



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

Parafield Gardens Community Club Incorporated
(AG2023/4954)

PARAFIELD GARDENS COMMUNITY CLUB INC/LHMU COLLECTIVE AGREEMENT 2009-2011

Registered and licensed clubs industry

DEPUTY PRESIDENT SLEVIN
DEPUTY PRESIDENT GRAYSON
COMMISSIONER CRAWFORD

SYDNEY, 9 FEBRUARY 2024

*Application to extend the default period for the Parafield Gardens Community Club Inc/LHMU
Collective Agreement 2009-2011*

Introduction

[1] Parafield Gardens Community Club Incorporated (**Parafield Gardens**) 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 *Parafield Gardens Community Club Community Club Inc/LHMU Collective Agreement 2009-2011* (**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*.¹

[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] Parafield Gardens submits that the employees covered by the Agreement would be better off overall if the Agreement continued to apply to them rather the *Registered and Licensed Clubs Award 2020 (Award)*.

[6] Parafield Gardens confirmed to the Commission in a submission dated 21 December 2023 that there are currently 29 casual employees covered by the Agreement.

Consideration

[7] All the employees covered by the Agreement are casual employees. As a result, Schedules S1.1.4.1 and S1.1.5 of the Agreement are critical to the better off overall assessment. These provisions state:

“An employee who is employed as a casual employee shall be paid a minimum rate higher by 50% than the appropriate full time hourly rate prescribed by subclause S1.1.1 or 1.1.3 of the appropriate level and shall not be appointed to a classification lower than level 1.

The minimum wage increase decision of the Australian Fair Pay Commission (or equivalent body) can be absorbed into the rates of pay above, provided that no employee shall be paid a lesser amount than is applicable under the relevant Australian Pay and Classification Scale.”

[8] It is evident from other provisions that the higher casual loading is effectively a loaded rate for all hours worked and casual employees are expressly excluded from various other conditions, beyond the terms regularly excluded for casual employees such as paid leave, including:

- Spread of hours: clause 32.3.2.
- Overtime, weekend penalty rates and broken work allowance: clause 35.
- Shift allowance for working at nights: Schedule S3.1.

[9] The base rates of pay in the Agreement have fallen below the base rates in the Award, meaning the base rates in the Award must be applied instead of the rates prescribed in the Agreement in accordance with Sch 9 of the Transitional Act.

[10] On balance, we consider the relevant casual employees will be better off overall if the Award applies to them instead of the Agreement.

[11] Although we accept Parafield Gardens has confirmed it has been paying employees the 50% casual loading on the base rates in the Award without utilising the absorption condition in Schedule S1.1.5, the operation of this provision is far from clear. For the purposes of our assessment, we cannot assume that this ambiguous provision will be applied in the same way in the future.

[12] As the Full Bench identified in *Loaded Rates in Agreements*², being satisfied that a loaded casual rate is sufficient to offset various award penalty rate and loading entitlements is inherently difficult, because a casual employee generally does not have guaranteed weekly hours, days, or times of work. While we accept Parafield Gardens has provided evidence about the hours currently being worked by its employees, we cannot assume these hours for casual employees will remain unaltered into the future for the purposes of our assessment.

[13] Given the uncertainty about whether the Agreement permits the higher 50% casual loading to be absorbed by minimum wage increases, and given the broad range of penalty rates, loadings, and allowances that casual employees would be entitled to under the Award, we consider the casual employees would likely be better off overall under the Award.

[14] As a result of our finding that the relevant employees would likely be better off overall under the Award, subitem 20A(9) of Sch 3 is not satisfied and the default period cannot be extended under subitem 20A(6)(a).

[15] We cannot extend the default period under subitem 20A(6)(a) and (7) of Sch 3 because there is no evidence Parafield Gardens has commenced bargaining for an enterprise agreement.

[16] The Agreement may otherwise be extended if it is “reasonable in the circumstances” to extend the default period in accordance with subitem 20A(6)(b) of Sch 3.

[17] In *Suncoast Scaffold Pty Ltd*,³ the Full Bench described the ‘reasonable’ criterion in item 20A(6)(b) of Sch 3 to the Transitional Act in this way:

[17] Subitem (6)(b) of item 20A constitutes an independent pathway to the grant of an extension. The ‘reasonable’ criterion in the subitem should, in our view, be applied in accordance with the ordinary meaning of the word – that is, ‘agreeable to reason or sound judgment’. Reasonableness must be assessed by reference to the ‘circumstances’ of the case, that is, the relevant matters and conditions accompanying the case. Again, a broad evaluative judgment is required to be made.

[18] We also consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The explanatory memorandum expressed the purpose of the provisions relating to extending the default period in this way⁴:

Provision would be made for the FWC to (upon application) extend the default period to ensure the automatic sunsetting of zombie agreements does not operate harshly, including by leaving employees worse off.

[19] Full Benches of the Commission have said a number of times that the purpose of the sunsetting arrangements introduced in the SJBPA Act⁵ is that zombie agreements are to be replaced by contemporary instruments made under the *Fair Work Act 2009* (FW Act).

[20] We are not satisfied that in the circumstances of this case it is reasonable to extend the default period for the Agreement. The Agreement does not contain contemporary terms and the employees covered by the Agreement would be better off overall under the Award. We consider the Agreement is precisely the type of instrument that the SJBPA Act was intended to address because its continued operation would disadvantage employees and the conditions are outdated.

[21] As our decision is to refuse to extend the default period under subitem 20A(6) of Sch 3 and our decision is made after the sunset date in the Transitional Act, subitem 20A(11) provides that we must extend the default period to the day of this decision or specify a day that is not more than 14 days after the day of this decision. We have decided that to enable the parties to make the necessary administrative arrangements to give effect to the sunsetting of the Agreement the default period is extended to 23 February 2024.

[22] The application is dismissed.



DEPUTY PRESIDENT

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¹ [2023] FWCFB 105 at [3] to [18].

² [2018] FWCFB 3610.

³ [2023] FWCFB 105.

⁴ Explanatory Memorandum *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [670].

⁵ See for example *Quinn Transport Pty Ltd Enterprise Agreement 2009* [2023] FWCFB 195 at [23] and *One HPA Certified Agreement 2004-2007* [2023] FWCFB 137, at [32].