



DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 Sch 3, Item 20A (4)—Application to extend default period agreement-based transitional instrument

LOUISE NOMINEES PTY LTD T/AS IGA HARVEY - IGA WAROONA - IGA PARABURDOO - IGA DUNSBOROUGH

(AG2023/3920)

Retail industry

DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN

SYDNEY, 30 JANUARY 2024

Application by Louise Nominees Pty Ltd t/as IGA Harvey – IGA Waroona - IGA Paraburdoo - IGA Dunsborough to extend the default period for four collective agreement-based transitional agreements

[1] Louise Nominees Pty Ltd has applied, pursuant to subitem 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 four agreements:

Louise Nominees Collective Employment Agreement - Harvey Supa IGA AC303043
Louise Nominees Collective Employment Agreement - Waroona IGA AC303044
Louise Nominees Collective Employment Agreement [Paraburdoo] AC325966
Louise Nominees Collective Employment Agreement [Dunsborough] AC325066

[2] Each Agreement was registered under the *Workplace Relations Act 1996* and has operated since 2005. Each is a collective agreement-based transitional instrument within the meaning of that term in Schedule 2 of the Transitional Act. Item 20A of Schedule 3 to the Transitional Act provides for the automatic sunseting of agreement-based transitional instruments by the end of the default period on 6 December 2023, subject to the capacity to apply to the Commission for an extension of that period for up to four years in prescribed circumstances. The Applicant initially sought an extension of three months to 6 March 2024. It subsequently sought to amend the application to extend the default period for the Agreements to 6 May 2024.

[3] The agreements to which these provisions apply are known as zombie agreements. The main features of item 20A of Sch 3 are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd (Suncoast)*¹ and we rely upon what is said in that decision.

[4] When an application is made under subitem (4) of item 20A of Sch 3 to the Transitional Act, the Commission is required, under subitem (6), to extend the default period if the Commission 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.

[5] The grounds for these applications were set out in the Application as follows:

The Applicant is bargaining for a single replacement agreement to replace the four zombie agreements and expects to have the voting process completed, the agreement lodged and the Commission to make a determination on its approval within the extended period.

The Applicant undertakes to backpay employees to the December 2023 termination date of the zombie agreements once the replacement agreement is approved.

[6] We take these grounds to mean that the application is made under subitem (4) of item 30 of Sch 7 on two bases. First, that the Commission can be satisfied under subitem 30(6)(a) that subitem 30(7) applies and it is otherwise appropriate in the circumstances to extend the default period. Subitem 30(7) applies if bargaining for an enterprise agreement to replace the zombie agreement is occurring. The second basis is that the Commission can be satisfied under subitem (6)(b) that it is reasonable in the circumstances to extend the Agreement.

Background

[7] Louise Nominees operates four IGA supermarkets in Western Australia. The stores are in regional areas. It employs around 125 employees under the four Agreements. If the Agreements did not apply the General Retail Award 2020 (the Award) would cover the employees. Louise Nominees submits that it requires an extension of the Agreements to enable it to finalise a replacement enterprise agreement, and to prepare and lodge the replacement agreement with the Commission for approval.

[8] On 6 June 2023 correspondence was provided to the employees covered by the Agreements informing them that the Agreements would terminate from 6 December 2023 and that Louise Nominee proposed to put in place a replacement agreement. A notice of Representational Rights (NERR) was attached to the notice. The application stated that the Applicant was yet to establish a bargaining committee to negotiate the new agreement but intended to do so. No negotiations have occurred. It was anticipated that the Applicant would only need until 6 March 2024 to complete bargaining. We were subsequently informed that the Applicant's agent has been ill and so the bargaining will take longer and a further two month extension is sought.

[9] The Applicant accepts that the employees would be better off under the modern award as the Agreements, even taking into account wage increases since their inception, would not currently satisfy the BOOT.

[10] There are four Agreements subject of this application. They date back to 2005. The Agreements applying to the employees at Harvey and Waroona are in the same terms and the Agreements applying to the employees Dunsborough and Paraburdoo are in the same terms. The differences between the Agreements are minimal.

[11] As the Agreements were registered in 2005 the wage rates contained in them are well below the Award. There is a term in each Agreement providing that rates will be reviewed each year but no provision that they will increase. Despite this, the Transitional Act operates to require the Applicant to pay the employees at the base rates in the Award. Item 13 of Sch 9 to the Transitional Act provides that the base rates under the Agreement must not be less than the Award.

