



## Outsourcing and Local Government: Fair Work Commission decision may open up new options

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Last week, the Fair Work Commission ordered that a council's enterprise agreement would not apply to former council employees who changed jobs due to an outsourcing arrangement.

The decision in [Silver Chain Group Limited \[2018\] FWC 972](#) may make it easier for councils to find partners willing to take on existing staff when it comes to outsourcing, particularly in relation to aged and community services.

### Background

Ordinarily, when an employer outsources a part of its business, its enterprise agreement will continue to apply to the new employer and any transferring employees until it is terminated or replaced. This is often a significant obstacle to outsourcing for councils, as the terms of council enterprise agreements are often more generous than the terms which would apply to private sector employees performing similar tasks.

That means that an external service provider faces the unpalatable prospect of paying ex-council employees more to do essentially the same job as its current employees. There is also an administrative burden arising from having to administer an additional, unfamiliar enterprise agreement. Finally it can be a problem for staff morale when two workers who sit side by side are employed on substantially different conditions.

For these reasons, when a council is looking to outsource certain services it may be faced with a relatively small pool of potential partners, placing it in a poor commercial bargaining position.

The Fair Work Commission has the power to make an order that an enterprise agreement will not transfer from an old employer to a new employer in a transfer of business scenario. The Commission needs to consider:

1. the views of the affected parties;
2. whether any employees would be disadvantaged;
3. the expiry date of the enterprise agreement;
4. whether the transferring enterprise agreement would have a negative impact on the new employer's productivity;
5. whether the new employer would suffer significant economic

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5. whether the new employer would suffer significant economic disadvantage if the enterprise agreement comes across;
6. whether there is any synergy between the transferring agreement and any award or enterprise agreement which applies to the new employer; and
7. the public interest.

In the vast majority of cases, if the employees or the union do not oppose the application, the Commission has made orders declaring that an enterprise agreement does not transfer. The Commission has tended to reject requests for such orders where they are opposed, although there are some exceptions. For obvious reasons, employees typically do not consent to orders that would leave them financially worse off.

As a result, these applications have not generally been a viable option in relation to council outsourcing arrangements.

### Silver Chain application and decision

The Silver Chain case arose from the City of Canning outsourcing the provision of respite services in day centres to a not-for-profit provider, Silver Chain. Silver Chain applied to the Commission for orders that the City of Canning's enterprise agreement would not apply to the transferring employees, and that the employees would instead be covered by the Silver Chain enterprise agreement. The application was not opposed.

The Commission granted the orders for the following reasons:

- It would assist with the integration of the new employees into Silver Chain's business.
- It would promote productivity and harmony in the workplace, by avoiding a situation where employees are performing the same duties for different pay.
- It would be unreasonable to divert administrative resources to deal with 13 employees whose terms and conditions differ from the other 2,300, particularly given that the agreement would run for another 19 months.
- As a public benevolent institution, Silver Chain is able to offer salary sacrifice arrangements (ie salary packaging a broad range of benefits), and the tax benefits would largely offset the reduction in wages.
- The cost to Silver Chain of applying the council agreement would be significant, particularly in the context that Silver Chain is predominantly government funded, and the funding would not increase to reflect the additional cost.
- Given the difference in scope and industry between the two employers, there is little business synergy between the council agreement and the Silver Chain agreement.
- It is in the public interest for employees to remain employed despite an outsourcing process.

It was clear from the reasons that the absence of a significant financial disadvantage for the employees was an important factor influencing the Commission's decision. While most of the other factors would generally apply to any outsourcing of council services to an external provider, the drop in gross pay for the employees is normally an obvious impediment to such an application succeeding.

The Commission's approach in this case was to effectively look at the after-tax value of the remuneration, and because Silver Chain was a public benevolent institution with salary sacrifice arrangements, it was able to demonstrably close the gap.

### Lessons for councils

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Obviously, the Silver Chain decision does not significantly change the landscape if a council is outsourcing services to a commercial operator without the capacity to offer tax-effective salary sacrifice arrangements. However, where a council is in outsourcing discussions with a not-for-profit organisation which may have PBI status, the parties should consider whether it is possible to adopt the Silver Chain approach. Further, when

identifying potential outsourcing partners, councils should consider the fact that this decision may make the proposal more appetising for some not-for-profits.

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