DECISION

Fair Work Act 2009
s.225—Enterprise agreement

Orora Packaging Australia Pty Ltd T/A Orora Cartons & Ors
(AG2023/1445, AG2023/1446, AG2023/1447, AG2023/1450, AG2023/1464, AG2023/1465, AG2023/1468, AG2023/1469)

ORORA CARTONS HEIDELBERG ENTERPRISE AGREEMENT 2020

ORORA CARTONS BOTANY ENTERPRISE AGREEMENT 2016

ORORA FIBRE PACKAGING NATIONAL ENTERPRISE AGREEMENT 2019

ORORA ST REGIS BATES KEON PARK ENTERPRISE AGREEMENT 2015

ORORA CARTONS REGENCY PARK ENTERPRISE AGREEMENT 2018

ORORA PAPER BOTANY - B9 MACHINE - ENTERPRISE AGREEMENT 2019

ORORA FUNCTIONAL COATINGS ENTERPRISE AGREEMENT 2019

ORORA BAG SOLUTIONS REVESBY ENTERPRISE AGREEMENT 2019

Graphic Arts

COMMISSIONER BISSETT MELBOURNE, 28 AUGUST 2023

Application for termination of the Orora Cartons Heidelberg Enterprise Agreement 2020 & Ors – sections 225 and 226 of Fair Work Act 2009 – whether applicant has standing to make applications – whether agreements do not, and are not likely to, cover any employees – applications validly made – agreements do not, and are not likely to cover any employees – applications granted

[1] On 18 May 2023 and 19 May 2023 Orora Packaging Australia Pty Ltd (**Orora Packaging**) made a number of applications pursuant to s.225 of the *Fair Work Act 2009* (**FW Act**) in which it sought the termination of eight separate agreements (**the Agreements**) after

their respective nominal expiry dates. Those agreements are listed in the Attachment to this decision. Orora Packaging rely in particular on s.226(1)(b) of the FW Act – that each agreement does not, and is not likely to cover employees – in support of its applications.

[2] The AMWU is named in the approval of each agreement as being covered by each agreement. For this reason a conference of Orora Packaging and the AMWU was convened to determine if there were any issues from the AMWU's perspective that might impact the applications of Orora Packaging. Following some delays due to staff movements in the AMWU and a further conference, on 11 June 2023 the AMWU indicated in correspondence to the Commission that it objected to the applications on the grounds that Orora Packaging was not a 'employer covered by the agreements' and therefore did not have standing to make the applications to terminate each agreement. The AMWU otherwise advised that, save for the *Orora Fibre Packaging National Enterprise Agreement 2019* (**the Fibre Packaging Agreement**), it accepted that the agreements did not, and were not likely to cover employees.

[3] The AMWU advised that, in relation to the Fibre Packaging Agreement, it held a concern that termination of that agreement may prejudice the interests of an employee for whom a dispute had been notified to the Commission pursuant to s.739 of the FW Act in relation to that Agreement. In this respect the AMWU said that the Fibre Packaging Agreement continued to cover the employee concerned.

[4] Ultimately I issued directions to the parties for the filing of submissions and evidence in relation to the AMWU's objection that Orora Packaging lacks standing to make the applications to terminate the Agreements and its objection in relation to the Fibre Packaging Agreement. The two jurisdictional matters were listed for hearing before me on 14 August 2023. In particular those directions indicated that the two matters which required resolution were:

1. Whether Orora Packaging has standing as an employer covered by the Agreements to make the applications to terminate the Agreements; and

2. Whether the Fibre Packaging Agreement covers, or is likely to cover, any employees.

[5] At the commencement of the hearing of the applications the AMWU withdrew its claim that the Fibre Packaging Agreement covered, or was likely to cover, any employees. Despite this withdrawal I note that I must nevertheless reach the requisite satisfaction in relation to employees covered by the Agreement. I note there is now no contradictor to the submissions of Orora Packaging on this question.

LEGISLATIVE PROVISIONS

[6] Sections 225 and 226 of the FW Act set out those matters relevant to an application to terminate an enterprise agreement that has passed its nominal expiry date.

> **225 Application for termination of an enterprise agreement after its nominal expiry date**
>
> If an enterprise agreement has passed its nominal expiry date, any of the following may apply to the FWC for the termination of the agreement:

(a) one or more of the employers covered by the agreement;

(b) an employee covered by the agreement;

(c) an employee organisation covered by the agreement.

