# 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

## Suncoast Scaffold Pty Ltd as trustee for The Warren Family Trust
(AG2023/790)

## SUNCOAST SCAFFOLD PTY LTD EMPLOYEE COLLECTIVE AGREEMENT 2009

Building, metal and civil construction industries

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT ROBERTS

SYDNEY, 16 JUNE 2023

**Background and statutory framework**

**[1]** On 23 March 2023 Suncoast Scaffold Pty Limited (Suncoast) made an application under item 20A(4) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act) to extend the 'default period' for the *Trustee for the Warren Family Trust t/a Suncoast Scaffold Pty Lid Employee Collective Agreement 2009* (Agreement). The application seeks to extend the default period to 31 March 2027.

**[2]** The Agreement is, on its face, a collective agreement made pursuant to Part 8 of the *Workplace Relations Act 1996* (Cth) (WR Act). As such, it is a 'WR Act instrument' within the meaning of item 2(2) of Sch 3 to the Transitional Act, being a workplace agreement (item (2)(c)). By virtue of item 2(3) of Sch 3, it is a 'transitional instrument' under Sch 3. It is classified by item 2(5)(c)(i) of Sch 3 as a 'collective agreement-based transitional instrument'.

**[3]** Item 3 of Sch 3 to the Transitional Act, which commenced operation on 1 July 2009, preserved the legal operation of transitional instruments notwithstanding the repeal of the WR Act effective from 1 July 2009 and the commencement of operation of the *Fair Work Act 2009* (Cth) (FW Act). Item 3(1) and (2) of Sch 3 to the Transitional Act provide:

> **3 The employees, employers etc. who are *covered* by a transitional instrument and to whom it *applies***
>
> (1) A transitional instrument ***covers*** the same employees, employers and any other persons that it would have covered (however described in the instrument or WR Act) if the WR Act had continued in operation.

Note 1: The expression ***covers*** is used to indicate the range of employees, employers etc. to whom the instrument potentially ***applies*** (see subitem (2)). The employees, employers etc. who are within this range will depend on terms of the instrument, and on any relevant provisions of the WR Act.

Note 2: Depending on the terms of a transitional instrument and any relevant provisions of the WR Act, the instrument's coverage may extend to people who become employees after the instrument becomes a transitional instrument.

(2) A transitional instrument applies to the same employees, employers and any other persons the instrument covers as would, if the WR Act had continued in operation, have been:

(a) required by the WR Act to comply with terms of the instrument; or

(b) entitled under the WR Act to enforce terms of the instrument.

Note: The expression ***applies*** is used to indicate the range of employees, employers etc. who are required to comply with, or can enforce, the terms of a transitional instrument.

**[4]** The above provisions make clear that transitional instruments cover and apply to those employers, employees and organisations who would have been bound by the instruments if the WR Act had continued in operation. In the case of collective agreement-based transitional instruments, this would include the employer and all employees within the scope of the instrument's terms, including new employees who came to be engaged by the employer after the instrument had commenced operation. By operation of these provisions, the Agreement has continued in operation since it first came into effect in 2009. Schedule 3 to the Transitional Act makes provision for the variation and termination of transitional instruments in prescribed circumstances, but there is nothing before us to indicate that these provisions have ever been exercised in respect of the Agreement. Accordingly, we are satisfied that the Agreement, in its original terms, remains in effect.

**[5]** The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act) amended, among other things, Sch 3 to the Transitional Act to insert item 20A. Item 20A in its entirety provides:

**20A Automatic sunsetting of all remaining agreement-based transitional instruments**

*Automatic sunsetting*

(1) An agreement-based transitional instrument terminates at the end of the grace period for the instrument if the instrument has not already terminated before that time.

(2) The ***grace period*** for an agreement-based transitional instrument is:

(a) subject to paragraph (b), the period of 12 months (the ***default period***) beginning on the day Part 13 of Schedule 1 to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* commences; or

(b) if the default period is extended for the instrument on one or more occasions under subitem (6) or paragraph (11)(e)—the default period as so extended.

