced the government to make choices between customer and employee interests. It further submits that the regulatory impact on new employers and consequential stifling of innovation in service provision has raised costs which are ultimately reflected in bids received by the Government:

> *Potential service providers agree that if the transition of public service employees forms part of a contract with government, it is likely that the additional costs involved in doing so will ultimately be borne by the state and reflected in the bids received. This will significantly impact on the value for money outcomes that the Queensland Government can obtain on behalf of Queenslanders.*[62]

The New South Wales Government submits that nationally consistent transfer of business provisions for public sector employees has not been achieved by the Transfer of Business Amendment. Its view is that there is differential treatment of certain instruments under Part 6-3A, as compared to Part 2-8 (which applies to public sector employers in the national system (including the Commonwealth and Victoria)). Part 2-8 provides flexibility in the way that transferable instruments can brought to an end that is not available under Part 6-3A for copied State awards. Its view is that this is anomalous and should be rectified.[63]

Tasmania provides an example of where the Transfer of Business Amendment has added complexity to a transfer of business process. In that case, outlined below, an application to the Fair Work Commission will be needed to seek orders that relevant awards do not transfer to the new employer.

[58] WA Government submission, p. 1
[59] Qld Government submission, pp. 1, 3-4; WA Government submission, p. 2
[60] NSW Government submission, p. 9
[61] Ibid, p. 2-3
[62] Ibid, p. 4
[63] NSW Government submission, p. 9

Case study (c): Dorset Aged Care Facility, Tasmania (Source: Department of Premier and Cabinet, Tasmania)[64]

Negotiations were underway prior to December 2012 concerning the outsourcing of an aged care facility at Scottsdale to the non-government sector.

With the introduction of the Transfer of Business Amendment, the five year rule applying to the preservation of copied state awards became an unforeseen issue and prompted a closer examination of the terms and conditions contained in the relevant state and modern awards. This highlighted the impracticality of comparing the safety net of wages and conditions contained in a modern award with the bargained outcomes contained in the state awards.

The issue did not deter the parties from seeking a resolution and negotiations on a draft agreement continued. When reached, the agreement will require an application to the Fair Work Commission for orders to not transfer state award/s.

Unions NSW contend that the principal benefit to state governments is that skilled and experienced staff transition to the new employer, minimising disruption to services and ensuring that the quality of care for clients is maintained.[65] The following case study was provided by Unions NSW to demonstrate how the Transfer of Business Amendment applied in a recent transfer of business initiative.

Case study (d): Lifehouse at Royal Prince Alfred Hospital (Source: Unions NSW)[66]

Negotiations were underway prior to December 2012 for Cancer Oncology Services at Royal Prince Alfred Hospital (RPA) to transfer in two tranches to Lifehouse at RPA Trust (Lifehouse), a national system employer. Affected employees included several radiation and medical oncologists, radiation therapists, medical physicists, nurses and support staff.

Following passage of the Transfer of Business Amendment, a number of greenfields agreements were successfully negotiated and certified by the Fair Work Commission, prior to Lifehouse commencing its operations in November 2013.

Unions NSW attributes to the Amendment the successful transfer to Lifehouse of the majority of those formerly employed by RPA. It also submits that the Transfer of Business Amendment provided a framework that permitted a continuum of critical care and service delivery to cancer patients of the RPA.

It is however noted that the parties would still have been free to negotiate arrangements to cover transferring employees without the Transfer of Business Amendment being in place, with transferring employees' protected by the national system safety net.

[64] Tasmanian Department of Premier and Cabinet submission, p. 1-2
[65] Unions NSW submission, pp. 4-5
[66] Ibid, p. 8-10

As previously noted the ACTU submission states that the Transfer of Business Amendment puts state government employees on an equal footing with national system employees.[67] The ACTU submission notes what it describes as anecdotal evidence that the Transfer of Business Amendment had indirectly protected the rights and entitlements of employees and helped to ensure skilled workers are retained in areas such as disability services and health.[68]

Unions NSW argues that the loss of state government employment conditions could lead to employees not transferring to a national system employer, which may have a detrimental impact on clients of the NDIS in New South Wales. Unions NSW suggest that:

> …'*loss of employment conditions may result in a loss of experience and expertise to other employers. This ... may result in an increase in anxiety for students with disabilities due to separation from service providers with whom they had relationships of confidence and trust…* [and] *Teachers in schools will have increased workloads because of students who are suffering* [this] *increased anxiety'.*[69]

Employer representatives submit that state governments face higher redundancy costs as a result of the provisions. They argue that this is due to new employers not wanting to engage former state government employees because of the need to provide different terms and conditions of employment that are often more costly than those paid to their existing employees.[70]

Some also contend that state governments face higher costs from outsourcing arrangements. To illustrate, included in the ACCI submission is a letter from the Australian Public Transport Industrial Association, which states:

> *Given that labour costs in providing public transport … represents at least 50% of the total costs of providing those services the provisions in the* [Transfer of Business Amendment] *Act to require any incoming, successful private transport operator to take over the same terms and conditions of an enterprise agreement or award of an outgoing public operator defeats the Government's intention to tender the public services (being to gain cost efficiencies by allowing private operators, traditionally more cost efficient).*
>
> *The effect of this anomaly therefore in any tender process is to push costs up rather than down and to place enormous burdens on the current industrial environment, dominated by potential protected action to support employment and conditions.*[71]

The New South Wales Government submits that the process for dealing with copied State instruments by the Fair Work Commission is potentially a costly and time consuming burden. It contends that, while the Fair Work Commission is required to take into account whether the copied State instrument would have a negative impact on the productivity of the new employer's workplace or result in significant economic disadvantage for the new employer, these matters are not accorded priority.[72] The ACTU, on the other hand, points to these considerations as evidence that sufficient

[67] ACTU submission, para. 9
[68] Ibid, para. 19
[69] Unions NSW submission, p. 18
[70] ACCI submission, p. 16; Ai Group submission, p. 4-5
[71] ACCI submission, p. 12
[72] NSW Government submission, pp. 7-8

flexibility exists to ensure that copied State instruments are better aligned to the working arrangements of the new employer's enterprise.[73]

The New South Wales Government further submits that an application to '*the Fair Work Commission will not necessarily address regulatory uncertainty – particularly where different terms and conditions of employment apply to different transferring employees and those terms are inconsistent the new employer's enterprise agreement'*.[74]

Unions NSW submit that the Transfer of Business Amendment '[does] *not impede private sector employers seeking to renegotiate conditions of employment'*.[75]

The ACTU submits the Transfer of Business Amendment should be allowed to operate for longer before being reviewed given recent reports of new outsourcing and privatisation initiatives by the New South Wales and Queensland governments.[76] The ACTU notes reports that the New South Wales Government plans to outsource a considerable number of public sector jobs in line with recommendations of the Independent Pricing and Regulatory Tribunal and reports that the Queensland Government may privatise electricity generation, distribution and retail, and the Gladstone and Townsville ports.[77] The Department notes that the timing of the review is in accordance with Australian Government regulation impact analysis requirements.

Analysis

Over recent decades, outsourcing by state governments has occurred in a wide range of areas, including infrastructure and construction; support services (such as facility management, security or information technology); delivery of human services (such as education, health, disability or aged care services); privatisation or commercialisation of government enterprises (such as public transport or electricity provision); and/or policy contestability (such as consultants).[78]

As previously indicated, the Transfer of Business Amendment has application in five states: New South Wales, Queensland, Western Australia, South Australia and Tasmania. It applies only when there are one or more transferring employees in a transfer of business from a state public sector employer to a national system employer.

