

[2023] FWCFB 124 [Note: A copy of the zombie agreement to which this decision relates ([AE872615](#)) is available on our website.]



## DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

Sch 7, Item 30(4)—Application to extend default period for enterprise agreement made during the bridging period

**Application by Tinmarl Pty Ltd as trustee for R & M Patane Family Trust trading as North Queensland Golden Fruit**  
(AG2023/1864)

**TINMARL ENTERPRISE AGREEMENT 2009**  
[AE872615]

Wholesale and retail trade

JUSTICE HATCHER, PRESIDENT  
DEPUTY PRESIDENT WRIGHT  
DEPUTY PRESIDENT SLEVIN

SYDNEY, 12 JULY 2023

*Application to extend the default period for the Tinmarl Enterprise Agreement 2009.*

### Introduction

[1] On 12 June 2023, Tinmarl Pty Ltd (as trustee for R & M Patane Family Trust trading as North Queensland Golden Fruit) (Tinmarl) made an application under subitem 30(4) of Sch 7 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act) to extend the ‘default period’ for the *Tinmarl Enterprise Agreement 2009* (Agreement). The application seeks to extend the default period for two years to 6 December 2025.

[2] The Agreement was made in 2009 in the ‘bridging period’ as defined in the Transitional Act. It continues to operate. It is a ‘zombie agreement’ for the purposes of item 30 of Sch 7 to that Act and it will cease to operate on 6 December 2023 unless extended by the Commission.

[3] The main aspects of the statutory framework for applications for the extension of zombie agreements were detailed in the recent Full Bench decision in *Suncoast Scaffold Pty Ltd*.<sup>1</sup> The Full Bench there dealt with an application to extend a ‘WR Act agreement’ under item 20A of Sch 3 to the Transitional Act. The terms of item 20A of Sch 3 are relevantly the same as item 30 of Sch 7. The Full Bench’s analysis of those provisions applies equally to item 30 of Sch 7 and it is not necessary to repeat it here.

[4] Put briefly, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) amended the Transitional Act to add include item 30 in Sch 7. Item 30 provides for the

sunsetting of remaining enterprise agreements made during the bridging period on 6 December 2023 unless extended by the Commission. Subitem 30(6) provides that where an application is made under subitem 30(4) for the 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) or (8) applies and it is otherwise appropriate in the circumstances to do so; or
- (b) it is reasonable in the circumstances to do so.

[5] Subitem (7) applies where the application is made at or after the notification time for a proposed enterprise agreement that will cover the employees and bargaining for the proposed enterprise agreement is occurring. Subitem (8) applies if it is likely relevant employees covered by the agreement would be better off overall if the agreement continued to apply.

[6] In the present matter, the applicant does not contend that either subitem (7) or (8) applies. Rather the applicant relies on paragraph (b) of subitem (6). It contends that it is reasonable in the circumstances to extend the default period for two years.

[7] In a document filed with the application, Tinmarl sets out the circumstances confronting its business should the Agreement cease to operate. The application was listed for directions on 16 June 2023, at which Tinmarl provided further information about its operations. The Australian Workers' Union (AWU) appeared and opposed the application. The parties were content for the matter to be determined on the papers and the information provided at the directions hearing.

### **Tinmarl's circumstances**

[8] Tinmarl operates a mango farm at Mareeba in Far North Queensland. The picking season for mangoes occurs in a short window of six to eight weeks commencing in December or January each year. Tinmarl describes its core seasonal workforce as 10 employees who are engaged under a Commonwealth government seasonal worker program. Those employees are Pacific Islanders. They return home when the work is done. The seasonal worker program requires that Tinmarl make offers of employment underpinned by an industrial instrument that applies for the duration of the employment. Those offers must be made in August 2023. The workers employed under the scheme are not available to bargain for a replacement enterprise agreement before the automatic termination of the Agreement on 6 December 2023.

[9] During the upcoming season Tinmarl intends to bargain for an enterprise agreement to replace the Agreement. It is expected the workers will return home at the end of the season which is anticipated to be April 2024.

[10] In support of the application Tinmarl contends that if the Agreement ceases to operate during the upcoming season then it will be unable to meet the requirement of the seasonal worker scheme that it specify an industrial instrument to apply to the work for the duration of the upcoming season. This is because two instruments will apply, the Agreement until 6 December 2023 and the *Horticulture Award 2020* after that time. It also contends that as its seasonal workers are not available to bargain for a replacement agreement before December 2023 it will be unable to have a replacement agreement in place to meet the scheme's requirement.

[11] The AWU opposes the application on the basis that there is no reason Tinmarl cannot enter into a replacement agreement.

### **Consideration**

[12] In *Suncoast Scaffold Pty Ltd* 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.

[13] Item 30(6)(b) is in the same terms.

[14] For the reasons which follow, we are satisfied that in the circumstances of this case it is reasonable to extend the default period for the Agreement. We will not, however, extend the period for the two years sought but will extend it to 30 April 2024.

[15] We are satisfied that the timing of the sunseting of the Agreement will unreasonably impact on Tinmarl’s operations. This is so because if the Agreement ceases to operate while the picking season is underway the employment of the employees will no longer be underpinned by the industrial instrument identified for the purpose of meeting the requirements of the seasonal worker scheme. Extending the period will permit Tinmarl to make offers of employment in accordance with the scheme with confidence that it is in this regard compliant with the scheme. It is reasonable to extend the default period to enable Tinmarl to participate in the scheme.

[16] Contrary to the submission of the AWU we do not believe it is possible for Tinmarl to enter into an enterprise agreement to replace the Agreement prior to making offers to the seasonal workers. Tinmarl explained that the workers live in the Pacific Islands in remote places with limited access to communications. While it may have been possible for an enterprise agreement to be made and approved during the last picking season, that did not occur. It may have been preferable that it did, but we do not consider that matter outweighs the reasonableness of granting an extension.

[17] Tinmarl indicated that it has commenced preparations to negotiate a replacement agreement during the upcoming season. We consider that a sensible course and consider that in the circumstances an extension which runs to the end of this season is appropriate. We consider that 30 April 2024 is an appropriate date for this purpose.

[18] One further issue raised by the AWU was the level of wages received under the Agreement. While the question of whether the employees are better off overall is not an express consideration under item 30(6)(b), we are of the view the impact of the extension on the terms and conditions of the employees does fall within relevant circumstances to be considered under the subitem. The Agreement is a comprehensive agreement and provides at clause 3.4 that wage

adjustments be made in accordance with minimum wage movements. While it is preferable that agreements be negotiated to reflect contemporary standards, and Tinmarl proposes to embark on that process in the upcoming picking season, we consider that this issue does not outweigh the reasonableness of granting an extension.

[19] The default period for the Agreement is extended until 30 April 2024. An order to give effect to this decision will be published separately. The Agreement is published, in accordance with item 30(9A)(c) of Sch 7 to the Transitional Act, as an annexure to this decision.



PRESIDENT

*Appearances:*

*N Wilson and M Patane for the applicant.  
G Taylor for The Australian Workers' Union.*

*Hearing details:*

2023.

Video using Microsoft Teams:  
16 June.

Printed by authority of the Commonwealth Government Printer

<PR764164>

---

<sup>1</sup> [\[2023\] FWCFB 105](#) at [3]-[18].