



## DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 3, Item 20A(4) - Application to extend default period for agreement-based transitional instruments

**The Broken Hill Town Employees' Union**  
(AG2023/4495)

### **THE ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS NSW INC STAFF COLLECTIVE AGT 2008-2011**

Animal care and veterinary services industry

DEPUTY PRESIDENT ROBERTS  
DEPUTY PRESIDENT SLEVIN  
COMMISSIONER CRAWFORD

SYDNEY, 16 FEBRUARY 2024

*Application to extend the default period for the Royal Society for the Prevention of Cruelty to Animals New South Wales Inc. Staff Agreement 2008 – 2011*

#### **Introduction**

[1] The Broken Hill Town Employees' Union (**BHTEU**) has made an application under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for the *Royal Society for the Prevention of Cruelty to Animals New South Wales Inc. Staff Agreement 2008 - 2011* (**Agreement**). The application seeks to extend the default period for the Agreement to 6 December 2027.

[2] The Agreement is a collective agreement that was made under the *Workplace Relations Act 1996* (Cth) (**WR Act**) and approved under that Act by the Workplace Authority. The Agreement is a 'WR Act instrument' within the meaning of item 2(2) of Sch 3 of the Transitional Act. It is classified by item 2(5)(c)(i) of Sch 3 as a 'collective agreement-based transitional instrument'. Agreements of this kind are commonly referred to as 'zombie agreements'.

[3] The Transitional Act was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**) to provide for the automatic termination of all remaining transitional instruments. Pursuant to items 20A(1) and (2) of Schedule 3 to the Transitional Act, the Agreement would have terminated on 6 December 2023 (the end of the default period) unless extended by the Commission. The main features of item 20A of Schedule 3 to the Transitional Act are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd*.<sup>1</sup>

[4] Under subitem 20A(6) of Sch 3, where an application is made under subitem 20A(4) for the default period to be extended, the Commission must extend the default period for a period of no more than four years if either (a), subitem (7), (8) or (9) applies and it is otherwise appropriate in the circumstances to do so, or (b), it is reasonable in the circumstances to do so. Subitem (7) applies if bargaining for a replacement agreement is occurring. Subitem (8) relates to individual agreement-based transitional instruments. Subitem (9) applies if the application relates to a collective agreement-based transitional agreement and it is likely that as at the time the application is made the award covered employees, viewed as a group, would be better off overall if the agreement continued to apply than if the relevant modern award applied.

### **Grounds relied upon**

[5] BHTEU's application submits that employees would be better off overall under the Agreement than they would be under the relevant modern awards.

[6] The employer covered by the Agreement, the Royal Society for the Prevention of Cruelty to Animals, New South Wales (**RSPCA NSW**), has indicated that the following modern awards cover their employees and will apply to the employees if the Agreement terminates:

- a. *Animal Care and Veterinary Services Award 2020.*
- b. *Clerks Private Award 2020.*
- c. *Miscellaneous Award 2020.*

(collectively, **Awards**)

[7] BHTEU's application raises concerns about the loss of the following conditions if the Agreement terminates:

- a. Broken Hill Allowance.
- b. Casual loading of 30.6%.
- c. Annual leave.
- d. Long Service Leave.

[8] BHTEU's application states the relevant employees requested that RSPCA NSW commence bargaining for a new agreement on 4 October 2023 and that RSPCA NSW declined this request. That means bargaining is not occurring and that subitem 20A(7) of Sch 3 is not applicable.

[9] The application indicates BHTEU seeks an extension under either subitems 20A(6)(a) and (9) (the better off overall argument) or alternatively, because it is reasonable in the circumstances to do so pursuant to subitem 20A(6)(b).

### **Opposition to the application**

[10] BHTEU's application is opposed by RSPCA NSW.

[11] RSCPA NSW submits its employees will be better off overall if the Agreement terminates and the Awards apply in relation to their employment.