Costs and benefits to state governments relate to whether or not the Transfer of Business Amendment changed the process or outcome of a transfer of business initiative, in comparison to what would have happened had the legislation not been in place. The outcomes that may have been impacted by the Amendment include, but are not limited to:

- the continuation and seamless provision of services because of the retention of experienced employees (transferring to the new provider)

[73] ACTU submission, para. 12
[74] NSW Government submission, pp. 7-8
[75] Unions NSW submission, p. 4
[76] ACTU supplementary submission of 28 March 2014, p. 1-2
[77] Ibid, p. 1.
[78] *Outsourcing community service delivery,* NSW Parliament Legislative Assembly Committee on Community Services, Sydney NSW, November 2013, Chapter 2.

- how many state public sector employees transferred to the new employer (as transferring employees), were redeployed within the public sector or were made redundant
- the value for money achieved from outsourcing and privatisation arrangements, including for example, whether bids from potential providers anticipated higher costs due to the Transfer of Business Amendment
- the scope of reforms and level of innovation implemented
- the duration and complexity of negotiations with the new employer and transferring employees and their representatives, and
- whether an application to the Fair Work Commission was needed for orders in relation to copied State instruments.

The contribution of the Transfer of Business Amendment to the first five of the six outcomes listed above cannot be isolated. For the sixth, there have been a small number of applications made under Part 6-3A to the Fair Work Commission. Applications are therefore not frequent (and are discussed elsewhere in this report). With regard to the other five outcomes:

- continuity and ongoing quality of service is aided by, but not entirely dependent upon, transferring employees. The existing industry presence, work practices and service delivery or business model of the new employer are likely to have the greatest influence
- the difficulty in estimating the number of transferring employees has been described elsewhere in this report
- the difference between planned and realised reforms and innovation is also influenced by the negotiation process and consequential (or separate) policy decisions, and
- the duration and complexity of negotiations is also influenced by the individuals and organisations involved.

The department's assessment is that a cost-benefit cannot be quantified because of the complexity of isolating the impact of Transfer of Business Amendment on outsourcing arrangements.

The principal argument for the legislation's benefit to state governments made by unions is that it facilitates the retention of skilled and experienced workers, ensuring that the level and quality of service delivery to consumers is maintained following a transfer of business. This benefit is strongest where there are transferring staff with specialised or rare skills and where entities need a ready workforce to deliver services (for example see Attachment D).[79] In other circumstances, the benefit is less predictable because continuity of services is strongly influenced by the existing industry presence and work practices of the new employer.

A number of stakeholders have argued that the transfer of public sector conditions and working arrangements into the private sector provides a disincentive to take on public sector employees. Lower skilled workers are arguably less likely than higher skilled workers to be valuable enough to a new employer to warrant the higher labour costs that the Transfer of Business Amendment is likely to impose. For this reason the department considers that the Transfer of Business Amendment

[79] By way of example, Attachment D is a media report illustrating mixed employment outcomes in a transfer of business from Queensland Health to a private company operating a new Children's Hospital in Brisbane (27 April 2014).

provides incentive not to take on many former state government employees, and therefore has a negative impact on the continuity of service delivery to the detriment of the community.

State governments have expressed the firm view that the Transfer of Business Amendment is an unwelcome and unnecessary intrusion by the Commonwealth into their jurisdiction and that it directly impacts their capacity to efficiently manage public services. There have been strong arguments made in submissions that the legislation has constrained strategies to reform public administration and has reduced value for money achieved from outsourcing arrangements. State governments have indicated that they may decide not to engage in an outsourcing or asset sale activity as a result of the Transfer of Business Amendment.

One of the justifications for the introduction of the Transfer of Business Amendment was to protect Queensland and New South Wales workers from state government outsourcing. Queensland Government statistics indicate a reduction in Queensland Public Service numbers of over 13,300 full-time equivalent employees between June 2012 and June 2013.[80] The figures do not account for staffing of government-owned corporations.[81] New South Wales Government statistics for the 2012/13 financial year indicate there was a decrease in full-time equivalent public service employees of over 3,200 and nearly 1,800 full-time equivalent public trading enterprise staff.[82] There is however no indication as to how the reductions in both Queensland and New South Wales were achieved (i.e. through redundancies, outsourcing, asset transfers etc). It is therefore unclear as to whether the processes were impacted by the Transfer of Business Amendment.

As previously noted, the national workplace relations system was established through referrals of powers over workplace relations matters from state governments (other than Western Australia) to the Commonwealth. The negotiations were anticipated in the previous Government's 2007 workplace relations policy '*Forward with Fairness*', which undertook that:

> *Labor will work cooperatively with the States to achieve national industrial relations laws for the private sector.*

The policy also said that:

> *Current arrangements for the public sector and local government can continue with many of these workers regulated by State industrial relations jurisdictions.*
>
> *State Governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees.*[83]

Achievement of the national system was negotiated between state and federal governments and is subject to governance by the *Inter-governmental Agreement for a National Workplace Relations System for the Private Sector*. Negotiations were held over an extended period, including in relation

[80] Queensland Government Public Service Commission, *Queensland Public Service and sector wide profile data*, p.7.
[81] Ibid, p.8
[82] NSW Government Public Service Commission, *Workforce Profile Report 2013*, p. 6
[83] Rudd K and Gillard J, *Forward with Fairness. Labor's Plan for fairer and more productive Australian workplaces*, April 2007, p. 6

to the extent of referrals as well as ancillary matters such as the application of state and territory anti-discrimination laws. In accordance with the parameters outlined in the *Forward with Fairness* policy each of the referring state governments retained power to regulate workplace relations arrangements for state government and local government entities not already covered by the federal system, subject to limitations included in amendments to the Fair Work Act.

The department notes that the transfer of business provisions were not extended to cover state government employees moving into the federal system as part of the national system negotiations. The states retained the capacity to regulate transfer of business activities involving their employees.

The department further notes that prior to the Transfer of Business Amendments being made the Commonwealth had not sought to regulate such initiatives. This is despite outsourcing and asset transfers by state governments being a long term phenomenon.

State governments in New South Wales, Queensland and Western Australia strongly oppose the Transfer of Business Amendments for reasons including that the legislation encroaches on their right to make decisions in respect of state government employees and the provision of government services. These governments have also previously argued that the provisions were implemented without proper consultation and displace arrangements that were in place to deal with outsourcing and asset transfers involving employee transfers.

There is an argument that the Transfer of Business Amendment unduly encroaches on the right of state governments to regulate arrangements for their state system employees. The amendments were contrary to previous practice in this area and contrary to the Commonwealth's approach in negotiations for the national system. State governments have overall responsibility for regulating workplace relations arrangements for their state system employees and had arrangements in place for dealing with employee entitlements in transfers of business before the amendments were put in place.

Unions have also argued that the provisions achieve national consistency in the treatment of employees in transfer of business situations. It is however noted that the Transfer of Business Amendment was not extended to cover transfers from local government employers that are not in the national system. If national consistency was a key aim of the Transfer of Business Amendment the provisions should have also been extended to cover former state system-covered local government employees.

In relation to national consistency, it is noted that state system public sector employees in New South Wales, Queensland, Western Australia, South Australia and Tasmania are generally not otherwise covered by the national workplace relations system. So whilst the Transfer of Business Amendment achieves increased national consistency in relation to this narrow issue, differences clearly remain in the regulation of state and national system employees and employers despite the Transfer of Business Amendment being in place.

