



# 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

**Hogmania Pty Ltd T/A Hog's Breath Cafe Rockhampton**  
(AG2023/4932)

## **HOGMANIA PTY LTD - EMPLOYEE COLLECTIVE AGREEMENT 2007-2012**

DEPUTY PRESIDENT SLEVIN  
COMMISSIONER CRAWFORD  
COMMISSIONER THORNTON

SYDNEY, 24 JANUARY 2024

*Application to extend the default period for the Hogmania Pty Ltd – Employee Collective Agreement 2007-2012*

[1] Hogmania Pty Ltd (**Hogmania**) has applied, pursuant to 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 *Hogmania Pty Ltd - Employee Collective Agreement 2007-2012* (**Agreement**). The application seeks to extend the Agreement for a period of 12 months until 1 December 2024.

[2] The Agreement was made in 2007 and approved under the *Workplace Relations Act 1996* (Cth) (WR Act). The Agreement is a 'WR Act Instrument' within the meaning of item 2(2) of Sch. 3 to the Transitional Act. It is classified by item 2(5)(c)(i) of Sch. 3 as a 'collective agreement-based transitional instrument'.

[3] Item 20A of Sch 3 to the Transitional Act provides for the automatic sunset 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 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)*<sup>1</sup> and we rely upon what is said in that decision.

[4] The application is made under subitem (4) of item 20A of Sch 3 to the Transitional Act, on two bases. First, that the Commission can be satisfied under subitem (6)(a) that subitem (7) applies and it is otherwise appropriate in the circumstances to extend the default period for the

Agreement. Subitem (7) applies if bargaining for an enterprise agreement to replace the zombie agreement is occurring. The second basis for the application is that the Commission can be satisfied that it is otherwise reasonable to extend the Agreement.

[5] Hogmania operates a Hogs Breath Cafe restaurant franchise in Rockhampton in Queensland. It employs 26 employees under the Agreement. If the Agreement did not apply the *Restaurant Industry Award 2020* (Award) would apply to the employees. Hogmania submits that it requires an extension of the Agreement to enable it to finalise a replacement enterprise agreement, and to prepare and lodge the replacement agreement with the Commission for approval.

[6] Hogmania lodged its application to extend the default period on 5 December 2023, the day before it was due to terminate in accordance with the Transitional Act. The application attached a copy of a Notice of Representational Rights (NERR) that had been provided to employees by email on 4 December 2023. The application stated that the applicant was yet to establish a bargaining committee to negotiate the new agreement but intended to do so.

[7] As the Agreement was made in 2007 the wage rates as specified are well below the Award. There is a term in the Agreement providing that rates will be always be equal to or above the Federal Minimum Wage, but no wage increases are set out in the Agreement. Item 13 of Sch 9 to the Transitional Act also provides that the base rates under the Agreement must not be less than the Award.

[8] Provisions of the Agreement which are less beneficial than the Award include:

- No annual leave loading is payable.
- Casual employees receive a 20% casual loading, which is less than 25% loading in the Award.
- The rates of pay contained within the Agreement are flat rates of pay in the sense that they are said to compensate employees for working weekends, shift work, public holidays, overtime and allowances.
- The spread of ordinary hours of work are broader than compared to the Award.
- The hours of work for part time employees can be varied during any roster, with no penalty payable for additional hours worked.
- Leave entitlements are expressed in hours rather than days/weeks.

[9] Hogmania drew the following matters to our attention regarding the terms and conditions which it applies to the employees:

- All hourly employees are currently paid at least 9% above the base legal rate of pay and all salaried full-time staff are paid at least 25% above the base legal rate of pay. This means that all paid leave entitlements are also paid at this rate of pay.
- The Agreement provides for employees under 17yrs, 17yrs, and 18 yrs old to be paid 5% more than the minimum percentages set out in clause 18.2 of the *Restaurant Industry Award 2020* (the Award).
- Hogmania ensures that if any Agreement term is less beneficial than the National Employment Standards (NES), that the NES will prevail, and the Employer complies with the NES.

[10] The rates of pay applied by Hogmania appear to be in addition to the requirements of the Agreement. That is not a matter that is directly relevant to our consideration. If the rates are in excess of what is required under either the Agreement or the Award then Hogmania may continue to pay those rates in the same fashion as it currently does, that is, on the basis that they are paying in excess of the requirements in the industrial instrument.