[12] RSPCA NSW also submits that the application is made on behalf of around 10 employees located at Broken Hill whereas the Agreement applies to around 344 employees who work across its NSW sites at Yagoona, Rutherford, Unanderra, Coffs Harbour, Orange and Broken Hill.

[13] RSPCA's submission to the Commission dated 8 December 2023 includes the following commitments:

“RSPCA NSW has communicated to existing Broken Hill employees that all Broken Hill specific entitlements under the Agreement (with the exception of the casual loading which shall be reduced to 25%) shall be preserved under a revised contract of employment.

Further and in addition, RSPCA intends to preserve the vast majority of other enhanced benefits under the Agreement for all employees.”

### **Consideration**

[14] The first question is whether the better off overall test in subitem 20A(9) of Sch 3 is satisfied. This requires a comparison of the Agreement terms and the terms of the Awards.

[15] The Agreement contains rates of pay in clause 6.1 which range from \$27,728 to \$51,129 across nine grades. Clause 6.3 refers to the rates being increased in accordance with “the percentage change in the Seasonally Adjusted amount for the Labour Price Index across Australia for the preceding twelve months as measured from March to March.” The annual increases take effect in the first full pay period commencing after 1 July each year.

[16] We have not been provided with the history of increases to the minimum rates. Clearly, the rates would be much higher than those prescribed in clause 6.1 of the Agreement. RSPCA NSW submits it pays employees a base rate that is at least equivalent to the minimum rate in the relevant award. However, RSPCA NSW also included clause 6.3 of the Agreement in its list of superior conditions in the Agreement, which was Annexure C to its submission filed on 8 December 2023. BHTEU has not identified the minimum rates in the Agreement as a more beneficial condition. In the circumstances, we do not know definitively what the minimum rates in the Agreement are. However, item 13 of Schedule 9 of the Transitional Act requires that the base rate of pay in agreement-based transitional instruments for an employee must be not less than the base rates of pay that would be payable under the modern award if the modern award applied to the employee. Consequently, we consider the most appropriate approach is to assume the minimum rates paid to employees equal the minimum rates in the Awards and treat the rates of pay as a neutral factor in our assessment.

[17] The Agreement contains several conditions that are superior to the Awards, including the following:

- Redundancy pay entitlements exceed the NES.

- The casual loading is 28.5% generally and 30.6% for employees working at Broken Hill.
- The minimum engagement period is higher.
- Annual leave loading is 19%.
- Broken Hill Allowance.
- Long service leave, particularly for Broken Hill employees.
- Euthanasia allowance.
- On-call allowance.
- Christmas bonus.

[18] However, the following conditions in the Agreement are inferior to the Awards:

- There is no span of ordinary hours and no maximum daily hours.
- The averaging period for ordinary hours is longer.
- There are no shift penalties in the Agreement.
- The Agreement has a reduced Saturday penalty rate compared to the *Animal Care and Veterinary Services Award 2020* and *Clerks Award*.

[19] The absence of a span of ordinary hours, maximum daily hours and averaging arrangements limit the scope for overtime payments under the Agreement. This is an important inferior condition. However, there are several important entitlements in the Agreement that are superior to the conditions in the Award including redundancy, annual leave loading, minimum engagement, Christmas bonus and casual loading.

[20] On balance, we are satisfied that the relevant employees, viewed as a group, would be better off overall if the Agreement continued to apply. In circumstances where the rates of pay are a neutral factor, the various superior conditions in the Agreement tip the balance in favour of employees being better off under the Agreement. That means the default period must be extended under subitems 20A(6)(a) and (9), if we are satisfied it is otherwise appropriate in the circumstances to do so.