8 - Impact – New employers

Advice from submissions

Submissions from employer representatives variously describe costs incurred by new employers who employ transferring employees as including:

- payroll system upgrades to administer copied State instruments[84]
- inherited periods of service and generous redundancy entitlements[85]
- legacy employment terms and conditions that originated as policy instruments but have become part of industrial instruments and that do not mix well with the terms and conditions of the employer[86]
- complications arising from employees on different employment conditions performing the same work [where there are existing employees of the new employer who are not covered by the copied State instrument][87]
- enforced transfer of inappropriate terms and conditions which are detrimental to the goals of the new employer.[88] Also, because the broad economic and social environment that the public and private sectors operate in is very different, the two sets of entitlements that have developed do not easily mix[89]
- 'business as usual' workplace cultures also transfer and these can be antithetical to the goals of the new employer and its workplace culture[90]
- legacy terms and conditions, such as successor employers also being bound by the copied State instruments or state-registered employee associations being able to represent transferring employees in the national system for a transitional period (or indefinitely under certain circumstances), and
- costs associated with applications to the Fair Work Commission to seek orders to stop or amend copied State instruments.

Many government outsourcing arrangements are for fixed terms, without guarantee of renewal or extension. By contrast, asset sale or lease arrangements often involve one-off and longstanding contracts. The Ai Group submits that given certain copied State instruments potentially apply for five years, the Transfer of Business Amendment is a major disincentive to engage in fixed term outsourcing arrangements because of the potential for costly redundancies when a contract expires.[91]

The Ai Group also submits that applications to the Fair Work Commission to address transfer of business implications can be restricted by commercially sensitive tendering processes and

[84] Ai Group submission, p. 6
[85] Ibid.
[86] ACCI submission, p. 7-8
[87] Ibid, p. 15
[88] Ai Group submission, p. 4
[89] ACCI submission, p. 8
[90] Ibid, p. 8
[91] Ai Group submission, p. 6

negotiations.[92] In addition, negotiations may only conclude close to the date that an outsourcing occurs, preventing the employer from seeking orders from the Fair Work Commission.[93]

The ACCI submission states:

> *Government services are typically uniquely delivered by government authorities, so that first generation outsourcing relies on the ability to transfer competent and skilled staff into a new management and contracting environment. The outsourced environment improves flexibility and creates investment to support service delivery.*
>
> *The* [Transfer of Business Amendment has] *substantially restricted this opportunity. The practical effect of the transfer obligations is that employees affected by the outsourcing would not be employed or employable by the incoming employer. This occurs even if the transfer is on a voluntary basis.*
>
> *The impact of not transferring staff is a material decrease in the ability of the market to respond to government initiatives which reduce the cost of service delivery by seeking engagement with the private sector and consequential economic impact.*
>
> *This results in significantly increased cost in transmitting business and material loss of knowledge and history in service delivery resulting in increased risk of transition (both financially and operationally).*[94]

State government submissions raise a number of the issues put forward by employer representatives. They submit that public sector award conditions may be inappropriate for national system employers and that it may be impractical to have different awards and agreements applying in the same occupation group of employees at the new employer's workplace. The Queensland Government expressed concern that the provisions have the potential to significantly add to the regulatory burden and cost of affected private and not for profit businesses.[95] The New South Wales Government suggests that this circumstance presents particular problems for small to medium enterprises '*that may not be able to absorb the additional employment costs involved'.*[96]

Further, the Western Australian Government's submission states that:

> *…employment conditions such as penalty rates, allowances, rostering arrangements and leave conditions tailored to public sector service delivery may not be suitable for private sector providers, and the transfer of employee terms and conditions could significantly impact on the efficiency of private sector service provision.*[97]

The Western Australian Government also submits that:

> *…under the transfer of business provisions, public sector unions have representational rights at the [new] workplace. This could lead to demarcation disputes between public sector*

[92] Ibid.
[93] Ibid.
[94] ACCI submission, pp. 18-19
[95] Qld Government submission, p. 4
[96] NSW Government submission, pp. 6-7
[97] WA Government submission, p. 1

unions and private sector unions, both of whom may have coverage of the same occupational group.[98]

National Disability Services (NDS) note that the New South Wales, Western Australian, Queensland and Australian Capital Territory governments are seeking to transfer the provision of disability services to the community sector as part of the transition to the National Disability Insurance Scheme.[99] While comprehensive statistics are not available, the New South Wales Government has publicly stated that there are approximately 14,000 public sector disability workers in New South Wales alone.[100] NDS submits that under the Transfer of Business Amendment employers face a significant financial risk in taking on former state government employees and that its application could increase wages costs in the system more widely.[101] NDS further note a range of difficulties that could arise in not employing former public sector staff so as to avoid application of the Transfer of Business Amendment, covering disruption of service, unemployment and workforce shortages.[102]

Unions submit that the benefits to national system employers include that skilled workers transition to the new workplace bringing skills, knowledge and ensuring a continuum of care/service provision to clients.[103] They further submit that the Transfer of Business Amendment can assist with the negotiation of new agreements to cover transferring employees, facilitating the successful transfer of employees.[104]

The ACTU contends that Part 6-3A contains provisions that reduce administrative burden for employers and that it provides sufficient flexibility to ensure copied State instruments can be varied to operate in a way that better aligns with the working arrangements of the new employer's enterprise. It points to the legislative requirement for the Fair Work Commission to take account of productivity, economic disadvantage and degree of business synergy when deciding whether to vary instruments.[105]

Analysis

The number of new employers directly affected by the Transfer of Business Amendment are those that have employed transferring employees (as defined by the legislation) plus those that would have employed state government employees if the Transfer of Business Amendment had not been in place.

Impacted employers also include those that have made a decision to:

- not pursue outsourced work due, in part or fully, to obligations under the Transfer of Business Amendment, or

[98] Ibid, p. 2
[99] National Disability Services submission, p. 1
[100] The Hon John Ajaka, NSW Minister for Disability Services, National Disability Insurance Scheme (NSW Enabling) Bill (NSW) 2013 Second Reading Speech, 23 October 2013.
[101] Ibid, p. 2
[102] Ibid, p. 2
[103] Unions NSW submission, p. 4
[104] Ibid, p. 9
[105] ACTU submission, paras 12-14

- delay employment of former state public sector employees beyond three months after the termination of their old employment, thereby avoiding the application of the Transfer of Business Amendment.

Data is not available to reliably estimate the number of businesses that have been affected by the changes or to quantify the benefits and costs that they may have incurred as a consequence of the changes.

The principal benefits to new employers if experienced staff transfer are:

- the employees transfer with valuable skills and knowledge
- they support the continuation of services and client relationships, and
- they also avoid costs associated with recruitment, training or 'stop-start' service provision.

There is greater benefit to new employers when the transferring employees bring scarce or specialist skills. The benefit of continuity and quality of service is greater when experienced employees transfer. The existing industry presence, work practices and service delivery models of the new employer are also likely to have significant influence.

The principal costs to new employers relate to:

- where there are transferring employees and industrial instruments, the costs associated with observing and administering the difference between the terms and conditions contained in the copied State instrument and those in the relevant award or enterprise agreement that otherwise applies to the new employer
- costs associated with any applications to the Fair Work Commission to vary, consolidate or terminate copied State instruments, and
- where staff do not transfer, the loss of knowledge and experience in service delivery and costs associated with recruitment and training of replacement personnel.

