



# DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 3A, Item 26A(4) - Application to extend default period for Division 2B State  
employment agreements

**Sunmanor Pty Ltd t/a Foaming Fury**  
(AG2023/3625)

## FOAMING FURY CERTIFIED AGREEMENT 2004

Clerical industry

DEPUTY PRESIDENT WRIGHT  
DEPUTY PRESIDENT ROBERTS  
DEPUTY PRESIDENT SLEVIN

SYDNEY, 14 FEBRUARY 2024

*Application to extend the default period for the Foaming Fury Certified Agreement 2004*

[1] Sunmanor Pty Ltd (**Applicant**) has applied under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for an enterprise agreement known as the Foaming Fury Certified Agreement 2003 CA No. 573 of 2004 (**Agreement**).

[2] The application seeks to extend the default period until 6 December 2024.

[3] The Agreement was approved in 2004 and is a Division 2B State Employment Agreement within the meaning of item 2(4), and item 5 of Part 2 of Sch 3A of the Transitional Act. Agreements of this kind are commonly referred to as ‘zombie agreements’.

[4] 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 26A(1) and (2) of Schedule 3A to the Transitional Act, the Agreement was to terminate on 6 December 2023 (the end of the default period) unless extended by the Commission.

[5] Under Subitem 26A(6) of Sch 3A, where an application is made under subitem 26A(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.

[6] Subitem (7) applies in specified circumstances where bargaining for a replacement agreement is occurring. Subitem (8) applies if the application relates to an individual agreement-based transitional instrument and is not relevant here. Subitem (9) applies if the application relates to a Division 2B state employment agreement and it is likely that, as at the

time the application is made, the award covered employees for the agreement under subitem (10), viewed as a group, would be better off overall if the agreement applied to the employees than if the relevant modern award or awards applied.

### **Grounds relied upon**

[7] The Applicant made the application on the basis that negotiations were to take place for a new agreement, that termination of the Agreement would create administrative difficulties and that bargaining would have some complexity because it would involve incorporating three different sites and multiple employee classifications into a single agreement.

[8] The Applicant advised that bargaining had not yet commenced for a replacement agreement. Subitem (7) does not apply since the application was not made at or after the notification time for an agreement.

[9] Whilst the Applicant said that they were paying their employees above award rates, we do not take the application as being advanced on the basis that subitem (9) applies and that employees viewed as a group, would be better off under that Agreement than the relevant modern awards. The relevant comparison under subitem (9) is between the terms of the Agreement and those of the relevant awards, not what is paid as a matter of practice. In any case, having regard to the terms of the Agreement and the analysis undertaken by the Commission's agreement analysis team, we are of the view that the employees would not be better off if the Agreement applied. We therefore deal with the application on the basis that the Applicant contends it is reasonable in the circumstances to extend the default period under subitem (6)(b) of item 26A.

### **Consideration**

[10] The Agreement contains rates of pay that fall well below the relevant Awards. The awards that have been considered are the Amusement, Events and Recreation Award 2020 and the Clerks Award 2020. Clause 3.8 of the Agreement sets out wage increases, however it is unclear how this clause is intended to apply and whether, having regard to its drafting, the wage increases applicable to the modern awards would have been applied to the rates within the Agreement. We note that notwithstanding the ambiguity in the Agreement relating to wage rates, the operation of Item 13 of Schedule 9 of the Transitional Act, means that base rates of pay under the Agreement would be at least equal to those rates provided for in the Awards.

[11] The Agreement operates to the exclusion of all Awards and contains a number of less beneficial terms when compared to the relevant Awards. These terms include:

- Broader span of hours, daily hours, days on which ordinary hours can be worked;
- Reduced minimum engagement periods for part time and casual employees;
- Less beneficial rostering provisions, and in particular in relation to part-time employees, the ability to extend or reduce hours unilaterally and without payment of overtime penalties;
- No weekend, shift or public holiday penalties;

- All-inclusive and annualised salary rates which are unlikely to be high enough to compensate employees for the penalties and loadings the rate intends to compensate for;
- Reduced overtime entitlements, particularly having regard to the broader span of hours;
- No annual leave loading.
- Employees engaged as rafting guides to supply, at their own cost, a number of items necessary for the performance of their role, including a helmet, lifejacket, knife, whistle and a number of other items. Where the employee fails to have these items or fails to maintain these items in good working condition, the employer has the right to stand down the employee without pay.

[12] We also observe that the Agreement contains a range of conditions that are inferior to or inconsistent with the National Employment Standards (NES). These provisions relate to notice of termination, compassionate leave and personal leave.

[13] Subitem 26A(6)(b) of Sch 3A allows us to extend the default period of the Agreement if it is “reasonable in the circumstances” to do so. In *Suncoast Scaffold Pty Ltd*,<sup>1</sup> the Full Bench described the ‘reasonable’ criterion in item 20A(6)(b) of Sch 3 to the Transitional Act, the equivalent provision for agreement-based transitional instruments, 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.

[14] 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:<sup>2</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.

[15] Full Benches of the Commission have said a number of times that the purpose of the sunseting arrangements introduced in the SJBPA Act<sup>3</sup> is that zombie agreements are to be replaced by contemporary instruments made under the *Fair Work Act 2009 (FW Act)*.

[16] We are not satisfied that in the circumstances of this case it is reasonable to extend the default period for the Agreement. The Applicant is a medium sized and growing employer with over 120 employees. The Applicant has been on notice of the sunseting provisions for some time but had not commenced bargaining before the application was made. It appears that formal bargaining processes have not been engaged in at the workplace for 20 years.

[17] The Agreement was approved in 2004. It does not contain contemporary terms and the employees covered by them would be better off overall under the Awards. We consider the Agreement is precisely the type of instruments that the SJBPA Act was intended to address because its continued operation would disadvantage employees and the conditions are outdated and inferior.

[18] As our decision is to refuse to extend the default periods under subitem 26A(6) of Sch 3A and our decision is made after the sunset date in the Transitional Act, subitem 26A(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 Agreement, the default period is extended to 28 February 2024.

[19] The application is dismissed.



DEPUTY PRESIDENT

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

<sup>2</sup> Explanatory Memorandum *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [670].

<sup>3</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].