



DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 3, Item 20A(4) - Applications to extend default period for agreement-based transitional instruments

Stabilus Pty Ltd

(AG2023/4515)
(AG2023/4517)
(AG2023/4518)
(AG2023/4520)
(AG2023/4521)
(AG2023/4525)

STABILUS PTY LTD AUSTRALIAN WORKPLACE AGREEMENT (AWA)

Manufacturing and associated industry

DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN
COMMISSIONER CRAWFORD

SYDNEY, 16 FEBRUARY 2024

Application to extend the default period for six Australian Workplace Agreements between Stabilus and individual employees – applications dismissed

Introduction

[1] Stabilus Pty Ltd (**Stabilus**) has made the following applications under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for the following Australian Workplace Agreements (**AWAs**):

- a. Matter AG2023/4515: Application to extend the default period for an AWA titled *Stabilus Pty Ltd Australian Workplace Agreement Issue 1*. The employee covered by this AWA is Cong Nguyen. The application states the AWA was approved by the Workplace Authority on 4 June 2007 with an agreement number of 075145582. The application seeks to extend the default period for the AWA 1 to 6 December 2027. We will refer to this instrument as the **Nguyen AWA**.
- b. Matter AG2023/4517: Application to extend the default period for an AWA titled *Stabilus Pty Ltd Australian Workplace Agreement Issue 1*. The employee covered by this AWA is Haci Tokdemir. The application states the AWA was approved by the Workplace Authority on 4 June 2007 with an agreement number of 075145556. The

application seeks to extend the default period for the AWA 1 to 6 December 2027. We will refer to this instrument as the **Tokdemir AWA**.

- c. Matter AG2023/4518: Application to extend the default period for an AWA titled *Stabilus Pty Ltd Australian Workplace Agreement Issue 1*. The employee covered by this AWA is Mark Scanlon. The application states the AWA was approved by the Workplace Authority on 4 June 2007 with an agreement number of 075145543. The application seeks to extend the default period for the AWA 1 to 6 December 2027. We will refer to this instrument as the **Scanlon AWA**.
- d. Matter AG2023/4520: Application to extend the default period for an AWA titled *Stabilus Pty Ltd Australian Workplace Agreement Issue 1*. The employee covered by this AWA is Wai Kin Kwok. The application states the AWA was approved by the Workplace Authority on 21 June 2007 with an agreement number of 075386498. The application seeks to extend the default period for the AWA 1 to 6 December 2027. We will refer to this instrument as the **Wai Kin Kwok AWA**.
- e. Matter AG2023/4521: Application to extend the default period for an AWA titled *Stabilus Pty Ltd Australian Workplace Agreement Issue 1*. The employee covered by this AWA is Wai Chung Kwok. The application states the AWA was approved by the Workplace Authority on 21 June 2007 with an agreement number of 075386511. The application seeks to extend the default period for the AWA 1 to 6 December 2027. We will refer to this instrument as the **Wai Chung Kwok AWA**.
- f. Matter AG2023/4525: Application to extend the default period for an AWA titled *Stabilus Pty Ltd Australian Workplace Agreement Issue 1*. The employee covered by this AWA is Hor Truong. The application states the AWA was approved by the Workplace Authority on 4 May 2005 with an agreement number of H30437786. The application seeks to extend the default period for the AWA 1 to 6 December 2027. We will refer to this instrument as the **Hor Truong AWA**.

(collectively, **Stabilus AWAs**).

[2] The Stabilus AWAs were made under the *Workplace Relations Act 1996* (Cth) (**WR Act**). The Stabilus AWAs are ‘WR Act instruments’ within the meaning of item 2(2) of Sch 3 of the Transitional Act. They are classified by item 2(5)(d)(iii) of Sch 3 as ‘individual agreement-based transitional instruments.’ Agreements of this kind are commonly referred to as ‘zombie agreements’.

[3] The Transitional Act was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**) to provide for the automatic termination of all remaining transitional instruments. Pursuant to items 20A(1) and (2) of Schedule 3 to the Transitional Act, the Stabilus AWAs would have terminated on 6 December 2023 (the end of the default period) unless extended by the Commission. The main features of item 20A of Schedule 3 to the Transitional Act are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd*.¹

[4] Under subitem 20A(6) of Sch 3, where an application is made under subitem 20A(4) for the default 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), (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. Subitem (7) applies if bargaining for a replacement agreement is occurring. Subitem (8) applies if the application relates to an individual agreement-based transitional instrument and it is likely that as at the time the application is made, the award covered employee would be better off overall if the agreement continued to apply than if the relevant modern award applied. Subitem (9) relates to collective agreement-based transitional instruments.