[12] The Agreements provide the following reductions in relation to penalties and entitlements when compared to the Award:

- The span of ordinary hours per day is greater, reducing entitlements to overtime.
- There is no agreement with respect to part time employees' hours of work or payment of overtime when engaged in excess of agreed hours.
- Employees can have their leave entitlements pre-paid and part time employees can elect to be treated as casual employees and receive a casual loading instead of leave entitlements, notice of termination, redundancy, and minimum engagement periods.
- Casual loading is 20% rather than 25%.
- Casual employees receive a minimum 2 hours pay compared to 3 hours under the Award.
- There are no shift penalties.
- There is no annual leave loading.
- The Agreements are silent in relation to allowances.
- The Agreements are silent in relation to weekend work. The Dunsborough and Paraburdoo Agreements are silent in relation to Sunday work (Saturday work is paid as per the Shop and Warehouse (Wholesale and Retail Establishments) Award);
- The Harvey and Waroona Agreements have a reduced public holiday penalty and employees may choose to work public holidays in which case ordinary rates are payable.
- Employees can choose to work overtime in which case ordinary rates are payable. If employees do not agree the Harvey and Waroona Agreements pay overtime at a penalty of 200% which is higher than the Award in relation to permanent employees engaged Monday to Saturday. Under the Dunsborough and Paraburdoo Agreements overtime is

paid in accordance with the redundant Shop and Warehouse (Wholesale and Retail Establishments) Award.

- The Agreements are silent in relation to allowances.

Consideration

[13] The Full Bench in *ISS Health Services Pty Ltd*² described the three requirements for subitem (7) to apply. The first is the requirement that the application is made at or after the ‘notification time’ for the proposed replacement agreement. Notification time is defined in s.173(2) of the *Fair Work Act 2009* (FW Act). The definition includes the time when the employer agrees to, or initiates, bargaining. Issuing an NERR indicates agreement to bargain for the purpose of s173(2). The second requirement is that the proposed agreement must cover the same or substantially the same group of employees as the zombie agreement. The Full Bench stated that this could be established by comparing the NERR for the proposed agreement to the coverage clause of the zombie agreement. The NERR here satisfies that requirement. Relevantly, the third is that bargaining for the proposed agreement is occurring.

[14] We are of the view that the application satisfies the first two requirements for subitem (7) but does not satisfy the third. Bargaining is not occurring. The default period for the Agreement therefore cannot be extended in accordance with subitem (6)(a).

We take the second basis for the application as seeking to extend the default period pursuant to subitem 30(6)(b) on the basis that it is reasonable to do so because the applicant undertakes to pay employees at the rates negotiated in any replacement agreement from 6 December 2023. The subitem requires a consideration of whether it is reasonable in the circumstances to extend the Agreement. This involves the application of a broad evaluative judgement.

[15] In *Suncoast*,³ the Full Bench said:

[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.

[16] 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.⁵ 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

[17] The Applicant accepts that a replacement agreement must be negotiated and accepts that it has failed to do so in time. Its explanation is that its stores are in remote regional areas in Western Australia making coordination of bargaining difficult. A delay has also occurred due

to the illness of its bargaining representative. However, the NERR was issued in June 2023, and it appears no steps were taken to negotiate towards a replacement agreement.

[18] The Applicant also acknowledges that the employees are worse off on the Agreements than they would be under the Award. The Applicant has undertaken to backpay the employees from 7 December 2023 on the rates negotiated in the replacement agreement. There is no provision for undertakings under item 20A of Schedule 3 of the Transitional Act. The undertaking is commendable but would be unenforceable. Consequently, we give it little weight.

[19] We find on the bases that the Agreements provide terms and conditions that are significantly inferior to the Award, combined with the fact that the Agreements are almost 20 years old, and the delay in the Applicant in negotiating a replacement agreement that it is not agreeable to reason or sound judgment to extend the default periods. As we are not satisfied that it is reasonable in the circumstances to extend the default period of the Agreement the application is dismissed.

[20] 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 (11)(e) 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 until 13 February 2024.



DEPUTY PRESIDENT

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¹ [\[2023\] FWCFB 105](#) at [3] to [18].

² [\[2023\] FWCFB 122](#) at [4]

³ [\[2023\] FWCFB 105](#).

⁴ [\[2023\] FWCFB 137](#)

⁵ *Ibid*, [32].

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

⁷ *Ibid*, [14].