



# 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

## Finance Sector Union of Australia

(AG2023/4508)

## AMP-GIO ENTERPRISE AGREEMENT 2000

Bank, finance and insurance industry

DEPUTY PRESIDENT ROBERTS  
DEPUTY PRESIDENT SLEVIN  
COMMISSIONER CRAWFORD

SYDNEY, 13 FEBRUARY 2024

*Application to extend the default period for the AMP-GIO Enterprise Agreement 2000*

### Introduction

[1] The Finance Sector Union of Australia (**FSU**) has made an application under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for the *AMP-GIO Enterprise Agreement 2000* (**Agreement**). The application seeks to extend the default period for the Agreement to 6 December 2024.

[2] The Agreement is a collective agreement that was made under the *Workplace Relations Act 1996* (Cth) (**WR Act**) and approved under that Act by the Australian Industrial Relations Commission. The Agreement is a ‘WR Act instrument’ within the meaning of item 2(2) of Sch 3 of the Transitional Act. It is classified by item 2(5)(c)(i) of Sch 3 as a ‘collective agreement-based transitional instrument’. 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 Agreement 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*.<sup>1</sup>

[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) relates to individual agreement-based transitional instruments. As the Agreement is a collective agreement-based instrument subitem (8) does not apply. Subitem (9) applies if the application relates to a collective agreement-based transitional agreement and it is likely that as at the time the application is made the award covered employees, viewed as a group, would be better off overall if the agreement continued to apply than if the relevant modern award applied.

### **Grounds relied upon**

[5] The FSU submits that employees would be better off overall under the Agreement than they would be under the *Banking, Finance and Insurance Industry Award 2020 (Award)*, which covers the employees and will apply to the employees if the Agreement terminates.

[6] The FSU also submits that AMP recently reneged on a commitment to commence bargaining for a new agreement.

[7] The FSU submits it intends to apply for a majority support determination during 2024 and that an extension of the default period to 6 December 2024 will allow the Agreement to continue operating while that process and any subsequent negotiations occur.

[8] The application seeks an extension under either subitem 20A(6)(a) and (9) (the BOOT ground) or alternatively, because it is reasonable in the circumstances pursuant to subitem 20A(6)(b).

### **Opposition to the application**

[9] The FSU's application is opposed by AMP Services Limited and AMP Bank Limited (collectively, **AMP**). AMP are employers to whom the Agreement applies. The application is also opposed by Dexus Capital Office and Industrial Pty Limited (**Dexus**). Dexus employees are covered by the Agreement because they were previously employed by AMP Limited.

[10] AMP and Dexus both filed submissions which argue the relevant employees will be better off overall under the Award than the Agreement.

[11] AMP provided undertakings to maintain the existing redundancy and long service leave conditions, which are superior to those in the Award, until 6 December 2024. AMP acknowledges that it has decided not to commence bargaining for an enterprise agreement but denies it breached a commitment to do so.

[12] Dexus relied on a witness statement from Janelle Dwyer (Senior Manager, People and Culture) dated 14 December 2023. Ms Dwyer provided evidence about consultation with affected Dexus employees regarding the sunseting of the Agreement. The consultation process identified that the affected employees were mainly concerned about losing long service leave, redundancy, and personal leave conditions. These conditions have now been protected via common law contractual arrangements. Ms Dwyer provided evidence that affected Dexus employees do not support the FSU's application because it is delaying their transition onto standard Dexus conditions.

## Consideration

[13] We cannot be satisfied for the purpose of subitem 6(a) that subitem (7) applies as bargaining has not commenced for a replacement agreement. As the Agreement is a collective agreement-based instrument subitem (8) does not apply.

[14] Further, we are not satisfied we can extend the default period pursuant to subitem 20A(6)(a) and (9) of Sch 3 because we take the view that it is likely the relevant employees, viewed as a group, would be better off under the Award than they would be under the Agreement.

[15] The Agreement does not contain minimum rates of pay, meaning the Award base rates apply pursuant to Item 13 of Sch 9 of the Transitional Act. The rates of pay are therefore not a factor in favour of employees being better off under the Agreement.

[16] In addition to the redundancy and long service leave conditions that all parties agree are superior under the Agreement, the Agreement does contain several conditions that are superior to the Award, including in relation to:

- Weekly hours of work.
- Minimum engagement for part-time employees.
- Paid breaks.
- Recall to work.
- Travel conditions and meal allowance.
- Night shift penalty rate.

[17] The following conditions in the Agreement are inferior to the Award:

- Averaging period for ordinary hours of work and span of ordinary hours.
- Casual loading.
- Casual overtime penalty rates.
- The use of voluntary non-core hours of work provisions.
- Reduced public holiday penalty rates.
- TOIL.
- Annual leave loading.
- Vehicle allowance.

[18] We do not consider the superior conditions identified above are sufficient to outweigh the detrimental conditions in the Agreement.

[19] After reviewing the terms of the Agreement and the Award, we have determined the relevant employees, viewed as a group, would not be better off under the Agreement than they would be if the Award applied. As a result, the default period for the Agreement cannot be extended under subitem 20A(6)(a) and (9) of Sch 3.

[20] We are also not satisfied that it is “reasonable in the circumstances” to extend the default period in accordance with subitem 20A(6)(b) of Sch 3.

[21] In *Suncoast Scaffold Pty Ltd*,<sup>2</sup> 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.

[22] We also consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The Explanatory Memorandum for the SJBPA Act expressed the purpose of the provisions relating to extending the default period in this way:<sup>3</sup>

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.

[23] Full Benches of the Commission have said a number of times that the purpose of the sunseting arrangements introduced in the SJBPA Act<sup>4</sup> is that zombie agreements are to be replaced by contemporary instruments made under the *Fair Work Act 2009 (FW Act)*.

[24] We are not satisfied that in the circumstances of this case it is reasonable to extend the default period for the Agreement because the Agreement does not contain contemporary terms and the employees covered by the Agreement would be better off overall under the Award.

[25] We also note that AMP has provided undertakings to maintain the existing redundancy and long service leave conditions until 6 December 2024. The undertakings will provide the same practical outcome as an extension of the default period until 6 December 2024. Whilst it would have been preferable for AMP to protect these conditions via contractual arrangements in the way Dexu has done, we do not consider it likely that AMP will renege on undertakings provided to the Commission that have been taken into account in support of their argument to oppose the FSU’s application.

[26] 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 20A(11) 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 sunseting of the Agreement the default period is extended to 27 February 2024.

[27] The application is dismissed.



DEPUTY PRESIDENT

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

<sup>2</sup> [\[2023\] FWCFB 105](#).

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

<sup>4</sup> 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].