For reasons discussed previously the department is unable to quantify additional costs that may apply to employers affected by the Transfer of Business Amendment. Based on anecdotal advice from submissions the department is of the view that the provisions would involve additional costs for a significant number of employers. In cases where employment costs broadly align between the public and private sector, or where private sector providers pay more than the public sector, there are likely to be additional costs associated with seeking orders in relation to copied State instruments or otherwise in administering transferring state industrial instruments.

In cases where private sector employers pay less than the public sector, which is likely to be the majority of cases, additional expenses involved with transferring employees could include higher wages and conditions, costs associated with maintaining multiple industrial instruments and/or costs associated with seeking Fair Work Commission orders in relation to copied State instruments.

In order to attribute the benefits to new employers outlined above to the Transfer of Business Amendment, it must be the case that employees would not have transferred had the legislation not been in place. The department's view is that this argument cannot be sustained. The amendment in effect seeks to maintain public sector employment standards for employees transferring into the private sector rather than them being subject to an enterprise agreement or modern award that

would otherwise apply to the new employer. This exposes affected employers to additional costs and red tape that they were not previously subject to.

If employees are only willing to transfer to a national system employer on their existing terms and conditions, the employer will need to meet these arrangements. In scenarios such as this, it cannot be argued that the Transfer of Business Amendment facilitates transfers, as it has always been open to employers to meet such requests. As was previously the case, if an employer is unwilling to meet an employee's demands, the employee can choose not to accept employment with them.

Overall the Transfer of Business Amendment would have a negative impact on continuity of service due to the incentive for employers to avoid application of the legislation by not employing former state government employees. These employers will consequently be exposed to recruitment and training costs that they may have otherwise avoided.

Submissions indicate that exposure to these additional costs may also mean that businesses are unwilling to quote in outsourcing or asset transfer situations, particularly where there is a requirement for state government employees to transfer as part of the arrangement.[106] The provisions would be a particular disincentive in cases where contracting periods are finite. The Transfer of Business Amendment would represent an opportunity cost for businesses in such circumstances.

Overall the department is of the view that the Transfer of Business Amendment would have a negative impact on new employers. It exposes potential employers to additional impediments to hiring state government employees, providing an incentive not to take on such employees and possibly resulting in reduced continuity of service and additional recruitment and training costs. The provisions may also prevent businesses from tendering for state government assets or contracts, representing an opportunity cost for such businesses.

The department is of the view that the administration of cases under the Transfer of Business Amendment has operated smoothly to date, although noting that the cases heard so far by the Fair Work Commission were not contested matters.

Quantifiable costs of administration

The following section seeks to quantify the administrative costs involved with applications under the Transfer of Business Amendment to the Fair Work Commission. The department has not sought to cost negotiations between government, employees and business that would occur in a transfer of business scenario, as similar negotiations would have also taken place before the legislation was put in place.

Under the Transfer of Business Amendment the Fair Work Commission is able to vary a copied State instrument, modify its coverage and/or consolidate multiple workplace instruments applying to a national system employer. The Commission can do this on its own initiative or upon application by a transferring employee, a new employer or a union entitled to represent the industrial interests of a transferring employee.

[106] ACCI submission, p. 18; Qld Government submission, p. 5

As these costs are similar to applications under Part 2-8 of the Fair Work Act, the department has used the same methodology previously utilised in the Details Stage Regulation Impact Statement (RIS) for measures in the Fair Work Amendment Bill 2014.[107]

The direct costs associated with applications to the Fair Work Commission are the time and wages required to prepare an application to vary or stop the instrument transferring, negotiate union support for the application and to prepare for a Fair Work Commission hearing.

Costing assumptions include:

- that the rate of applications remain largely unchanged, with seven applications per year to the Fair Work Commission involving four hearings
- three of four hearings will be up to two hours duration, one hearing for a more complex application
- preparation for and representation at the Fair Work Commission for new employers would be conducted by two employees, at the classifications of one Human Resources and Recruitment – Management and one Human Resources and Recruitment – Industrial Relations. These job titles and roles have been chosen for their expertise in labour relations
- preparation for and representation at the Commission by unions would be by two Industrial Officers equivalent to the Human Resources and Recruitment – Industrial Relations classification
- using average annual salaries before tax drawn from MyCareer Salary Centre data for the October-December 2013 quarter, weekly earnings have been calculated by dividing the salary by 52 weeks, and hourly rates of pay by dividing the weekly amount by 38 hours:

Classification	Weekly earnings	Hourly rate
Human Resources and Recruitment – Management ($156,282 av. annual salary)	$3005	$79.09
Human Resources and Recruitment - Industrial Relations ($101,549 av. annual salary)	$1953	$51.39

- for simple applications, it is assumed that one week is required for the employer's representatives to prepare the application, consult and negotiate with the employees and the union/s and to prepare for the Commission hearing. It is assumed that the union side will spend the same time in preparing for the matter, and
- for a more complex or disputed application, greater preparation time is required and the assumption is that one case per year would require three weeks preparation by both the new employer and union representing transferring staff.

[107] Department of Employment (2014), *Details Stage Regulation Impact Statement Fair Work Amendment Bill*, pp. xxxiv-xxxvii. This document is available at : http://ris.dpmc.gov.au/2014/03/19/amendments-to-the-fair-work-act-2009-details-stage-regulation-impact-statement-department-of-employment/

Using the Office of Best Practice Regulation Business Cost Calculator to calculate the compliance costs of regulatory proposals, the annual administrative costs associated with applications to the Fair Work Commission are estimated to be $61,690 per year.

	Average cost per business	**Total cost for all businesses**
Start-up cost	$0.00	$0.00
Ongoing compliance cost per year	$15,422.49	$61,689.96

An indirect cost may occur if an application process delays or curtails the finalisation of contracts on a transfer of business. A delay may be caused awaiting the Fair Work Commission's decision or to accommodate its orders in a final contract. Further, if the Commission finds against an employer's application, this could result in the transfer of business not proceeding. While it is possible that an order from the Fair Work Commission could be sufficient for contract negotiations to be terminated, the likelihood of such an outcome is unclear.

All applications to the Fair Work Commission (under Part 6-3A) have been granted, reflecting the fact that the orders sought were not contested and had previously been negotiated with or were not opposed by employee representatives. It also appears that the cost to new employers of the hearings would be moderate in such circumstances. There is no evidence available as to whether this cost is absorbed by new employers or passed on to state governments as part of the employer's contract tender.

9 - Conclusion

The original case for change put forward by the former government was the need to maintain employees' conditions in the face of large scale downsizing of the public sector workforce by some state governments. This view is also put by unions in support of the continuation of the Transfer of Business Amendment.

However, the weight of argument included in submissions is that the Amendment has created a disincentive for new employers to employ former public sector employees. While data is not available, the department is of the view that it is likely that this disincentive is more prevalent egregious for employees in generalist or lower skilled jobs that have more beneficial employment conditions than their private sector counterparts. Public sector employees with specialist or rare skills are arguably more likely than lower skilled employees to transfer to a new employer regardless of whether transfer of business protections apply or not.

In the department's view, the Transfer of Business Amendment does meet the stated intention of maintaining conditions of employment provided by state industrial instruments when public sector employees actually transfer. But the Transfer of Business Amendment makes it less likely those employees will actually transfer. This means that employees, particularly lower-skilled employees are more likely to face redundancy than ongoing employment.

