

[2024] FWCFB 99 [Note: A copy of the zombie agreement to which this decision relates ([AG838498](#)) is available on our website.]



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

Australian Grand Prix Corporation T/A Australian Grand Prix
(AG2023/4973)

AUSTRALIAN GRAND PRIX CORPORATION EMPLOYEES AGREEMENT 2004

Sporting organisations

DEPUTY PRESIDENT SLEVIN
COMMISSIONER CONNOLLY
COMMISSIONER PERICA

SYDNEY, 20 FEBRUARY 2024

*Application to extend the default period for the Australian Grand Prix Corporation
Employees Agreement 2004*

[1] Pursuant to subitem 20A(4) of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (*Transitional Act*) Australian Grand Prix Corporation has applied to extend the default period for the *Australian Grand Prix Corporation Employees Agreement 2004* (Agreement). Under subitem 20A(1), the Agreement was to terminate on 6 December 2023.

[2] The Agreement was made in December 2004 and approved under the *Workplace Relations Act 1996* (Cth) (*the WR Act*). The Agreement is a collective agreement-based transitional instrument under item 2(5)(c) of Sch 3 of the *Transitional Act*. The application is made in accordance with subitem 20A(4) and seeks an extension to the default period to 6 September 2024.

[3] Item 20A of Sch 3 to the Transitional Act provides for the automatic sunset of agreement-based transitional instruments by the end of the default period on 6 December 2023. Specified parties may apply to the Commission for an extension of that period for up to four years in prescribed circumstances. The main features of item 20A of Sch 3 are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd*¹ and we rely on what was stated in that decision.

[4] The application is made under subitem (4) of item 20A of Sch 3 to the Transitional Act, on two bases. First, that the Commission can be satisfied under subitem (6)(a) that subitem (7) applies and it is otherwise appropriate in the circumstances to extend the default period for the Agreement. Subitem (7) applies if bargaining for an enterprise agreement to replace the zombie

agreement is occurring. The second basis for the application is that the Commission can be satisfied under subitem 20A(6)(b) that it is reasonable in the circumstances to extend the Agreement.

[5] In the matter of *ISS Health Services Pty Ltd*,² the Full Bench stated that in order for subitem (7) to apply, three requirements must be satisfied:

1. The application must be made at or after the notification time for a proposed enterprise agreement; and
2. The proposed enterprise agreement must cover the same or substantially the same group of employees covered by the Agreement; and
3. Bargaining for the proposed enterprise agreement must be occurring.

[6] *ISS Health Services Pty Ltd* related to an application under item 26A(4) of Sch 3A, which relates to Division 2B State employment agreements. The wording in item 26A is substantially the same as the wording in item 20A.

Background

[7] Australian Grand Prix Corporation (AGPC) is a Victorian Government Public entity and is subject to the Victorian Government's 2023 Wages Policy and Enterprise Bargaining Framework (WPEBF). The WPEBF sets out a number of requirements with respect to enterprise bargaining by Victorian public sector employers, including that approval must be obtained prior to commencement of bargaining for a replacement agreement. This process requires a detailed application to the Victorian Government.

[8] AGPC lodged its application with respect to a proposed replacement agreement with the Victorian Government on 13 November 2023. Approval was granted and on 12 February 2024 the Applicant issued a Notice of Representational Rights to all employees proposed to be covered by the replacement agreement. It is the AGPC's intention to commence and conclude enterprise bargaining between the months of April-June 2024.

[9] Further, AGPC submits that employees under the current agreement are provided with better conditions overall than those that would apply if the Award applied in its place from 7 December 2023. AGPC has provided detailed submissions with its application in support of this position.

Consideration

[10] The Applicant does not specify which provision of 20A(6) is relied upon to extend the default period. Its submissions are that as a Victorian Government entity it has commenced the processes required to conclude bargaining for a replacement agreement and intends this to be completed between April and June 2024. Further, that it seeks to extend the default period to 6 September 2024 to allow the more beneficial terms of the current agreement to continue to apply during bargaining for the replacement agreement.