[21] We approach the question of whether it is “otherwise appropriate” to extend the default period on the basis of the propositions stated in *Suncoast Scaffold Pty Ltd*,<sup>2</sup> namely that:

[16]...‘Appropriate’, on its ordinary meaning, connotes that it is ‘suitable’ or ‘fitting’ to grant the extension. ‘In the circumstances’ connotes the relevant matters and conditions accompanying the particular case. The inclusion of the adverb ‘otherwise’ indicates that appropriateness must be assessed by reference to circumstances other than those addressed by subitem (7), (8) or (9), as applicable. A broad evaluative judgment is required to be made.

(footnote omitted)

[22] We consider RSPCA NSW’s commitment to maintain superior conditions is relevant to our assessment of whether it is otherwise appropriate to extend the default period. RSPCA NSW has committed to maintain all Broken Hill specific entitlements (except casual loading) and to preserve the “vast majority of other enhanced benefits” for all employees. Although BHTEU has queried whether the commitment to the Broken Hill employees has been provided in clear terms, we are satisfied based on RSPCA NSW confirming the commitment in writing twice to the Commission that it has been made and will be honoured. We consider this commitment

generally negates the potential for disadvantage for the Broken Hill employees, with the possible exception of casual employees.

[23] However, we have not been provided with the details of RSPCA's broader commitment to preserve the "vast majority of other enhanced benefits" for all employees. This commitment is unclear because it could mean, for example, that there is no commitment to maintain the redundancy and annual leave loading conditions. We also note there is no reference to the commitment in the email that was sent to staff by Samantha Robertson (HR Manager) on 13 December 2023.

[24] Given the lack of certainty concerning the commitment given to the broader RSPCA NSW workforce, we cannot assess with certainty the practical impact of the Agreement terminating for around 334 employees. We also do not have sufficient evidence to determine whether the employees support the termination of the Agreement. We suspect the answer is likely to turn on the extent to which the superior conditions in the Agreement will continue operating.

[25] We do not have any evidence which suggests the extension of the default period will have any significant impact on RSPCA's operations or viability.

[26] After considering all the circumstances, we find it is otherwise appropriate to extend the default period for the Agreement.

[27] As we are satisfied of the requirements under item 20A(6)(a), we must extend the default period for each of the Agreements for a period of no more than four years. However, we have a discretion in relation to the length of the extension and we are not bound to grant the period of extension sought in the applications, which is the maximum period of four years.<sup>3</sup>

[28] The Full Bench in *APESMA & Ors*<sup>4</sup> stated:

The default position of the statutory scheme is to automatically terminate transitional instruments on 6 December 2023, which in our view suggests a policy preference in the legislative scheme for employees covered by transitional instruments to eventually become regulated by instruments made under the FW Act. Although as noted above, there is no evidence that DXC Enterprise proposes to initiate bargaining for a replacement agreement, there are avenues available for employees covered by the Agreements, and the unions representing them, to secure the employees' conditions in a new enterprise agreement, including by applying for a majority support determination under s 236 of the FW Act.

[29] RSPCA NSW has confirmed in its submissions that it intends to preserve "the vast majority of other enhanced benefits under the Agreement for all employees" via a "revised contract of employment." If that occurs, the conditions of employment will be based on the terms of the Awards, which are instruments made under the FW Act, and the "preserved" superior Agreement entitlements in the employment contracts. We consider a brief period for RSPCA NSW and its employees to finalise the revised contracts to be more appropriate than allowing the transitional instrument to continue operating until 6 December 2027.

[30] While RSPCA NSW has confirmed it does not currently intend to bargain for a new enterprise agreement, the revision of the employment contracts does not preclude this.

[31] We have decided to extend the default period for the Agreement to 30 June 2024 to provide RSPCA NSW and its employees with time to finalise the revised employment contracts. An order to give effect to this decision will be published separately. The Agreement is published, in accordance with item 20A(10A)(c), as an annexure to this decision.



DEPUTY PRESIDENT

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<sup>1</sup> [2023] FWCFB 105 at [3] to [18].

<sup>2</sup> Ibid at [16].

<sup>3</sup> Ibid at [18].

<sup>4</sup> [2023] FWCFB 137 at [32].