The reduced likelihood of employees transferring means that the Transfer of Business Amendment is also likely to have an overall negative impact on the quality and continuity of the provision of services by the new employer in an asset transfer or outsourcing situation.

Another argument put forward for the Transfer of Business Amendment is that there is a need for national consistency covering transfer of business arrangements between state and national system employers. However, as previously noted, if national consistency was a key aim, the provisions should have been extended to state system-covered local government employees transferring into the national system. This did not occur.

State governments argue that the Amendment is unnecessary because adequate protections for transferring state public sector employees already existed in their jurisdictions.

While providing limited detail, New South Wales, Queensland and Western Australian governments submit that adequate provisions were in place to protect conditions of transferring employees and that they did so. The Tasmanian Department of Premier and Cabinet has also outlined the pre-Amendment arrangements in their state. The ACTU submits that the Amendment has enhanced employee protections and Unions NSW contends that the '*Amendment provides state government employees with the same* [protections] *and certainty afforded to private sector employees under the Fair Work Act*'.[108]

State governments that made submissions express a firm view that the Transfer of Business Amendment is an unwelcome intrusion by the Commonwealth into their jurisdiction as it directly impacts their capacity to efficiently manage public services. This is an area where the

[108] ACTU submission, paragraph 21; Unions NSW submission, p. 4

Commonwealth has extended regulatory coverage beyond what was negotiated in the move to the national workplace relations system and the process was arguably inconsistent with requirements under the *Inter-governmental Agreement for a National Workplace Relations System for the Private Sector*.

Submissions from state governments and employers support the argument that there has been an increase in the regulatory burden since the Transfer of Business Amendment, particularly:

- greater complexity in negotiations of outsourcing contracts
- greater complexity and cost to observe and apply a transferring state instrument in a workplace otherwise covered by the national system, and
- longer term application of copied State awards (up to five years).

Findings

In conclusion, evidence presented in submissions to this review indicate that, on balance, the Transfer of Business Amendment has increased the protection of employment terms and conditions for transferring state public sector employees. However, the evidence also indicates that it is more likely than not that:

- fewer state public sector employees transferred to new national system employers than would otherwise have occurred had the Transfer of Business Amendment not been in place
- more redundancies, redeployment and attrition have been a direct consequence
- more complexity and cost has been created for state governments and for new employers in transfers of business, and
- these issues are likely to continue into the future.

On this last point, submissions from state governments and National Disability Services indicate that the Transfer of Business Amendment could hamper the transition to the National Disability Insurance Scheme.

The department does not consider that the legislation meets its stated intention of achieving national consistency for the treatment of employees in transfer of business scenarios, and notes that the provisions were introduced against the wishes of a number of state governments, arguably in contravention of previously agreed protocols under the *Inter-governmental Agreement for a National Workplace Relations System for the Private Sector*.

Attachment A: Post implementation review - Terms of Reference

Terms of Reference for the Post Implementation Review of the
Fair Work Amendment (Transfer of Business) Act 2012

The *Fair Work Amendment (Transfer of Business) Act 2012* commenced operation on 5 December 2012 and amended the *Fair Work Act 2009* (the Fair Work Act) to:

- provide for the transfer of employees' terms and conditions of employment where an employee transfers from a state government employer to a national system employer
- enable the Fair Work Commission to make orders that modify the general effect of the transfer of business rules in these circumstances
- provide for the interaction between the transfer of employees' terms and conditions of employment and the Fair Work Act, including the National Employment Standards, and other necessary transitional and technical provisions.

These stated reasons for the amendments were so that state government employees retain their existing terms and conditions of employment if their positions are outsourced and they are transferred to a private sector employer covered by the national workplace relations system.

A Regulation Impact Statement was not prepared for the legislation so the Department of Employment must conduct a Post Implementation Review of the changes in accordance with the Australian Government's best practice regulation requirements.

The Post Implementation Review (the Review) will examine and report on the regulatory impact of the Fair Work Act, providing rules governing a transfer of business between a state government and national system employer.

The Review will undertake this assessment on the basis of evidence, including:

- submissions from stakeholders affected by the amendments
- consultations with key stakeholders
- data produced by the Australian Bureau of Statistics
- other relevant sources of data.

The department will produce a report drawing on this evidence which will be assessed for compliance with the Government's best practice regulation requirements by the Office of Best Practice Regulation. The Review process will be completed by 30 June 2014.

Making a submission

For accessibility reasons, please submit responses in Word or RTF format attached to an email. An additional PDF version may also be submitted.

Address submissions to:

Transfer of Business Post implementation Review

Framework Policy Branch
Australian Government Department of Employment

GPO Box 9880
Canberra ACT 2601

Email submissions to: **transferofbusinesspir@employment.gov.au**

The closing date for submissions is **5.00pm AEDST, 13 March 2014**

The Department reserves the right to disregard submissions received after the closing date.

Confidentiality

All information (including name and organisation details) contained in submissions will be made available to the public on the Departmental website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. If you would like part of your submission to remain in confidence, you should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

Publication of submissions will occur within a few days after the closing date.

Further information

For enquiries please call Mr Peter Cully at the Department of Employment on (02) 6121 7237 or email transferofbusinesspir@employment.gov.au.

Further information is also available on the Department's website at: www.employment.gov.au.

Attachment B: Media releases regarding the Transfer of Business Amendment

September 21, 2012

Media Release: Minister for Employment and Workplace Relations, the Hon. Bill Shorten MP

Source: http://billshorten.com.au/action_to_protect_outsourced_state_publicservants

Action to protect outsourced state public servants

The Australian Government will urgently introduce an amendment to the Fair Work Act to protect the entitlements of tens of thousands of state public servants threatened by job cuts announced by state governments.

Minister for Employment and Workplace Relations Bill Shorten said the amendment, to be introduced in the next sitting of Federal Parliament, will change the transfer of business provisions in the Act to protect entitlements of former state public service employees where a state government outsources work or sells assets to private sector employers.

"I am deeply concerned about recent announcements by state governments to cut tens of thousands of public service jobs. The Commonwealth will do what it can to protect the terms and conditions of these workers. There is potential for state governments who outsource arrangements or asset sales to put at risk the pay and conditions of these employees," Mr Shorten said.

"This is of particular concern in Queensland with the Newman Government's announcement that it will cut the jobs of 14,000 public sector workers."

"The Newman Government has already legislated to override employment security provisions and limitations on the use of contractors in state public sector agreements, paving the way for outsourcing of public sector jobs."

"The Gillard Government will not stand idly by and let the Liberal State Governments cut wages and conditions by stealth."

"The attack on public sector entitlements is not confined to Queensland."

"We've seen 15,000 public sector workers in New South Wales who have been cut in two budgets, including the 800 workers in the TAFE sector who have fallen victim to the O'Farrell Government's $1.7 billion education cuts. There are also some 5,500 public sector workers in Victoria who are facing the axe."

The Fair Work Act's transfer of business provisions protect employee entitlements where a business changes hands and the new employer employs the old employer's workers to do the same job.

These provisions currently only operate where both the old and new employers are covered by the national workplace relations system.

The amendments would ensure that where there is a transfer of business from a state public sector employer to a new employer in the national workplace relations system, the former public sector employees will see their existing terms and conditions and accrued entitlements protected, and have their prior service recognised.

"State public sector workers should not be worse off as a result of state governments outsourcing their jobs," Mr Shorten said.