[11] We have considered the application with regard to 20A(6)(a) and subitem 7 as set out by the Full Bench in *ISS Health Services Pty Ltd* as follows:

1. This application was made on 6 December 2023. A NERR was provided to all employees proposed to be covered by the agreement on 12 February 2024. The application has not been made at or after the notification time as required and defined in s.173(2) of the *Fair Work Act 2009 (FW Act)*.
2. The Applicant submits that it has been granted approval from the Victorian Government to bargain for an agreement that will cover the same or substantially the same group of employees as the existing agreement and the NERR provided to employees reflects this intention.
3. A NERR was issued to all employees to be covered by the proposed agreement on 12 February 2024. The Applicant submits bargaining will now commence and its intention is to reach an agreement between April-June 2024.

[12] The Full Bench in *ISS Health Services Pty Ltd* identified the requirements for subitem 7 to be satisfied as threefold. The Applicant has only been able to satisfy one of the three requirements. On this basis, its application to extend the default period cannot be granted pursuant to 20A(6)(a).

[13] A second basis for the application is that, under subitem 20A(6)(b), it is reasonable in the circumstances to extend the default period. This involves the application of a broad evaluative judgement.

[14] In *Suncoast Scaffolding Pty Ltd*,³ the Full Bench stated:

“[17] 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.”

[15] The Agreement was made and approved under the terms of the *WR Act*. The Applicant in this case is a Victorian Government Statutory Authority established under the *Australian Grand Prix Act 1994 (Vic)* and subject to the direction and control of the Victorian Government Minister for Tourism, Sport and Major Events. Consequently, the Applicant submits employees covered by the agreement have access to a number of more beneficial terms and conditions under the agreement as part of a framework of terms and conditions that apply to them under the agreement, legislation (including the NES), the Victorian *State Government Agencies Award 2020*, AGPC policy and their employment contracts.

[16] The materials identify that some of these more beneficial terms and conditions include:

- Rates of pay between 13.86% to 106.5% higher than the Award;
- Annual performance incentive payments of up to 10%;
- A more beneficial span of hours Monday – Friday of 8.30am to 5.30pm compared to 7am-6.30pm under the Award;

- 38 hour work week consistent with the Award;
- Minimum casual rates of pay and a 25% casual loading in accordance with the Award;
- Paid parental leave of 14 weeks, for a primary care giver and two weeks for secondary carer eligible employees;
- 20 days paid family violence leave;
- 3 days paid compassionate leave and up to 7 days personal leave access;
- Travel time entitlements paid consistent with the Award.

[17] The Applicant's materials also acknowledge that a number of the terms and conditions under the Agreement are less beneficial to employees than the Award. We have considered these submissions and compared the terms of the Agreement to the modern Award. The agreement contains a number of provisions that are superior to the Award, including in relation to:

- Rates of pay either equal to or up to 44.24% higher than applicable Award rates;
- The span of hours under the Agreement operates between 8:30am and 5:30pm, Monday to Friday. This is less than compared to the Award under which ordinary hours can be worked between 7am and 6:30pm. It is noted however, no overtime or shift penalties are payable under the Agreement;
- In lieu of the two weekends spent working during the Formula One and Australia Motorcycle Grand Prix, employees are provided with two days leave for each of these events;
- During Formula One and Australia Motorcycle Grand Prix weekends, employees are entitled to meals, including lunch and dinner, and in the case of the Grand Prix, breakfast;
- Two days study leave per semester.

[18] We have also identified a number of terms of the agreement that are less beneficial than the Award, including:

- Ordinary hours under the Agreement are 40 hours per week, compared to the Award which provides 38 hours per week;
- The Agreement does not provide a 25% casual loading;
- No overtime, weekend, shift work or public holiday penalties are payable under the Agreement, although as set out above, employees are entitled to two days leave for

each of the Formula One and Australia Motorcycle Grand Prix worked and under clause 29.1.3 the employer may award time off in lieu of work engaged in on weekends;

- Annual leave loading is not payable under the Agreement;
- Additional meal breaks and meal allowances are provided for under the Award which are not otherwise provided for under the Agreement;
- More stringent higher duties allowance;
- Lack of first aid, equipment, and excess travel allowances.