*Employer to give notice to employees*

(3) An employer covered by an agreement-based transitional instrument must, before the end of 6 months beginning on the day Part 13 of Schedule 1 to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 commences, give each employee who is covered by the instrument and employed by the employer at the end of that period written notice advising the employee:

(a) that the employee is covered by an agreement-based transitional instrument; and

(b) that the instrument will terminate unless an application is made to the FWC under subitem (4), before the end of the period of 12 months beginning on the day that Part commences, for the FWC to extend the default period for the instrument; and

(c) of the day on which that Part commences.

Note: For compliance with this obligation, see item 4C of Schedule 16.

*Application to FWC for extension of default period*

(4) Any of the following may apply to the FWC, before the end of the grace period for an agreement-based transitional instrument, for the FWC to extend the default period for the instrument for a period of no more than 4 years:

(a) an employer covered by the instrument;

(b) an employee covered by the instrument;

(c) an industrial association that is entitled to represent the industrial interests of one or more of the employees covered by the instrument.

(5) An application under subitem (4) must be accompanied by:

(a) a copy of the instrument; and

(b) any declarations that are required by the procedural rules of the FWC to accompany the application.

*Extension of default period*

(6) If an application is made under subitem (4), the FWC must extend the default period for the agreement-based transitional instrument for a period of no more than 4 years if the FWC is satisfied that:

(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.

(7) This subitem applies if:

(a) the application is made at or after the notification time for a proposed enterprise agreement; and

(b) the proposed enterprise agreement will cover:

(i) if the application relates to an individual agreement-based transitional instrument—the employee covered by the individual agreement-based transitional instrument; or

(ii) if the application relates to a collective agreement-based transitional instrument—the same, or substantially the same, group of employees as the collective agreement-based transitional instrument; and

(c) bargaining for the proposed enterprise agreement is occurring.

(8) This subitem applies if:

(a) the application relates to an individual agreement-based transitional instrument; and

(b) the employee covered by the instrument would be an award covered employee for the instrument under subitem (10) if the instrument were a collective agreement-based transitional instrument; and

(c) it is likely that, as at the time the application is made, the employee would be better off overall if the instrument applied to the employee than if the relevant modern award referred to in that subitem applied to the employee.

(9) This subitem applies if:

(a) the application relates to a collective agreement-based transitional instrument; and

(b) it is likely that, as at the time the application is made, the award covered employees for the instrument under subitem (10), viewed as a group, would be better off overall if the instrument applied to the employees than if the relevant modern award or awards referred to in that subitem applied to the employees.

(10) For the purposes of subitems (8) and (9), the ***award covered employees*** for a collective agreement-based transitional instrument are the employees who:

(a) are covered by the instrument; and

(b) at the time an application is made under subitem (4) in relation to the instrument, are covered by one or more modern awards (the ***relevant modern awards***) that:

(i) are in operation; and

(ii) cover the employees in relation to the work that the employees are to perform under the instrument; and

(c) are employed at that time by an employer who is covered by the instrument and by one or more of the relevant modern awards.

*Publication of decisions etc.*

(10A) The FWC must publish the following, on its website or by any other means that the FWC considers appropriate:

(a) a decision under subitem (6);

(b) any written reasons that the FWC gives in relation to such a decision;

(c) if the decision is to extend the default period for a collective agreement-based transitional instrument—the instrument.

The FWC must do so as soon as practicable after making the decision.

(10B) Paragraph (10A)(b) applies subject to any order made under section 594 of the FW Act.

(10C) The FWC must not publish an individual agreement-based transitional instrument in relation to which an application under subitem (4) is made.

*Pending applications*

(11) If:

(a) an application is made under subitem (4) in relation to an agreement-based transitional instrument; and

(b) the FWC has not made a decision on the application at a time (the ***critical time***) that is immediately before what would (apart from this subitem) be the end of the grace period for the instrument;

then:

(c) the FWC must make the decision on the application after the critical time; and

(d) the decision on the application is taken to have been made at the critical time; and

(e) if the FWC's decision on the application is to refuse to extend the default period for the instrument under subitem (6)—the FWC must extend the default period until the end of:

(i) subject to subparagraph (ii), the day the refusal decision is made; or

(ii) if the refusal decision specifies a later day that is not more than 14 days after the day the refusal decision is made—that later day.