"Today I have written to my State and Territory colleagues seeking their feedback on this proposal. I respect the rights of state and territory governments to conduct their own administrations, but my strong view is the Commonwealth must ensure these employees are not disadvantaged.

"I am more than happy to work with my State and Territory colleagues to get these protections right.

The Commonwealth believes that protecting former state public sector employees in these circumstances is the right thing to do".

November 27, 2012

Media Release: Minister for Employment and Workplace Relations, the Hon. Bill Shorten MP

Source: http://billshorten.com.au/better_protections_for_one_million_australianworkers

Better protections for one million Australian workers

State public sector workers will enjoy better protection of their working conditions if their jobs are outsourced to employers in the national workplace relations system, through a Bill that passed Federal Parliament today.

The Fair Work Amendment (Transfer of Business) Bill 2012 extends the benefits of the existing transfer of business provisions under the Fair Work Act 2009 to certain former state public sector employees who move into the national system through a transfer of business.

Minister for Employment and Workplace Relations Bill Shorten said previously these provisions only applied when both old and new employers were covered by the national Fair Work system.

"This legislation is a necessary response to the challenge of ensuring certain former state public sector employees who move into the national system as a result of a transfer of business generally retain the benefit of their existing terms and conditions of employment," Mr Shorten said.

"Workers can feel a greater sense of security from the passage of this Bill.

"The amendments will better protect entitlements of employees whose jobs are lost in circumstances including where a state government outsources work or sells assets and they are rehired by an employer in the national workplace relations system to do the same job in a transfer of business.

"The Government does not accept that these employees should be worse off, or that they should have their entitlements put at risk, simply because their jobs are outsourced."

Employees working in the Commonwealth, Victorian, Northern Territory and Australian Capital Territory public sectors already have the benefit of the transfer of business protections in the Fair Work Act.

The passage of the Bill will extend these protections to over one million public sector employees in the other states.

These amendments will take effect the day after the Bill receives Royal Assent.

Attachment C: Estimating the population reach of the Transfer of Business Amendment

The exact number of state public sector employees to whom the Transfer of Business Amendment potentially covers is not available. An estimate has been calculated, based on 2009-10 and 2012-13 Australian Bureau of Statistics (ABS) data.

ABS figures (Cat. No. 6105.0) indicate that the majority of public sector employees have wages and conditions set by the state jurisdiction (Table C1). The figures in this table include public sector employees in the Commonwealth, state and local levels of government.

Table C1 – Jurisdictional Coverage of Employees Pay-Setting Arrangements: Public Sector Employees (proportion of employees - May 2010)[109]

State	NSW (%)	Qld (%)	WA (%)	SA (%)	Tas (%)
Public sector employees with wages and conditions set by national system (a) (b) (c)	19.8	24.2	28.0	25.7	33.0
Public sector employees with wages and conditions set by state jurisdiction (c)	54.8	61.9	55.4	63.7	58.7
Unable to be determined (d)	25.4	13.8	16.5	*10.6	*8.3
TOTAL public sector	100.0	100.0	100.0	100.0	100.0

* estimate has a relative standard error of 25% to 50% and should be used with caution
(a) Includes employees transitioning out of the federal jurisdiction.
(b) Employees transitioning into the federal jurisdiction.
(c) Includes employees receiving over award pay.
(d) Employees whose jurisdictional coverage for pay setting was unable to be determined.
Source: Employee Earnings and Hours, Australia (cat. no. 6306.0)

ABS Cat. No. 6248.0 *Public Sector Employment and Earnings* provides a jurisdictional breakdown of numbers of public sector employees by the level of government. This provides a financial year estimate based on the annual public sector employer survey.

[109] ABS 6105.0 - Australian Labour Market Statistics, July 2011, Feature article: *Trends in Employee Methods of Setting Pay and Jurisdictional Coverage* (Table 3).

Table C2: Public sector employees by government level, selected states (2009-10)[110]

Level of government	NSW (,000)	Qld (,000)	WA (,000)	SA (,000)	Tas (,000)
Commonwealth	54.6	29.7	15	13.6	5.7
State	436.6	300.2	162.8	109.5	40.9
Local	56.4	43.9	10.7	20.1	3.9
Total	547.5	373.9	135.2	196.5	50.6

By applying the proportions in table C1 above to the total populations of public sector employees in each state (which are inclusive of Commonwealth, state and local government employees), an estimate can be calculated of the number of public sector employees covered by the national and state systems. Knowing that Commonwealth employees are covered by the federal system and local government employees in New South Wales, Queensland and South Australia are covered by state systems, it is possible to further refine estimates of system coverage. Calculation cannot be made for WA (because either system can apply at the local government level) or Tasmania (due to an anomaly in the survey data).

Table C3: – Estimated Jurisdictional Coverage of Employees Pay-Setting Arrangements for State Public Sector Employees in New South Wales, Queensland and South Australia (2009-10).

	NSW (,000)	Qld (,000)	SA (,000)	*Total %*
State public sector employees with wages and conditions set by federal jurisdiction	81.7	71.1	22.6	*21*
State public sector employees with wages and conditions set by state jurisdiction	355.4	229.2	86.8	*79*
Total state public sector employees, selected states	437.1	300.2	109.5	*100*

[110] ABS 6248.0.55.002 - Employment and Earnings, Public Sector, Australia, 2009-10. Table 1. Public Sector Employees, level of government – States and Territories.

Assumptions include that the ‘’unable to be determined” group (in Table C1) are allocated 80:20 to the state: federal jurisdictions. This estimate indicates that 79 per cent of all state public sector employees in New South Wales, Queensland and South Australia have their terms and conditions of employment set by their state jurisdiction.

Extrapolating this estimate to include Western Australia and Tasmania, 79 percent of state public sector employees in five states in 2012-13 equates to almost 843,000 employees.

State	Number of state public sector employees, 2012-13 (,000)
New South Wales	451.7
Queensland	289.7
South Australia	113.7
Western Australia	172.2
Tasmania	39.5
Total of five states:	**1066.8**
79%	842.8

Source: ABS Cat. No. 6248.0.55.002 - *Employment and Earnings, Public Sector, Australia, 2012-13*

Attachment D: Media report on transfer of business (Queensland)

Sun Herald, Sunday 27 April 2014, Page: 3, Region: New South Wales Metropolitan

Non-clinical staff won't keep jobs at new hospital

CAMERON ATFIELD

Non-clinical staff at the Royal Children's Hospital in Brisbane have been told they will not be employed at the new Lady Cilento Children's Hospital in a move unions claim is an attempt to slash workers' conditions.

LCCH has signed an outsourcing agreement with Medirest, a subsidiary of British company Compass, to supply most of its non-clinical patient support services.

Queensland Health defended the move and pointed to a $4 million annual cost saving associated with the outsourcing.

More than 100 Queensland Health staff, such as cleaners, those involved in patient food supply and preparation, laundry workers and security guards, will lose their jobs at RCH when it closes in November to make way for the new hospital.

Australian Workers' Union organiser Steve Baker said the law required RCH staff employed at the new hospital to have their pay and conditions maintained, unless they had not worked for Queensland Health for at least three months.

Staff had been told they would not have jobs at Lady Cilento when it opened, Mr Baker said.

He said RCH staff had been encouraged by management to speak to Medirest about possible employment elsewhere in the company. "I'm suspicious the intention is to employ them elsewhere in the organisation and then move them back to the Lady Cilento hospital once that three-month period is up, which means they will then be able to pick up that skills set from the Royal Children's Hospital on a much lower rate of pay," he said.

