[2024] FWCFB 107 [Note: A copy of the zombie agreement to which this decision relates (AC310479) (AC315870) is available on our website.]

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 Trustee for Ian Dicker Family Settlement t/a Steritech Pty Ltd
(AG2023/4864; AG2023/4865)

STERITECH (NARANGBA) PLANT OPERATORS COLLECTIVE AGREEMENT 2007
[AC310479]

STERITECH (DANDENONG) PLANT OPERATORS COLLECTIVE AGREEMENT 2008
[AC315870]

Health and welfare services

DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN
COMMISSIONER PERICA

SYDNEY, 26 FEBRUARY 2024

Application to extend the default periods for the Steritech *(Narangba) Plant Operators Collective Workplace Agreement 2007* and the *Steritech (Dandenong) Plant Operators Collective Workplace Agreement 2008*

[1] Pursuant to subitem 20A(4) of Sch 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**), Steritech Pty Ltd (Applicant) has made two applications to extend the default periods for the *Steritech (Narangba) Plant Operators Collective Workplace Agreement 2007* (**the Narangba Agreement**) and the *Steritech (Dandenong) Plant Operators Collective Workplace Agreement 2008* (**the Dandenong Agreement**). The applications seek to extend the default periods for each Agreement to 6 December 2027.

[2] The Agreements are collective agreements that were made under the *Workplace Relations Act 1996* (Cth) (**WR Act**) and approved under that Act by the Workplace Authority. The Agreements 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)(c)(i) of Sch 3 as a 'collective 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 Agreements 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) relates to individual agreement-based transitional instruments. 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.

Background and Grounds relied upon

[5] The Applicant is a contact sterilization and decontamination processor of customer products across multiple industries including health care, agriculture, fresh produce, quarantine and pet products. It runs four processing plants using gamma radiation and ethylene oxide processing for the purposes of sterilisation. The zombie agreements in these proceedings cover employees at the Narangba Plant in Queensland and the at the Dandenong plant in Victoria.

Narangba Agreement

[6] The Narangba Agreement covers 4 full time employees who are classified as Plant Operator Grade 2 under the Agreement. Those four employees would otherwise be covered by the *Storage Services and Wholesale Award 2020.*

[7] The analysis undertaken by the Commission's Agreements Team confirms that the Narangba Agreement has entitlements that are less beneficial than the Award. The Narangba Agreement provides an annual salary that compensates employees for all ordinary hours worked, an additional four hours each week, shift work, annual leave loading and any other allowances otherwise provided in the Award. As the rates of pay are either equal to the Award or 0.20% above the Award, we are of the view that employees would be worse off when compared to the Award having regard to the entitlements included as part of the annual salary.

[8] The Narangba Agreement provides a broader span of hours than compared to the Award, namely 6:00 AM to 6:00 PM, Monday to Friday, compared to 7:00 AM to 5:30 PM, Monday to Friday under the Award. Employees can work up to 12 hours per shift under the Narangba Agreement. Under the Award, employees can work a maximum of 8 hours, or 10 hours by agreement. It is silent with respect to breaks. Under the Award, all employees are entitled to two 10-minute paid breaks. Under clause 33(c) of the Agreement, employees are required to come in/stay back for 5 to 10 minutes to ensure a smooth changeover of shifts. This time appears to be unpaid.

[9] Overtime at 200% is payable to employees when required to work in excess of 12 hours in any shift. However, in accordance with clause 36 of the Agreement, it appears that where an employee is required to work an additional shift outside their ordinary hours, the time is paid at

ordinary rates. Unlike the Award which provides for shift penalties of between 112.5% and 130%, no shift penalties are payable under the Narangba Agreement. No allowances are payable under the Narangba Agreement.

[10] The Applicant filed an affidavit of Kym Morrison, who is the Human Resource Manager of the Applicant. The affidavit provides evidence that each year, the Applicant undertook a comparative test to "ensure" the employees' annualised salaries were above the Award. The affidavit contains an historical analysis of those pay increases. According to the affidavit, these pay rises have led to the position that the four employees who are covered by the Narangba Agreement are paid an average hourly rate of $39.20 under the classification Plant Operator Grade 2 which, according to this evidence, is superior to the average full time Store Worker Grade 2 hourly rate of $31.51.

Dandenong Agreement

[11] The Dandenong Agreement covers 8 employees who are engaged full time as Plant Operator Grade 2 under the Agreement. Four of those employees work a night shift roster and four work a day shift roster. The Dandenong plant operates 7 days a week, 24 hours a day with a working week of Saturday to Friday. Those eight employees would otherwise be covered by the *Storage Services and Wholesale Award 2020.*

[12] The Commission has prepared an analysis that confirms the Dandenong Agreement has entitlements that are less beneficial than the Award. The Dandenong Agreement provides an annual salary that compensates employees for all ordinary hours worked, an additional four hours each week, shift work, weekend work, annual leave loading and any other allowances otherwise provided in the Award. As the rates of pay are either equal to the Award or up to 5.67% above the Award, we are of the view that employees would be worse off when compared to the Award having regard to the entitlements included as part of the annual salary.