226 Terminating an enterprise agreement after its nominal expiry date

(1) If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

(a) the FWC is satisfied that the continued operation of the agreement would be unfair for the employees covered by the agreement; or

(b) the FWC is satisfied that the agreement does not, and is not likely to, cover any employees; or

(c) all of the following apply:

(i) the FWC is satisfied that the continued operation of the enterprise agreement would pose a significant threat to the viability of a business carried on by the employer, or employers, covered by the agreement;

(ii) the FWC is satisfied that the termination of the enterprise agreement would be likely to reduce the potential of terminations of employment covered by subsection (2) for the employees covered by the agreement;

(iii) if the agreement contains terms providing entitlements relating to the termination of employees' employment—each employer covered by the agreement has given the FWC a guarantee of termination entitlements in relation to the termination of the agreement.

(1A) However, the FWC must terminate the enterprise agreement under subsection (1) only if the FWC is satisfied that it is appropriate in all the circumstances to do so.

(2) This subsection covers a termination of the employment of an employee:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

(3) In deciding whether to terminate the agreement, the FWC must consider the views of the following covered by the agreement:

(a) the employees (unless there are no employees covered by the agreement);

(b) each employer;

(c) each employee organisation (if any).

Note: The President may be required to direct a Full Bench to perform a function or exercise a power in relation to the matter if any of the employers, employees, or employee organisations, covered by the agreement oppose the termination (see subsection 615A(3)).

(4) In deciding whether to terminate the agreement (the existing agreement), the FWC must have regard to:

(a) whether the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as the existing agreement; and

(b) whether bargaining for the proposed enterprise agreement is occurring; and

(c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.

(5) In deciding whether to terminate the agreement, the FWC may also have regard to any other relevant matter.

[7] Section 226 was subject to substantial amendment through the *Secure Jobs, Better Pay Act 2023.* By the same Act s.615A was inserted into the FW Act. Section 615A states:

615A When the President must direct a Full Bench to perform function etc.

Full Benches—directions on application

(1) The President must direct a Full Bench to perform a function or exercise a power in relation to a matter if:

(a) an application is made under subsection (2); and

(b) the President is satisfied that it is in the public interest to do so.

Note: The President gives directions under section 582.

(2) For the purposes of paragraph (1)(a), the following persons may apply to the FWC to have a Full Bench perform a function or exercise a power in relation to a matter:

(a) a person who has made, or will make, submissions for consideration in the matter;

(b) the Minister.

Full Benches—directions for certain terminations of enterprise agreements

(3) The President must direct a Full Bench to perform a function or exercise a power in relation to a matter arising under section 226 in relation to an application for the termination of an enterprise agreement if:

(a) the President has given a direction to an FWC Member to perform the function or exercise the power; and

(b) the FWC Member is satisfied that any of the following persons covered by the agreement oppose the termination:

(i) an employee;

(ii) an employer;

(iii) an employee organisation.

(4) Subsection (3) does not apply if the FWC Member is satisfied that the enterprise agreement does not, and is not likely to, cover any employees.

(5) Subsection (3) does not prevent a power that may be delegated under subsection 625(1) from being exercised by a single FWC Member or a person to whom the power has been delegated.

Note: The powers that may be delegated under subsection 625(1) include:

(a) the FWC's power to inform itself as it considers appropriate under section 590 (other than the FWC's power to hold a hearing); and

(b) the FWC's power to conduct a conference in accordance with section 592.

[8] Section 615A(3) of the FW Act requires that the President must direct a Full Bench to perform or exercise a power in relation to a matter arising under s.226 in relation to a termination of an enterprise agreement if the President has directed a Member to perform that function or exercise the power and an employee organisation (as in this case) opposes the termination of the agreement. However, the provision does not apply if the Member is satisfied that the Agreement does not, and is not likely to, cover any employee.

[9] On 18 May 2023 and 19 May 2023 the President issued two directions to me to hear and determine the applications of Orora Packaging. It follows that, should I be satisfied that each of the Agreements does not, and is not likely, to cover any employees then, despite the objections of the AMWU, I can proceed to deal with the applications. If I am not so satisfied, the applications concerned must be referred to the President.

[10] Prior to considering that matter I must first be satisfied that the applications are properly made in accordance with the FW Act.

BACKGROUND

[11] The background to the applications is not contentious.[1]

[12] Each of the eight agreements has been negotiated by Orora Packaging and representatives of the employees, including the AMWU. They were each subsequently approved by the Commission with varying termination dates.