Mr Baker said typical wages for employees would drop from about $24 to $17 an hour – a cut many would be unable to afford.

"Some of these people have been employed for years on end. I was talking to a guy only the other day who's been there for about 45 years," he said. ''It was his first job after leaving school and it's the only job he's had in his life, and now he's facing redundancy. With that comes a fair bit of experience, local knowledge and the expertise that goes with that. All that will be gone out the window."

A casual employee, who did not want to be named for fear of losing shifts at the RCH, said morale at the hospital had plummeted since the announcement was made at the end of last month.

"They feel very depressed, neglected and invisible because, naturally, the doctors are getting lots of publicity and headlines," he said.

"All the doctors are fighting about their contracts, while these people have just been told they're on the scrap heap."

Children’s Health Queensland hospital and health service chairwoman Susan Johnston said an “exhaustive review” had identified savings of $4 million, which would be reinvested in children’s health.

“To provide context, $4 million is the equivalent of 94 cochlear implants, more than 1300 tonsillectomies or more than 600 appendectomies,” she said.

“While this decision affected around 80 permanent employees at the Royal Children’s Hospital, the resulting involuntary job loss figure should be substantially lower.

“Around 30 staff have approached management about our offer to undertake training and reskilling options that might provide them with different job opportunities at LCCH. “Other staff will also be attractive to south-east Queensland’s five other hospital and health services, and could seek redeployment to these facilities.”

Medirest human resources executive director George Mifsud said that his company offered “best practices and economies of scale in services and staffing” and repeated Ms Johnston’s words that the savings would be reinvested in children’s health.

“Early indications are that the number of impacted staff will be smaller than anticipated,” he said. “We are committed to assisting impacted staff identify and apply for roles elsewhere within Medirest and will have a dedicated process in place to do so when their current employment ends.

“Medirest offers a comprehensive and competitive benefits program to ensure we are able to attract and retain high quality employees.’’

Attachment E: Summaries of applications to the Fair Work Commission

Source: www.fwc.gov.au

***Forestry Corporation of NSW* PR535353 (8 April 2013, Cargill C)**

Background

From 1 January 2013 the *Forestry Act 2012* (NSW) established the Forestry Corporation of New South Wales (the Corporation) as a statutory State owned corporation (as per the *State Owned Corporations Act 1989* (NSW)) and conferred on it functions relating to the management of the State's timber resources.

Previously, the management of the State's timber resources was conducted by Forests NSW, a public trading enterprise within the NSW Department of Primary Industry.

Following the establishment of the Corporation former employees of Forests NSW were offered employment with the Corporation.

The *Forests NSW Enterprise Agreement 2012* (EA12/16, NSWIRC, 20 December 2012) covered Forests NSW in the NSW State system.

Decision

Cargill C granted the application for consolidation and variation of the *Forests NSW Enterprise Agreement 2012* as a copied State agreement and issued a decision on transcript. Orders were made on 8 April 2013 to have effect from that date.

In particular, Cargill C ordered that the transferring employees' entitlements to personal / carer's leave and overtime rates be varied.

Cargill C also made orders that the varied copied State agreement would also apply to all non-transferring employees of the Corporation.

***Lifehouse at RPA as trustee for Lifehouse at RPA Trust - Re Public Health System Nurses' and Midwives' (State) Award* [2013] FWC 6925 (Watson VP, 12 September 2013) PR541729**

s.768BA - Application for an order about coverage for transferring employees under a state instrument

Background

The Commonwealth and NSW Governments entered into an arrangement to divest cancer oncology services being provided to patients by the Royal Prince Alfred Hospital (a NSW public hospital) to a new non-for-profit-provider, Lifehouse.

Lifehouse was to commence operations in November 2013.

Lifehouse planned to recruit nurses from the NSW public health system (currently covered by the *Public Health System Nurses' & Midwives' (State) Award 2011* (the NSW Nurses Award)) and offer employment on terms and conditions contained in the *Lifehouse Nurses Greenfields Agreement 2013* (the Greenfields Agreement).

Lifehouse (with support of relevant unions) sought orders under s 768BA that the transferring employees be covered by the Greenfields Agreement rather than the copied State award derived from the NSW Nurses Award. Nurses could otherwise choose to remain employed by the NSW Health Service and be covered by the NSW Nurses Award.

Decision

Watson VP granted the application and ordered that the NSW Nurses Award would not cover transferring employees formerly employed in the NSW Health system and that the Greenfields Agreement would cover all relevant employees.

***Lifehouse at RPA as trustee for Lifehouse at RPA Trust* [2013] FWC 6973 (Booth DP, 13 September 2013) PR541825; PR541826; PR541827; PR541828**

s.768BA - Transfer of instruments

Background

The Commonwealth and NSW Governments entered into an arrangement to divest cancer oncology services being provided to patients by the Royal Prince Alfred Hospital (a NSW public hospital) to a new non-for-profit-provider, Lifehouse.

Lifehouse was to commence operations in November 2013.

Lifehouse planned to recruit employees from the NSW public health system, currently covered by a variety of NSW State awards:

- *Staff Specialists (State) Award*
- *Health Employees' Administrative Staff (State) Award*
- *Health Employees' (State) Award*
- *Health Managers (State) Award*
- *Health Employees' Computer Staff (State) Award*
- *Public Hospital Professional Engineers' (Bio-medical Engineers) (State) Award*
- *NSW Health Service Health Professionals (State) Award*
- *Health and Community Employees Psychologists (State) Award*
- *Health Employees Pharmacists (State) Award*
- *Health Professional and Medical Salaries (State) Award*
- *Public Hospitals (Professional and Associated Staff) Conditions of Employment (State) Award*
- *Health Employees' Conditions of Employment (State) Award*
- *Public Hospital Medical Physicists (State) Award*
- *Hospital Scientists (State) Award*
- *Health Employees' Medical Radiation Scientists (State) Award*
- *Health Employees' Conditions of Employment (State) Award*

and offer employment on terms and conditions in a number of greenfields agreements:

- *Lifehouse Medical Radiation Scientists Greenfields Agreement 2013*
- *Lifehouse Health Professionals and Support Services Greenfields Agreement 2013*
- *Lifehouse Medical Physicists Greenfields Agreement 2013,* and
- *Lifehouse Staff Specialists Greenfields Agreement 2013*.

Lifehouse (with support of relevant unions) made four applications for orders regarding the transfer of employees. The applications sought that these non-nursing employees would be employed under the greenfields agreements.

Decision

Booth DP granted the application and issued separate orders to give effect to the decision with respect to each application. The orders took effect from the date of the transferring employees' re-employment.

Transit (NSW) Services Pty Ltd (Transit) **[2013] FWC 6894 (Sams DP, 16 September 2013)**

s.768BA - Application for an order about coverage for transferring employees under a state instrument

Background

Transit is a national system employer. Transit won a tender to operate passenger bus services in Sydney Region 3. Transit offered employment to employees of the former operator, Western Sydney Buses, a State public sector employer.

Transit applied for an order that the greenfields agreement known as the *Transit (NSW) Services Pty Ltd and the Transport Workers' Union of Australia Fair Work Agreement 2013* (the Agreement) apply to their employees to the exclusion of the copied state award derived from the *Western Sydney Buses Bus Operators' Transitway Enterprise (State) Award 2011* (the State award).