[13] The Dandenong Agreement provides a broader span of hours than compared to the Award, namely 6:00am to 6:00pm, Monday to Friday, compared to 7:00am to 5:30pm, Monday to Friday under the Award. Employees can work up to 12 hours per shift under the Dandenong Agreement. Under the Award, employees can work a maximum of 8 hours, or 10 hours by agreement. The Dandenong Agreement is silent with respect to breaks. Under the Award, all employees are entitled to two 10-minute paid breaks.

[14] Under the Dandenong Agreement, employees are required to come in/stay back for 5 to 10 minutes to ensure a smooth changeover of shifts. Overtime at 200% is payable to employees when required to work in excess of 12 hours in any shift. However, in accordance with clause 36 of the Agreement, it appears where an employee is required to work an additional shift outside their ordinary hours, it is paid at ordinary rates. No shift penalties are payable under the Agreement, unlike the Award, which provides for shift penalties of between 112.5% and 130%. No weekend penalties are payable under the Dandenong Agreement. The Award provides for weekend penalties of between 150% and 200%. No allowances are payable under the Agreement.

[15] The affidavit of Kym Morrison provides evidence that, as was the case with the Narangba Award, the Applicant undertook a comparative test each year to "ensure" the employees' annualised salaries under the Dandenong Agreement were above the Award. The affidavit contains an historical analysis of those pay increases. According to affidavit, these pay

rises have led to the position that the eight full time employees who are covered by the Dandenong Agreement under the Plant Operator Grade 2 classification are paid average hourly rate of $42.78 which. according to this evidence is superior to the average full-time Store Worker Grade 2 hourly rate under the Award of $33.33.

[16] The Applicant in both proceedings bases its claim to extensions of the default periods on the circumstances of the employer. Those submissions follow.

[17] The Applicant submits it is "committed to establishing modern Enterprise Agreements in 2024”. The Applicant has engaged AI Group Workplace Lawyers who have undertaken an investigation of the existing instruments. They have also given preliminary advice on the options for the Applicant. In early December 2023, meetings were arranged with the General Managers of Production of each site so that any new Agreement or Agreements are tailored appropriately for the respective operations. The Company is yet to make its decision on the overall approach, that is whether to have Enterprise Agreements for each of the facilities individually, or to have a joint, or national agreement. The timing for that decision is anticipated for some time in February or March 2024.

[18] The Applicant argues that if the Narangba and Dandenong Agreements were terminated and the employees reverted to the Award, it would have significant adverse financial effects on the Applicant. According to Mr. Morrison, the termination of the Agreements “would also adversely impact upon many of its customers and clientele for whom it performs an essential and unique service”.

[19] The Applicant argues the existing rates of pay based on the Agreement are paid on an annualized rate and are significantly ahead of the hourly rate in the Award. If shift loadings and other penalties and allowances under the Award are then added to that rate, the financial cost of operation would become unsustainable. The Applicant claims that “significant reduction would have to be undertaken on the working procedures and operation of the plants”.

[20] According to Mr. Morrison, any reduction would seriously impact on the sterilization and decontamination service the Applicant offers to health care industries such as hospitals, health care centres or aged care homes, as well as the many other industries it services. A reduced operation would also adversely affect the treatment of crops, plants and produce.

Consideration

[21] We cannot be satisfied that the requirements of subitem 6(a) have been met. Subitem (7) does not apply because there is no evidence that the application was made at or after the notification time for a proposed agreement. Further, as the Agreement is a collective agreement-based instrument, subitem (8) does not apply.

[22] After reviewing the terms of the Narangba and Dandenong Agreements and the Awards, as well as the analysis provided by the employer, we cannot be satisfied the employees, viewed as a group, are likely to be better off under the Agreements than they would be if the Award applied. We do accept the actual hourly rate of employees paid to employees who are covered by the agreements may be superior to the average hourly rate for the relevant comparator classification under the Award. However, the actual payments received by the employees are not the relevant comparator under subitem 9 which compares the terms of the Agreement against the Award. Therefore, subitem 9 does not apply here.

[23] We are, however, satisfied that it is "reasonable in the circumstances" to extend the default period in accordance with subitem 20A(6)(b) of Sch 3 based of the particular circumstances of the employer.

[24] 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:

> 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.

[25] We also consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The Explanatory Memorandum of the SJBP 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 sunsetting of zombie agreements does not operate harshly, including by leaving employees worse off.

[26] We accept, the Applicant has engaged advisers and is committed to the negotiation of modern Enterprise Agreements across its business. We also accept if an extension of the default period is refused, it may have practical consequences that could have an adverse effect on the important work undertaken by the Applicant and its employees. In all the circumstances, we consider it is reasonable to extend the default period.

[27] The three-year extension sought by the Applicant in each of these applications is excessive. We are of the view that a shorter extension is adequate for the Applicant to ensure it has time to seek advice and to negotiate appropriate modern Enterprise Agreements. 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 1 December 2024.

[28] The Narangba and Dandenong Agreements are published, in accordance with subitem 20A(10A)(c), on the Fair Work Commission's website.

DEPUTY PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR771804>

[1] [2023] FWCFB 105 at [3] to [18].

[2] [2023] FWCFB 105 at [17].

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