Grounds relied upon

[5] Stabilus makes each application on the basis that the employee would be better off under the relevant Stabilus AWA than they would be under the *Manufacturing and Associated Industries and Occupations Award 2020 (Award)*.

[6] The applications have been supported in brief terms by the relevant six employees.

Consideration

[7] We are not satisfied we can extend the default period pursuant to subitem 20A(6)(a) and (8) of Sch 3 because it is likely that the employees would each be better off under the Award than they would be under the Stabilus AWAs.

[8] All Stabilus AWAs are in the same form except for the Hor Truong AWA, presumably because this AWA was approved in 2005, earlier than the others. The other AWAs were approved in 2007.

[9] The basis for Stabilus' claim that the Stabilus AWAs are more beneficial is that they provide higher minimum rates of pay for the employees than they would be entitled to under the Award. We understand this contention arises because the Stabilus AWA rates have been increased by a CPI measure for Melbourne each year since they were made in 2005 or 2007, and this has resulted in the rates remaining above the Award rates. While it is positive for the employees that Stabilus has seemingly applied wage increases to this effect, the terms of the Stabilus AWAs, except for the Hor Truong AWA, refer only to increases in 2008 and 2009. The Hor Truong AWA refers to increases in 2006 and 2007. The increases after those years are not provided for by the AWAs. They are increases outside of the terms of the AWAs. The Transitional Act operates in these circumstances such that the Stabilus AWAs are deemed to contain the minimum award base rates of pay as a result of the operation of the protection in item 13 of Sch 9 to the Transitional Act.

[10] We were not able to identify any other conditions in the Stabilus AWAs that are more beneficial to the employees compared to the Award.

[11] In contrast, at least the following conditions in the Stabilus AWAs are inferior to the Award:

- Span of ordinary hours.

- Minimum engagement periods.
- Casual and part-time conditions.
- Shift loadings.
- Allowances.

[12] The Stabilus AWAs also contain a range of conditions that are inferior to the NES.

[13] Stabilus was provided with the Commission’s assessments of the Stabilus AWAs, which indicated all employees would be better off overall under the Award. Stabilus was provided with an opportunity to respond to the assessments. Stabilus has not identified any inaccuracies with the assessments.

[14] After reviewing the terms of the Stabilus AWAs and the Award, we have determined each employee would not be better off under the relevant Stabilus AWA than they would be if the Award applied. As a result, the default period for the Stabilus AWAs cannot be extended under subitem 20A(6)(a) and (8) of Sch 3.

[15] We cannot extend the default period under subitem 20A(6)(a) and (7) of Sch 3 because there is no evidence Stabilus has commenced bargaining for an enterprise agreement.

Subitem 20A(6)(b) of Sch 3 allows us to extend the default period of the AWAs if it is “reasonable in the circumstances” to do so.

[16] In *Suncoast Scaffold Pty Ltd*,² 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.

[17] We also consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The explanatory memorandum to the SJBPA Act expressed the purpose of the provisions relating to extending the default period in this way:³

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 by leaving employees worse off.

[18] Full Benches of the Commission have said a number of times that the purpose of the sunseting arrangements introduced in the SJBPA Act⁴ is that zombie agreements are to be replaced by contemporary instruments made under the *Fair Work Act 2009 (FW Act)*.

[19] We are not satisfied that in the circumstances of this case it is reasonable to extend the default period for the Stabilus AWAs. The Stabilus AWAs do not contain contemporary terms and the employees covered by them would be better off overall under the Award. We consider

the Stabilus AWAs are precisely the type of instruments that the SJBPA Act was intended to address because their continued operation would disadvantage employees and the conditions are outdated.

[20] We emphasise that this decision provides no impediment to the maintenance of any current rates of pay and that Stabilus is not compelled to reduce any employee's rate of pay as a result of this decision.

[21] As our decision is to refuse to extend the default periods under subitem 20A(6) of Sch 3 and our decision is made after the sunset date in the Transitional Act, subitem 20A(11) provides that we must extend the default periods 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 sunset of the Stabilus AWAs, the default period is extended to 1 March 2024.

[22] The applications are dismissed.



DEPUTY PRESIDENT

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¹ [2023] FWCFB 105 at [3] to [18].

² [2023] FWCFB 105.

³ Explanatory Memorandum *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [670].

⁴ See for example *Quinn Transport Pty Ltd Enterprise Agreement 2009* [2023] FWCFB 195 at [23] and *One HPA Certified Agreement 2004-2007* [2023] FWCFB 137, at [32].