**[6]** Item 20A forms part of a scheme of provisions established by Part 13 of Sch 1 to the SJBP Act for the 'sunsetting' of all transitional instruments remaining operative under the

Transitional Act, including agreement-based transitional instruments (which includes collective agreement-based transitional instruments), Division 2B State employment agreements[1] and enterprise agreements made during the 'bridging period'.[2] Collectively, these instruments are described as 'zombie agreements' in the title to Part 13 of Sch 1 to the SJBP Act. Part 13 commenced operation on 6 December 2022.

**[7]** Subitem (1) of item 20A provides that an agreement-based transitional instrument terminates at the end of the 'grace period' if it has not already terminated before that time. Subitem (2) defines the 'grace period' as being the period of 12 months ('default period') from the commencement date of Part 13 of Sch 1 to the SJBP Act (that is, the period ending 6 December 2023) or, if the default period is extended under subitems (6) or (11)(e), the default period as so extended. Item 21 provides that, once an agreement-based transitional instrument terminates, it ceases to cover, and can never again cover, any employees, employers or other persons.

**[8]** Subitem (6) of item 20A provides that, upon application, the Commission *must* extend the default period for an agreement-based transitional instrument for a period of no more than four years (that is, no more than until 6 December 2027) 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.

**[9]** Subitem (7) does not apply in the present case because it is not contended that Suncoast's application has been made after the notification time for a proposed enterprise agreement. Nor does subitem (8) apply, since it concerns only applications relating to an 'individual agreement-based transitional instrument'. The Agreement which is the subject of Suncoast's application is, as earlier stated, a collective agreement-based transitional instrument. Therefore, in order to grant the application, it would be necessary for us to be satisfied either that:

- subitem (9) applies, and it is otherwise appropriate in the circumstances to extend the default period, or

- it is reasonable in the circumstances to extend the default period.

**[10]** In order for subitem (9) to apply, two requirements must be satisfied. The first (in subitem (9)(a)), namely that the application relates to a collective agreement-based transitional instrument, is clearly met in this case. The second requirement (in subitem (9)(b)) is that it is 'likely' that the 'award covered employees' for the transitional instrument under subitem 10 'viewed as a group' would be 'better off overall' if the instrument applied to them than if the relevant modern award(s) referred to in subitem (10) applied to the employees. 'Award-covered employees' under subitem (10) are those employees who:

- are covered by the transitional instrument the subject of the application; and

- are, at the time of the application, covered by one or more modern awards in operation in relation to the work the employees are to perform under the transitional instrument; and

- are employed by any employer who is covered by the transitional instrument and by one or more of the relevant modern awards.

**[11]** Subitem (10) implies that the group of 'award covered employees' to whom the requirement in subitem 9(b) is to be applied is an identifiable cohort of employees fixed at the point of time when the application for an extension is made.

**[12]** The expression 'better off overall' used in subitem 9(b) is well known as a requirement for the approval of enterprise agreements under Part 2-4 of the FW Act. The 'better off overall test' (BOOT) for enterprise agreements explicated in s 193 of FW Act requires an overall comparison to be made between the terms of the enterprise agreement for which approval is sought and the relevant modern award. This requires the identification of terms which are more beneficial for an employee, terms which are less beneficial, and an overall assessment of whether an employee would be better off under the agreement.[3]

**[13]** However, there are two important differences between the BOOT in s 193 of the FW Act and the requirement in subitem (9)(b) of item 20A of Sch 3 to the Transitional Act. The first is that the former requires an individualised assessment, so that s 193(1) (in its current form) requires 'each award covered employee, and each reasonably foreseeable employee' (underlining added) to be better off overall under the enterprise agreement's terms than under the relevant modern award for the BOOT to be satisfied. The latter does not require an individualised assessment but rather requires that the award covered employees be 'viewed as a group' in assessing whether they would be better off overall under the transitional instrument than under the relevant modern award(s). The second difference is that in s 193, the Commission must positively be satisfied that the enterprise agreement passes the BOOT, whereas item (9)(b) is concerned only with the 'likelihood' of the award covered employees being better off overall under the transitional instrument than under the relevant modern award.

**[14]** The Explanatory Memoranda for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* provide no assistance in construing subitem 9(b).