Decision

Sams DP granted the application based on affidavit evidence from 29 of the transferring employees that they wished to be covered by the Agreement rather than the State award together with evidence from Transit regarding the effect on business synergy and productivity if they had to apply the State award. The unions did not oppose the application.

Leighton Boral Amey NSW Pty Ltd **PR549080 (Drake SDP, 28 March 2014)**

s.768AX - Application to vary copied State instruments

s.768BG - Application to consolidate orders in relation to non-transferring employees

Background

Leighton Boral Amey NSW Pty Ltd (LBA) is a national system employer. LBA won a contract to perform road maintenance work. The work was previously performed by Roads and Maritime Services NSW (RMS), a State public sector employer, whose employees were covered by *The Roads and Maritime Services Division of the Government Service of New South Wales (Wages Staff) Award 2013.*

Under the contract, the employees formerly with RMS will continue to perform the work for LBA. The proposed name of the copied State award was *The Leighton Boral Amey NSW Pty Ltd Wages Staff Copied State Award 2013* (LBA Award). LBA and the AWU applied to the FWC for orders to vary the LBA Award by consent.

Order

Drake SDP granted the application and issued a decision on transcript (that transcript is currently not available). Orders were made on 28 March 2014 to have effect from that date.

The variations to the LBA Award were described as 'necessary in order to achieve the efficient and meaningful operation' of the original State award as a Fair Work instrument. Drake SDP also ordered that the LBA Award apply to all transferring employees and to all non-transferring employees who perform, or are likely to perform, the transferring work.

University of Southern Queensland (USQ) **[2014] FWC 3950** **(Booth C, 25 June 2014)**
s.768BA - Application for an order about coverage for transferring employees under a state instrument

Background

USQ is a constitutional corporation and a national system employer. The Department of Agriculture, Fisheries and Forestry (DAFF) is a State public sector employer. USQ's employees were covered by *The University of Southern Queensland Enterprise Agreement 2010-2013* (USQ Agreement).

DAFF and USQ reached an agreement which meant that research and development in the field of broad-acre agriculture would be run out of the Institute for Agriculture and Environment (established by USQ) but using DAFF's research laboratories, facilities and intellectual property. 25 employees who work for DAFF were to be offered employment by USQ.

USQ applied under s 768BA(2) for orders that the transferring employees from DAFF would be covered by the USQ Agreement, and that the State Government Department's Certified Agreement 2009 (State Agreement) and the Queensland Public Service Award - State 2012 (State Award) would not cover them as copied state instruments.

Decision

Booth C was satisfied that the application had been appropriately made out and issued an order (PR522023). Booth C noted that the USQ Agreement provided terms and conditions of employment which are more beneficial than those contained in the State Agreement and the State Award.

Central Queensland University (CQU) [2014] FWC 4132 **(Booth C, 26 June 2014)**

s.768AX - Application to vary copied State instruments

s.768BD - Application to consolidate orders in relation to transferring employees

s.768BG - Application to consolidate orders in relation to non-transferring employees

Background

CQU is a constitutional corporation and a national system employer. CQ TAFE is a State public sector employer. CQU are to take on functions formerly performed by CQ TAFE as part of a merger. CQ TAFE's teaching employees recruited by CQU who transfer from CQ TAFE are to perform the same work, or substantially the same work, for CQU as they were for CQ TAFE.

CQU's employees are covered by the *Central Queensland Enterprise Agreement 2012* (the CQU Agreement).

Those teaching employees recruited by CQU who transfer from CQ TAFE would be offered employment on the basis that their terms and conditions of employment would be regulated by the relevant copied State instruments appropriately consolidated and varied.

CQU applied for an order that the transferring and non-transferring teaching employees from:

- CQ TAFE Canning Street Campus, Rockhampton
- CQ TAFE Mackay City Campus
- CQ TAFE Ooralea Campus
- CQ TAFE Yeppoon Campus
- CQ TAFE Central Highlands Campus
- CQ TAFE Biloela Campus

would be covered by consolidated copied State instruments.

CQU also applied for orders to vary those copied State instruments. The instruments are to be known as the:

- *Central Queensland University Educational Employees Copied State Employment Agreement 2014*, and
- *Central Queensland University TAFE Teachers Copied State Award 2014*

Decision

Booth C was satisfied that the application had been appropriately made out and issued an order. Booth C noted that the copied State instruments provide terms and conditions of employment which are more beneficial than those set out in the CQU Agreement.

Central Queensland University (CQU) [2014] FWC 4137 **(Booth C, 26 June 2014)**

s.768AX - Application to vary copied State instruments

s.768BD - Application to consolidate orders in relation to transferring employees

s.768BG - Application to consolidate orders in relation to non-transferring employees

Background

CQU is a constitutional corporation and a national system employer. CQ TAFE is a State public sector employer. CQU are to take on functions formerly performed by CQ TAFE as part of a merger. CQ TAFE's operational/cleaning stream employees are to perform the same work, or substantially the same work, for CQU as they were for CQ TAFE.

CQU's employees are covered by the *Central Queensland Enterprise Agreement 2012* (CQU Agreement).

The operational/cleaning employees recruited by CQU who transfer from CQ TAFE would be offered employment on the basis that their terms and conditions of employment would be regulated by the relevant copied State instruments appropriately consolidated and varied.

CQU applied for an order that the transferring and non-transferring operational/cleaning employees from:

- CQ TAFE Canning Street Campus, Rockhampton
- CQ TAFE Mackay City Campus
- CQ TAFE Ooralea Campus
- CQ TAFE Yeppoon Campus
- CQ TAFE Central Highlands Campus
- CQ TAFE Biloela Campus

would be covered by consolidated copied State instruments.

CQU also applied for orders to vary those copied State instruments. They would be known as the:-

- *Copied State Government Departments Employment Agreement 2014*
- *Central Queensland / University Copied Queensland Public Service Award - State 2014*, and
- *Central Queensland University Copied Employees of Queensland Government Departments (Other Than Public Servants) Award 2014*.

Decision

Booth C was satisfied that the application had been appropriately made out and issued an order. Booth C noted that the copied State instruments provide terms and conditions of employment which are more beneficial than those set out in the CQU Agreement.

Attachment F: List of submissions received

State governments

New South Wales State Government

Department of Premier and Cabinet, Tasmania

Queensland Government

Western Australian Government

Unions

Australian Council of Trade Unions (2 submissions)

Civil Service Association of Western Australia and the Community and Public Sector Union Western Australia Branch

Unions NSW

Employer representatives

Australian Chamber of Commerce and Industry

Australian Industry Group

Master Builders Australia

National Disability Services

Victorian Employers' Chamber of Commerce and Industry

Attachment G: References

Fair Work Amendment (Transfer of Business) Bill 2012 (Clth), Explanatory Memorandum

Holmes A and Neilsen M A, *Fair Work Amendment (Transfer of Business) Bill 2012*, Parliamentary Library Bills Digest No. 45 2012-13, November 2012.

Workplace Relations Ministers' Council 2009, *Inter-governmental Agreement for a National Workplace Relations System for the Private Sector*.

Outsourcing community service delivery, New South Wales Parliament Legislative Assembly Committee on Community Services, Sydney New South Wales, November 2013, pp.142.

Senate Education, Employment and Workplace Relations References Committee, *Report of Inquiry into conditions of employment of state public sector employees*, July 2013.

Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation. Australian Government Department of Education, Employment and Workplace Relations, 2012 (Chapter 9, pp.201-208)