[13] On 10 October 2019 Orora Packaging announced that it had entered into a binding agreement to sell its Australasian fibre business to a wholly owned subsidiary of Nippon Paper Industries Co. Limited (**Nippon Paper**). On 30 April 2020 Orora Packaging announced that the sale was complete.

[14] Nippon Paper is the parent company of Paper Australia Pty Ltd which, in turn, is the parent company of Opal Packaging Australia Pty Ltd (**Opal**). Following the completion of the sales of the fibre business Opal became the owner of that business and Orora Packaging ceased to employ all of its former fibre packaging employees.

[15] Each of the eight Agreements was specific to Orora Packaging's fibre business. Following the sale of this part of Orora Packaging's business, the Agreements no longer have application to any business of Orora Packaging.

[16] Orora Packaging no longer employs any employees within the scope of the Agreements.

[17] By virtue of the Declarations made in relation to the applications to terminate the Agreement and filed in accordance with *Fair Work Commission Rules 2013*, Ms Jobling Hodges of Orora Packaging declared that Orora Packaging is aware that Opal now has enterprise agreements that cover employees that were formerly covered by the Agreements subject to these applications. Further, she declared that Orora Packaging has notified Opal of each of the applications and Opal does not oppose termination of the Agreements.

[18] It is common ground that, as of 30 April 2020, there was a transfer of business from Orora Packaging to Opal. This was brought about by the employment by Opal of at least some of the employees previously employed by Orora Packaging who were covered by the Agreements.[2] Each of the employees was a transferring employee and the Agreements were transferable instruments.

DOES ORORA PACKAGING HAVE STANDING TO MAKE THE APPLICATIONS?

[19] Orora Packaging says it does have standing to make each of the applications as it is an employer covered by each Agreement (s.225(a) of the FW Act).

[20] Section 225 of the FW Act is found in Part 2-4 of the FW Act. Section 170 provides that, for the purposes of Part 2-4, an employer means a national system employer. The meaning of 'national system employer' is found in s.14 of the FW Act which states:

> **14 Meaning of national system employer**
>
> (1) A national system employer is:
>
> (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
>
> (b) the Commonwealth, so far as it employs, or usually employs, an individual; or

(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii)a waterside worker; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, ***Australia*** includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of ***Australia*** in section 12).

Note 2: Sections 30D and 30N extend the meaning of ***national system employer*** in relation to a referring State.

…

[21] The AMWU submits firstly that Orora Packaging does not 'employ or usually employ' an individual in the fibre business. For this reason, it says that Orora Packaging cannot be a national system employer as is required by s.225(a).

[22] This submission of the AMWU is easily dispensed with. Orora Packaging is a constitutional corporation which employs a multitude of employees in Australia. That it does not employ a person in the fibre packaging business is not the determinant of whether it is a national system employer. Section 14 does not restrict the areas in which a constitutional corporation must employ a person to be a national system employer. Section 14 of the FW Act makes clear that a constitutional corporation is a national system employer so long as it employs *an individual*. To be a national system employer does not require the employment of more than one person or for that person to be employed in any particular industry, and there is no dispute that Orora Packaging continues to employ at least one individual.

[23] The AMWU's reliance on the decision in *The Australasian Meat Industry Employees Union v Belandra Pty Ltd*[3] to support this submission is misplaced. That case was not about who a national system employer is, but rather whether an employer remained or had ceased to be an employer where it was not apparent that it 'usually employed' anyone at the time in question.

[24] Secondly, the AMWU submits that Orora Packaging is no longer an employer covered by the agreement because of a transfer of business. The AMWU submits that Orora Packaging terminated the employment of the employees covered by the Agreements and, as such, is no

longer an employer within the meaning of s.14 or s.225 of the FW Act. As Orora Packaging is not an employer, the Agreements do not cover Orora Packaging.

[25] The AMWU submits that s.53(1) of the FW Act provides that an enterprise agreement covers an employer when it is expressed to cover (however described) the employer. Section 53(4)(a) however says that that an enterprise agreement does not cover an employer if another section of the FW Act has the effect that the employer is not covered. The AMWU submits that the transfer of business provisions of the FW Act have the effect that, regardless of the coverage clauses of the Agreements, Orora Packaging is no longer covered by the Agreements.

[26] Contrary to the decision in *Construction, Forestry, Mining and Energy Union v LCR Group Pty Ltd*[4] in which Deputy President Richards held that the effect of a transfer of business upon an enterprise agreement is to 'widen and extend the coverage of the instrument to the new employer and transferring employees, preserving the coverage rules in the process', the AMWU says that what actually occurs in a transfer of business is that the coverage of the transferring agreement moves from the old employer (in this case Orora Packaging) to the new employer (Opal).