**[15]** The requirement for the better off overall criterion in subitem 9(b) to be assessed by reference to the award covered employees 'viewed as a group' appears to allow for the possibility that the criterion may be satisfied, notwithstanding that some individual employees are not better off overall than under the relevant award, as long as there is a discernible advantage for the employees considered as a collective. Further, there only needs to be satisfaction as to the 'likelihood' of such a discernible collective advantage; that is, it only needs to be probable rather than certain. Taking these matters together, it is apparent that the better off overall criterion is less stringent that the BOOT in s 193 of the FW Act. However, beyond these broad observations, subitem 9(b) discloses no methodology as to how the criterion is to be applied. All that can be said is that a broad evaluative judgment is required based upon an overall comparison of the terms of the transitional instrument and the relevant award(s) in their application to the cohort of award covered employees.

**[16]** Under subitem (6)(a) of item 20A, in addition to being satisfied that subitem (7), (8) or (9) applies, the Commission must also be satisfied that 'it is otherwise appropriate in the circumstances' for the default period to be extended. 'Appropriate', on its ordinary meaning, connotes that it is 'suitable' or 'fitting'[4] 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.

**[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'.[5] 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]** Although the Commission is required to grant an extension to the default period if the conditions of paragraph (a) or (b) of subitem (6) are satisfied, it has a discretion as to the length of the extension, subject to the limitation that the extension cannot be for more than four years. The Commission is not obliged to grant the period of extension sought in the application: s 599 of the FW Act.

**The Agreement**

**[19]** The coverage of the Agreement is set out in clause 1.2, which provides that the Agreement covers employees of Suncoast in the State of Queensland who are employed in the classifications contained in the Agreement. Clause 1.3 of the Agreement provides that it shall 'remain in force' for five years after approval by the Workplace Authority. Clause 1.6 provides, in summary, that the Agreement provides comprehensively for the wages and conditions of employment of the employees it covers.

**[20]** The classifications in the Agreement are set out in clause 4.1. The Agreement has two streams, Administration and Trades. The Administration Stream comprises Administration 1 and Administration 2 classifications. The Trades Stream comprises Labourer, Trades Labourer and Scaffolder classifications. The classifications in the Administration Stream are defined by reference to various indicative tasks that are clerical in nature. Each of the classifications in the Trades Stream is defined by reference to experience in or skills relevant to the building and construction industry.

**[21]** The hourly wage rates are set out in clause 4.2 (subject to junior rates for administrative employees only in clause 4.3):

| **Classification** | **Hourly rate ($)** | **Casual hourly rate ($)** |
|---|---|---|
| Administration Stream | | |
| Administration 1 | 17.10 | 21.03 |
| Administration 2 | 19.35 | 23.80 |
| Trades Stream | | |
| Labourer | 17.80 | 21.89 |
| Trades Labourer | 19.30 | 23.74 |

| | | |
|---|---|---|
| Scaffolder | 21.50 | 26.45 |

**[22]** Comparing the rates in the second column above to those in the first, it appears that the effective casual loading for which the Agreement provides is 23 per cent.

**[23]** Clause 4.4 provides for increases to the above wage rates as follows:

> **4.4 Wage Increases**
>
> An employee at all times will be entitled to wage increases in accordance with the Australian Fair Pay Commission (or equivalent body) decision.
>
> The Company makes a commitment that at all time[s] an employee will be entitled to the minimum wage as stipulated by the Australian Fair Pay Commission (or equivalent body).

**[24]** Other relevant conditions of employment for which the Agreement provides are:

- Clause 5.1 provides that the ordinary hours of work are 38 per week when averaged over 12 months, Monday to Friday inclusive, within the hours 6.00 am to 6.00 pm. Trades stream employees may be required to work 'reasonable additional hours' of six hours per week, averaged over 12 months.

- Clause 5.4 provides that overtime is to be paid at the rate of time and a half for the first three hours and double time thereafter, with all overtime on Sunday being paid at the rate of double time. However, clause 5.4 states that: 'This shall not be applicable to Trades Stream employees whose rate of pay compensates them for working overtime'.

- Clause 5.6 provides that employees shall receive double time and half for all work undertaken on a gazetted public holiday, with a minimum payment for four hours.

**[25]** The Agreement does not make provision for the payment of any disability or expense-related allowances apart from an overtime meal allowance in clause 5.2.