[19] After reviewing the terms of the Agreement and the Award, along with the submissions of the Applicant and the material provided, we are satisfied that the relevant employees, viewed as a group, are not likely to be better off overall under the Agreement than they would be if the Award applied. However, when considering all the additional benefits provided to employees under the framework of terms and conditions that apply to them including under the Agreement, legislation (including the NES), the Victorian *State Government Agencies Award 2020*, AGPC policy and their employment contracts we are satisfied that the employees are better off under these composite arrangements than under the Award.

[20] We have considered these findings with regard to whether it is “reasonable in circumstances” to extend the default period in accordance with subitem 20A(6)(b) of Sch 3 and satisfied this is the case.

[21] In *Peter Frick*,⁴ the Full Bench considered that the default position of the statute to automatically terminate transitional instruments on 6 December 2023 suggests a policy preference for employees covered by transitional instruments to be regulated by contemporary instruments made under the Act.⁵

[22] In *Kalfresh Management Services Pty Ltd*,⁶ the Full Bench expressed the view that where an agreement contains inferior and outdated terms and conditions, this weighs strongly against a conclusion that it is reasonable in the circumstances to extend a default period.⁷

[23] While we have identified some deficiencies with respect to the current agreement in comparison to the Award, we have also considered the purpose of the provisions to be relevant to the broad evaluative judgement that we are required to make. The Explanatory Memorandum for the Secure Jobs Better Pay Act expressed the purpose of the provisions relating to extending the default period in this way:⁸

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

[24] It is the Applicant’s position, and we are satisfied that when the total benefits provided to employees under the composite framework of terms and conditions that apply to them and their employment contracts are considered they are better off under these composite arrangements than under the Award. We consider these factors weigh in favour of granting the extension sought.

[25] Furthermore, the Applicant has submitted that now it has received Victorian Government approval to proceed with bargaining and issued the NERR, its intention is to conclude an agreement between April-June 2024. We are satisfied that this is the case and that it is reasonable in these circumstances to extend the default period.

[26] The extension sought by the Applicant is to 6 September 2024. When asked if a 6-month extension would be sufficient in light of recent Full Bench decisions of the Commission the Applicant indicated it was confident substantive bargaining could be concluded within this timeframe. However, the Applicant pressed its request for an extension to September to allow for the Victorian Government, employee and Fair Work approval processes to take place.

[27] As the Full Bench observed in *SunCoast*, the Commission has a discretion as to the length of the extension, subject to the limitation that the extension cannot be more than 4 years. The nature of the discretion is such that we are not bound to grant the period of extension sought in the application.⁹

[28] In the circumstances, we are not satisfied that the length of extension sought by the Applicant is justified. The Applicant is committed to bargaining for a replacement agreement and has just commenced this process with an intention to have it completed between April and June 2024. We see no material reason why this will not be the case.

[29] On this basis, we consider an extension to 30 June 2024 is an appropriate timeframe within which the Applicant can apply to the Commission for approval of the replacement agreement.

Order

[30] We order that the default period of the Agreement is extended to 30 June 2024, in accordance with item 20A(6) of the Transitional Act.

[31] The Agreement is published, in accordance with subitem 20A(10A) of Sch 3 of the Transitional Act, as an Annexure to this decision.



DEPUTY PRESIDENT

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¹ [\[2023\] FWCFB 105](#).

² [\[2023\] FWCFB 122](#) at [4].

³ [\[2023\] FWCFB 105](#).

⁴ [\[2023\] FWCFB 137](#).

⁵ *Ibid* at [32].

⁶ *Kallium Management Services Pty Ltd As Trustee For The Kalium Labour Trust T/A Kalfresh Pty Ltd* [\[2023\] FWCFB 217](#).

⁷ *Ibid* at [14].

⁸ Explanatory Memorandum *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [670].

⁹ [\[2023\] FWCFB 105](#) at [18].