[11] In terms of the relevant question, which is whether the terms of the Agreement are more beneficial to employees than the terms in the Award, we are of the view that the employees cannot be considered better off under the Agreement. Especially where the hourly rates of pay of the Agreement compensate employees for all hours worked, including weekends, shifts work, public holidays, and all overtime. It is likely, given the nature of the business, that the employees work evenings and weekends when such penalties would apply.

[12] In response to questions posed by the Commission Hogmania indicated that it had taken further steps in bargaining. On 6 December 2023 the employees were provided with a copy of the proposed agreement and bargaining representatives were nominated. It also said that it intended to conduct a group information session with employees on 12 January 2024 and hold a meeting of the bargaining committee to discuss the proposed agreement on the same day.

### **Consideration**

[13] The Full Bench in *ISS Health Services Pty Ltd*<sup>2</sup> 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. An NERR indicates the employer's agreement to bargain for the purpose of s.173(2). The second 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 scope in the NERR for the proposed agreement to the coverage clause of the zombie agreement. Here the NERR meets this 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. Since the application was filed Hogmania has taken some steps towards commencing bargaining. It relies upon those steps to establish that bargaining is occurring. However, given Hogmania was yet to hold discussions with employees about its proposed agreement we cannot be satisfied that bargaining is occurring. The default period for the Agreement therefore cannot be extended in accordance with subitem (6)(a).

[15] Even if it could be said that the issuing of a NERR combined with the steps taken by Hogmania since 6 December 2023 to prepare for bargaining could be said to satisfy the third requirement under subitem (7), we would not extend the agreement under subitem (6)(a) because it is not appropriate to do so.

[16] It would not be appropriate to do so because the inferior conditions in the Agreement mean it is likely that there would be a disadvantage to employees if the Agreement continues to apply prior to the finalisation of a new agreement. Hogmania suggests that in some instances

it pays its employees an hourly rate that is above the Award. As we have said, given the nature of the business, it is likely employees work evenings and weekends. It is unlikely the hourly rate compensates for the loss of overtime payments and weekend penalties. If the over award pay rates result in the employees receiving more, the termination of the Agreement will have no impact on Hogmania making ongoing payment of those above award rates.

[17] Further, the workforce is small and negotiating a replacement agreement should not be onerous. The Applicant has had 12 months to do so but waited until the final moment before proposing negotiations towards a replacement agreement. The time suggested in the application to extend the Agreement a further 12 months is excessive. We do not consider negotiating a new enterprise agreement would take the 12 months that the Applicant seeks.

[18] Hogmania applies in the alternative to have the default period extended pursuant to subitem 30(6)(b). The subitem requires a consideration of whether it is reasonable in the circumstances to extend the default period. This involves the application of a broad evaluative judgement.

[19] In *Suncoast*,<sup>3</sup> 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.”

[20] The Agreement was made and approved under the terms of the *Workplace Relations ACT 1996*. The terms of the Agreement reflect the benchmarks created by the legislative scheme under which it came into operation, and that scheme has long since been superseded. The terms fall short of the safety net standards provided for by the *Fair Work Act 2009* (Cth) (Act) and modern awards made under the Act.

[21] In *Peter Frick*,<sup>4</sup> 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 made under the Act.<sup>5</sup> In *Kalfresh Management Services Pty Ltd*,<sup>6</sup> 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.<sup>7</sup>

[22] We consider these factors weigh against granting the current application. The Applicant does not go so far as to suggest that the employees would be better off if the Agreement continued to apply. We are of the view that they would not. The terms of the Agreement are outdated and do not reflect contemporary standards. We have also taken into account that Hogmania has taken some steps to commence bargaining for a new enterprise agreement. This fact however does not convince us that we should extend the life of a zombie agreement that provides for terms and conditions that are inferior to the Award. We are of the view that the Agreement should be replaced by a modern instrument that meets the requirements of the FW Act.

[23] For these reasons we are not satisfied that it is reasonable in the circumstances to extend the default period of the Agreement. The Application is dismissed.

[24] 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 sunset of the Agreement the default period is extended until to 7 February 2024.



DEPUTY PRESIDENT

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<sup>1</sup> [\[2023\] FWCFB 105](#).

<sup>2</sup> [\[2023\] FWCFB 122](#) at [4].

<sup>3</sup> [\[2023\] FWCFB 105](#).

<sup>4</sup> [\[2023\] FWCFB 137](#).

<sup>5</sup> *Ibid*, [32].

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

<sup>7</sup> *Ibid*, [14].