## Applicant's case

**[26]** Suncoast's application is advanced under subitems (6)(a) and (9), in that it contends that its award covered employees would be better off overall if the Agreement continued to apply to them than if the relevant modern award applied. In support of this proposition, Suncoast contends in its application that 'All Entitlements (i.e. Holiday Loading, Overtime Allowances four hours at time and a half, two hours at double time are paid on a daily basis' (sic) and that '[a]ll pay rises as ratified are passed on plus percentage of entitlements'. Suncoast also contends in its application that '[e]mployees have been employed under this Collective Agreement since 2009 and are satisfied with the current arrangement'.

**[27]** In its application, Suncoast provided pay information in relation to its 18 current employees. Although the Agreement classification structure makes no provision for the classification of 'Basic Scaffolder', which is a classification referred to in the pay information

provided, on the assumption that employees in this classification fall within the 'Scaffolder' classification in the Agreement, the Agreement appears to apply to 12 of these employees. The 12 employees are paid the following rates of pay effective from 1 July 2022:

| | |
|---|---|
| Labourers: | $31.30 (1 employee) |
| Trades Labourers: | $33.50 (1 employee) |
| Basic Scaffolders: | $36.60 (3 employees) |
| Scaffolders: | $39.20 (4 employees) |
| Office Staff: | $33.50; $36.60; $43.95 (3 employees) |

**[28]** The remaining six employees are employed in roles not provided for in the Agreement, namely, 'Yard', 'Leading Hands Truck Drivers', and 'Sales'. Because, on the face of the job descriptions provided, these employees do not fall within the classifications in the Agreement, they are not and never have been covered by the Agreement and are thus irrelevant to the assessment required by subitem (9). For two of the office staff, Suncoast's pay information specifies that they are entitled to 'Hols & Sick' in addition to the specified hourly rate. It may be inferred that, for the rest of the employees, the absence of such a notation indicates that they are casual employees.

**[29]** Suncoast places no express reliance in its application on the alternative 'reasonable in the circumstances' criterion in subitem 6(b) of item 20A.

**Better off overall analysis**

**[30]** Based on the pay information provided by Suncoast, of the 12 employees covered by the Agreement, nine of them (described as 'Labourers', 'Trades Labourers', 'Basic Scaffolders' and 'Scaffolders') are covered by the *Building and Construction General On-Site Award 2020* (Building Award) and three (described as 'Office Staff') are covered by the *Clerks—Private Sector Award 2020* (Clerks Award).[6]

**[31]** With the consent of Suncoast, the Commission's Agreements Team undertook a comparison of the pay outcome produced by the Agreement as compared to the Building Award and the Clerks Award. It should be noted that the comparison required by subitem 9(a), and which has been undertaken, is between the rates of pay for which the Agreement provides — that is, the rates in clause 4.2 as escalated in accordance with clause 4.4 — and the relevant award rates. The actual rates paid by Suncoast, as specified in the pay information provided, do not appear to align with the actual rates of pay required by the Agreement. For instance, assuming that they are casuals, the employees described as 'Basic Scaffolders' appear actually to be paid less than what the Agreement requires for the Scaffolder classification, whereas 'Scaffolders' are paid more.

**[32]** A comparison of the ordinary-time hourly rates required by the Agreement and the two awards demonstrate that the Agreement rates are higher:

**Hourly Rate**

| Modern Award Classification | Agreement Classification | Modern Award Rate | Agreement Rate | Percentage Difference |
|---|---|---|---|---|
| **Building and Construction** | | | | |

| | | | | |
|---|---|---|---|---|
| CW1(A) | Labourers | $23.91 | $25.38 | 6.15% |
| CW1(b) | Trades Labourers | $24.35 | $27.52 | 13.02% |
| CW2 | Scaffolders | $25.54 | $30.66 | 20.04% |
| **Clerks - Private Sector** | | | | |
| Level 1 - Year 1 | Administration 1 | $22.67 | $24.38 | 7.56% |
| Level 2 - Year 1 | Administration 2 | $24.76 | $27.59 | 11.44% |