[27] In support of this proposition, the AMWU relies on the language of s.313 of the FW Act, supported by the Explanatory Memorandum for the Fair Work Bill 2009.

[28] Section 313 of the FW Act states:

> **313 Transferring employees and new employer covered by transferable instrument**
>
> (1) If a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee's employment with the old employer, then:
>
> (a) the transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (the *transfer time*) the transferring employee becomes employed by the new employer; and
> (b) while the transferable instrument covers the new employer and the transferring employee in relation to the transferring work, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to that work.
>
> (2) To avoid doubt, a transferable instrument that covers the new employer and a transferring employee under paragraph (1)(a) includes any individual flexibility arrangement that had effect as a term of the transferable instrument immediately before the termination of the transferring employee's employment with the old employer.
>
> (3) This section has effect subject to any FWC order under subsection 318(1).

[29] The AMWU relies on the change in language from 'covered' in relation to the old employer to 'covers' in relation to the new employer as found in ss.313(1) and (2)(a) and (b).

[30] The Explanatory Memorandum, in relation to s.313 of the FW Act, states:

> Clause 313 sets out the default rules that apply to the coverage of transferable instruments when a transfer of business occurs. The effect of subclause 313(1) is that a transferable instrument that covered an old employer and a transferring employee immediately before that employee's employment was terminated covers the new employer and the transferring employee in relation to the transferring work:
>
> - after the time the transferring employee becomes employed by the new employer; and
>
> - any other enterprise agreement or named employer award (that is not a transferable instrument) which covers the new employer does not cover the transferring employee.

[31] The AMWU submits that, while the FW Act is silent on coverage with respect to the old employer on a transfer of business, s.313 specifically deals with coverage with respect to the new employer. It says that the use of the word 'covered' in reference to the old employer clearly indicates that the (old) employer had historical coverage but the effect of the transfer of business on the enterprise agreement is that the coverage of the old employer is extinguished.

[32] For this reason the AMWU submits that Orora Packaging is not an 'employer' covered by the Agreements as contemplated in s.225 of the FW Act and hence does not have standing to make the application to terminate the Agreements.

[33] I am not convinced that Orora Packaging does not have standing to make the application.

[34] I am not satisfied that the provisions in relation to the transfer of business operate such that they have the effect that Orora Packaging is no longer an employer covered by the Agreements.

[35] First, s.310 of the FW Act states:

> **310 Application of this Division**
>
> This Division provides for the transfer of rights and obligations under enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from an old employer to a new employer.

[36] That is, the Division of the FW Act in relation to the transfer of instruments is about the transfer of rights and obligations, not about the transfer of a transferable instrument such that it no longer applies to or covers the old employer. This makes sense in the context of s.313 of the FW Act which provides that the transferable instrument covers the new employer only in relation to the transferring employees. That is, rights and obligations that may exist in an agreement that do not apply to transferring employees do not transfer to the new employer. This, on its own, tells against the interpretation favoured by the AMWU. The new employer assumes no obligations for employees who do not transfer. On the AMWU's submission that the old employer is no longer covered an Agreement that is a transferable instrument, non-transferring employees could find their rights extinguished.

[37] Secondly, the use of the past tense ('covered') and present tense ('covers') in s.313 must be read in context. Section 313(1) talks of a transferrable instrument that 'covered the old employer and a transferring employee' and then, in s.313(1)(a), s.313(1)(b) and s.313(2) of a transferable instrument that 'covers the new employer and the transferring employee'. The change in tense is clearly intended to distinguish the past relationship of the (old) employer and employee from the new relationship between the (new) employer and employee established by the transfer of business. 'Cover' is not used here to refer to the employer only.

[38] Thirdly, while the transfer of business from Orora Packaging to Opal appears to have been a very contained, neat separation of part of the business of Orora Packaging (with that part covered by agreements applicable to that confined part of the business only), this will not always be the case. The legislation must work in all circumstances and not just in the case before the Commission in these applications.

[39] The submissions of the AMWU are premised on all employees of the old employer transferring to the new employer. This may not necessarily (and is not required) to be the case. An employer may chose to sell off only a part of its business but keep another part that performs similar work covered by the same Agreement (or for that matter any work covered by the agreement). Alternatively some employees may choose not to accept employment with the new employer but remain with the old employer for a period whilst, for example, re-training occurs or they work through a termination process. In either of these examples and on the AMWU's submissions the old employer would no longer be covered by the agreement that previously covered it and hence the remaining employees. This may well result in the loss of previously agreed wages and conditions of employment to those non-transferring employees.

