



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

The Corporation Of The Trustees Of The Roman Catholic Archdiocese Of Brisbane
(AG2023/4925)

2008 CENTACARE COMMUNITY AND DISABILITY SERVICES UNION COLLECTIVE AGREEMENT

Health and welfare services

DEPUTY PRESIDENT O'KEEFFE
DEPUTY PRESIDENT ROBERTS
COMMISSIONER PERICA

PERTH, 9 FEBRUARY 2024

Application to extend the default period for 2008 Centacare Community and Disability Services Union Collective Agreement

[1] Pursuant to subitem 20A(4) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Act), The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane (the Applicant) has applied to extend the default period for the *2008 Centacare Community and Disability Services Union Collective Agreement* (the Agreement). The Agreement is an agreement-based transitional instrument within the meaning of item 2(3) of the Act.

[2] The application is made in accordance with subitem 20A(6)(a) of Sch 3 to the Act on the grounds that in accordance with subitem 20A(7), bargaining is occurring for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as are covered by the Agreement. The Applicant submits that it is appropriate in the circumstances for the Commission to grant an extension.

[3] The Full Bench in *ISS Health Services Pty Ltd*¹ described the requirements that must be met for an application to extend the default period where bargaining for a replacement agreement is made. Although that case involved a Division 2B State employment agreement to which Sch 3A of the Act applies, the principles are identical to those applying to agreement-based transitional instruments to which Sch 3 applies. The requirements are as follows:

(1) *The application must have been made at or after the 'notification time' for a proposed enterprise agreement. The notification time for an enterprise agreement is defined in s 173(2) of the Fair Work Act 2009 (Cth) (FW Act) and includes (in paragraph (a)) the time when the employer agrees to bargain, or initiates*

bargaining, for the agreement. Under s 173(3) of the FW Act, the employer must give the NERR required by s 173(1) to each employee covered by the proposed enterprise agreement within 14 days of the notification time. Section 174 prescribes the content of the NERR.

- (2) *The proposed enterprise agreement must cover the same, or substantially the same, group of employees as the Division 2B State employment agreement. Where bargaining has been agreed to or initiated by the employer, satisfaction of this requirement can practically be tested by comparing the coverage of the proposed agreement as described in the NERR to the coverage clause of the relevant Division 2B State employment agreement.*
- (3) *Bargaining for the proposed enterprise agreement must be occurring. The term 'bargaining' is not defined in the FW Act or the Transitional Act. In Endeavour Coal Pty Limited v APESMA,⁴ the Federal Court (Flick J) resorted to dictionary definitions of 'bargaining', which included '[d]iscussion between two parties over terms; haggling', and of 'negotiate', namely to '[c]ommunicate or confer (with another or others) for the purpose of arranging some matter by mutual agreement; have a discussion or discussion with a view to some compromise or settlement'.⁵ In addition, the Court determined that, in the statutory context of the FW Act, 'bargaining' incorporates a requirement to do so in good faith⁶ with the objective of ultimately reaching agreement, if possible.⁷ The good faith bargaining requirements provided for in s 228 of the FW Act suggest that such bargaining includes attending and participating in meetings, disclosing relevant information, considering and responding to proposals and recognising other bargaining representatives for the purpose of bargaining.*

[4] The material submitted in support of the application to extend the default period included correspondence from three employee organisations who represent employees of the Applicant who would be covered by the proposed enterprise agreement.

[5] The Australian Workers' Union and the United Workers' Union both advised that they did not oppose the request for an extension.

[6] The Australian, Municipal, Administrative and Clerical Services Union (the ASU) supported the application to extend the default period and confirmed that bargaining was taking place. The ASU further advised that the Agreement contained a number of conditions of value to its members which do not exist in the underpinning Awards and noted that these would be lost if the application to extend was refused.

[7] On the material before us we are satisfied that:

- i. The application was made after the notification time for the proposed enterprise agreement; and
- ii. The proposed enterprise agreement covers the same employees as the Agreement; and
- iii. Bargaining for the proposed enterprise agreement is occurring.

[8] As such, we find that the requirements for granting an extension have been met and that it is appropriate in the circumstances that an extension be granted. This then raises the issue of the appropriate length of the extension.

[9] The Applicant's material notes that bargaining has commenced, but that the ASU was still in the process of finalising its log of claims and did not envisage being in a position to serve that log until possibly early March, and in any case not before the Commission has ruled on the application to extend. The Applicant submitted that given the period of time over which the Agreement had been operating, and the desire of the employee organisations and their members to retain those conditions that are superior to the Awards, bargaining would be a complex process. As such, it sought an extension of 12 months.

[10] The Full Bench has considered this request, noting that it has the support of the three employee organisations and mindful that there may well be some complexity to the negotiations. We have formed the view that in the circumstances it is appropriate to allow a twelve-month extension.

[11] Pursuant to item 20A(6) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), we order that the default period for the Agreement, is extended until 6 December 2024.

[12] The Agreement is published, in accordance with subitem 20A(10A)(c), on the Fair Work Commission's website.

The image shows the official seal of the Fair Work Commission, which is circular and contains the text 'THE FAIR WORK COMMISSION' around the perimeter. Overlaid on the seal is a handwritten signature in black ink.

DEPUTY PRESIDENT

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¹ [2023] FWCFB 122 at [4]