**Casual Hourly Rate**

| Modern Award Classification | Agreement Classification | Modern Award Rate | Agreement Rate | Percentage Difference |
|---|---|---|---|---|
| **Building and Construction** | | | | |
| CW1(a) | Labourers | $29.89 | $31.21 | 4.44% |
| CW1(b) | Trades Labourers | $30.44 | $33.85 | 11.22% |
| CW2 | Scaffolders | $31.93 | $37.72 | 18.14% |
| **Clerks - Private Sector** | | | | |
| Level 1 - Year 1 | Administration 1 | $28.34 | $29.99 | 5.82% |
| Level 2 - Year 1 | Administration 2 | $30.95 | $32.91 | 6.33% |

**[33]** However, there are a number of differences in conditions of employment which bear upon the pay outcomes for employees under the Agreement as compared to under the relevant awards. These include the following:

- The Agreement provides that ordinary hours can be averaged over 12 months. Both awards provide for hours to be averaged over 28 days or four weeks.

- The Agreement provides a flat casual rate which appears to be in compensation for the 25 per cent casual loading provided in the awards.

- Under the Agreement, the minimum engagement period is two hours, whereas the Clerks Award provides that a casual employee must be paid for three hours' work per engagement and the Building Award provides that a casual employee is entitled to a minimum of four hours of work per engagement plus the relevant fares and travel allowances.

- The Agreement excludes Trades Stream employees who would otherwise be covered by the Building Award from any entitlement to payment for overtime. For Administration Stream employees otherwise covered by the Clerks Award, the Agreement provides for overtime penalty rates of 150 per cent for the first three hours and 200 per cent thereafter Monday to Saturday, with a 200 per cent rate on Sundays, whereas the Clerks Award provides a more beneficial overtime penalty of 150 per cent for the first 2 hours and 200 per cent thereafter Monday to Saturday and 200 per cent on Sunday.

- All award allowances are excluded by the Agreement except for the overtime meal allowance in clause 5.2. This allowance, of $9.60, is lower when compared to the *Building Award* ($16.37) and the *Clerks Award* ($16.91).

**[34]** The effect of these differences in entitlements are most apparent in respect of Trades Stream employees when working overtime. In *Construction, Forestry, Maritime, Mining and Energy Union v Allstyle Concrete*,[7] a 50-hour working week was determined by a Full Bench to constitute an appropriate model for applying the BOOT in the building and construction industry. The modelling below, which compares the Scaffolder classification in the Agreement to the corresponding classification in the Building Award, shows that employees in this classification would be worse off under the Agreement than under the Building Award when working 50 hours in a week (with no rostered day off).

| **Agreement Ordinary Rate** | **$30.66** | **Scaffolder** | |
|---|---|---|---|
| | **Hours** | **Loading** | **Weekly Total** |
| Monday | 7.6 | 100% | $233.02 |
| Tuesday | 7.6 | 100% | $233.02 |
| Wednesday | 7.6 | 100% | $233.02 |
| Thursday | 7.6 | 100% | $233.02 |
| Friday | 7.6 | 100% | $233.02 |
| Overtime | 10 | 100% | $306.60 |
| Overtime | 2 | 100% | $61.32 |
| | | | $0.00 |
| | | | $0.00 |
| **Allowances** | **Amount** | **Value** | |
| Crib time | | | $0.00 |
| Meal Allowance | 5 | $9.60 | $48.00 |
| Fares | | | $0.00 |
| Annual Leave | Yes | | $89.62 |
| Leave Loading | Yes | | $15.68 |
| **Totals** | **50.00** | **Hrs** | **$1,686.31** |

| **Award Ordinary Rate** | **$25.54** | **CW2** | |
|---|---|---|---|
| | **Hours** | **Loading** | **Weekly Total** |
| Monday | 7.6 | 100% | $194.10 |
| Tuesday | 7.6 | 100% | $194.10 |
| Wednesday | 7.6 | 100% | $194.10 |
| Thursday | 7.6 | 100% | $194.10 |
| Friday | 7.6 | 100% | $194.10 |
| Overtime | 10 | 150% | $383.10 |
| Overtime | 2 | 200% | $102.16 |
| | | | $0.00 |
| | | | $0.00 |
| **Allowances** | **Amount** | **Value** | |
| Crib time | 5 | $17.03 | $85.13 |
| Meal allowance - **for 2022/2023 fin year** | 5 | $16.37 | $81.85 |
| Fares - **for 2022/2023 fin year** | 5 | $20.32 | $101.60 |
| Annual Leave | Yes | | $74.66 |
| Leave Loading | Yes | | $13.06 |
| **Totals** | **50.00** | **Hrs** | **$1,812.08** |

| | |
|---|---|
| **Agreement Total Weekly Rate** | $1,686.31 |
| **Award Total Weekly Rate** | $1,812.08 |
| **Dollar / Actual Percentage Difference** | -$125.78<br>6.94% |