[40] The AMWU's submissions in respect to the transfer of business provisions are therefore rejected.

[41] For these reasons I am satisfied that Orora Packaging has standing to make the applications pursuant to s.225 of the FW Act. Further, I am satisfied that each of the Agreements has passed its nominal expiry date such that the applications can be considered by the Commission.

SHOULD THE AGREEMENTS BE TERMINATED?

[42] Section 226(1) of the FW Act makes clear that the Commission must terminate an agreement if the application has been made pursuant to s.225 of the FW Act and one of paragraphs (a), (b) or (c) of s.226(1) is satisfied.

[43] In this case Orora Packaging relies on s.226(1)(b) as the basis for its application.

[44] I am satisfied, based on the evidence of Ms Jobling Hodges that, following the sale of its fibre business, Orora Packaging no longer employs any employees whose employment is covered by the Agreements. Absent any evidence to the contrary I am satisfied that the Agreements do not, and are not likely to, cover any employees of Orora Packaging.

[45] I acknowledge that there remains a dispute before the Commission in relation to the *Fibre Packaging Agreement.* That dispute however is not in relation to the employment of an employee with Orora Packaging but rather in relation to the employment of a particular employee with Opal. Whatever 'rights' it may be that the AMWU was seeking to protect resides

in Opal (by virtue of s.310 of the Act the rights and obligations have transferred) and are now, in any event, replaced by the provisions of the new Opal agreement. I would observe that s.226(1)(b) of the FW Act is not about preserving 'interests' but whether there is anyone covered by the agreement in question. While the AMWU no longer press this objection I am satisfied that the *Fibre Packaging Agreement* does not, and is not likely to, cover any employee.

[46] I am also satisfied, based on the statements made by Orora Packaging in their applications, that each transferring instrument has been replaced by an enterprise agreement that covers Opal and the employees who do the transferring work.

[47] Section 226(1A) requires that I be satisfied that it is appropriate in all of the circumstances to terminate the Agreements. On the basis of the submissions and evidence before me I am satisfied that it is appropriate in all of the circumstances to terminate the Agreements.

[48] In reaching my conclusion I have had regard to the submissions put to me by Orora Packaging and the AMWU. There are no employees covered by the Agreements. The submissions of Orora Packaging and the AMWU have been taken into account and have not altered my view that the Agreements should be terminated.

[49] No other grounds exist in relation to my consideration.

[50] In these circumstances I am satisfied that the Agreements should be terminated.

CONCLUSION

[51] For the reasons given I above I have decided to terminate the Agreements listed in the Attachment to this decision.

[52] In accordance with s.227 of the FW Act the termination will operate from the date of this decision.

COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<AE413152 PR765311>

ATTACHMENT

Matter	**Agreement**
AG2023/1445 - Application by Orora Packaging Australia Pty Ltd T/A Orora Cartons	*Orora Cartons Heidelberg Enterprise Agreement 2020*
AG2023/1446 - Application by Orora Packaging Australia Pty Ltd T/A Orora Cartons	*Orora Cartons Botany Enterprise Agreement 2016*
AG2023/1447 - Application by Orora Packaging Australia Pty Ltd T/A Orora Fibre Packaging Australasia	*Orora Fibre Packaging National Enterprise Agreement 2019*
AG2023/1450 - Application by Orora Packaging Australia Pty Ltd T/A Orora St Regis Bates	*Orora St Regis Bates Keon Park Enterprise Agreement 2015*
AG2023/1464 - Application by Orora Packaging Australia Pty Ltd T/A Orora Cartons Australasia	*Orora Cartons Regency Park Enterprise Agreement 2018*
AG2023/1465 - Application by Orora Packaging Australia Pty Ltd	*Orora Paper Botany - B9 Machine - Enterprise Agreement 2019*
AG2023/1468 - Application by Orora Packaging Australia Pty Ltd T/A Orora Functional Coatings Australasia	*Orora Functional Coatings Enterprise Agreement 2019*
AG2023/1469 - Application by Orora Packaging Australia Pty Ltd T/A Orora Bag Solutions	*Orora Bag Solutions Revesby Enterprise Agreement 2019*

[1] See witness statement of Susannah Jobling Hodges, filed by Orora Packaging

[2] FW Act section 311

[3] [20023] FCA 910

[4] [2016] FWC 5823