**[35]** The percentage shortfall for employees of Suncoast in the Labourers and Trades Labourers classifications working the above pattern of hours would be larger when compared to the Building Award because the difference between the base hourly rates in the Agreement and the Building Award for these classifications is much smaller than for Scaffolders. If we are correct in inferring that the existing Trades Stream employees are all casual employees, then

the percentage shortfall would be larger again given that the effective casual loading in the Agreement is 23 per cent compared to 25 per cent under the Building Award.

**[36]** The comparative analysis prepared by the Agreements Team was provided to Suncoast, and Suncoast was afforded the opportunity to respond to it. Suncoast did not seek to challenge any aspect of the analysis.

**Consideration and conclusions**

**[37]** Based upon the above analysis, we are not satisfied that the award covered employees, viewed as a group, would be likely to be better off overall if the Agreement continued to apply to them rather than if the relevant modern award or awards applied. In particular, nine of the 12 employees are covered by the Building Award and would, on the analysis, be likely to be worse off if they performed a working pattern that is standard in the building and construction industry. Disadvantage is also likely to arise in a number of other scenarios given the identified differences in conditions. Such disadvantage is less likely to apply in respect of the employees in the Administrative Stream, but they only constitute a minority of the group we are required to consider.

**[38]** Consequently, we have concluded that subitem (9) of item 20A does not apply and, because the first condition in subitem 6(a) is not satisfied, we are not required to grant an extension to the default period under subitem 6(a).

**[39]** Although, as earlier stated, Suncoast did not contend in the alternative that an extension was required under subitem 6(b), we propose in any event to consider whether it would be reasonable to extend the default period in relation to the Agreement under that provision. Our conclusion in that respect is that we are not satisfied in the circumstances that it would be reasonable to extend the default period for the following reasons:

(1) The Agreement appears to have been made in the first half of 2009 under a different statutory regime, and its duration was intended to be for five years. It was made at time when the Building Award and the Clerks Award did not yet exist. There is nothing before us to suggest that the employees who made the Agreement, or any of them, are still employed by Suncoast. The continuation of the Agreement beyond its fourteenth year of operation, which would deprive the Agreement-covered employees of access to award entitlements now applicable under the FW Act, is not justifiable in these circumstances.

(2) Suncoast asserts in its application that its employees are ‘satisfied with the current arrangement’, but there is no independent evidence of the views of employees. The comparative analysis described above indicates that it is likely that the award covered employees, particularly those in the Trades Stream, would monetarily be worse off if the Agreement continued to apply. There is no basis to think that the award covered employees are aware of this. The continued operation of the Agreement is likely therefore to give rise to unfairness.

(3) According to the pay information provided by Suncoast, the Agreement appears to have limited relevance to Suncoast’s workforce. One third of the workforce

appears not to be covered by the Agreement at all, and thus would already be covered by applicable modern awards. The employees who are covered by the Agreement do not appear to be actually paid the wage rates for which the Agreement provides.

(4) There is nothing before us to suggest that the continued operation of the Agreement is critical, or even important, for the viability or efficiency of the Suncoast business, and indeed the representative of the business in the proceedings indicated a readiness to examine alternative options in lieu of the continued operation of the Agreement.

**[40]** For the above reasons, the application is dismissed.


PRESIDENT

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[1] Transitional Act Sch 3A.

[2] Transitional Act Sch 7.

[3] *Loaded Rates Agreements* [2018] FWCFB 3610 at [112].

[4] Macquarie Online Dictionary.

[5] Ibid.

[6] The *Building and Construction General On-Site Award 2020* does not contain clerical classifications.

[7] [2018] FWCFB 3823, 281 IR 1.