



# DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 7, Item 30(4) - Application to extend default period for enterprise agreements made during the bridging period

**Surf Hogs Pty Ltd T/A Hog's Breath Cafe Surfers Paradise**  
(AG2023/4992)

## **SURF HOGS PTY LTD - ENTERPRISE AGREEMENT 2009**

DEPUTY PRESIDENT SLEVIN  
COMMISSIONER CRAWFORD  
COMMISSIONER THORNTON

SYDNEY, 24 JANUARY 2024

*Application to extend the default period for the Surf Hogs Pty Ltd Enterprise Agreement 2009*

[1] Surf Hogs Pty Ltd (**Surf Hogs**) has applied, pursuant to item 30(4) of Sch 7 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**), to extend the default period for the *Surf Hogs Pty Ltd Enterprise Agreement 2009* (**Agreement**). The application seeks to extend the Agreement for a period of 12 months until 1 December 2024.

[2] The Agreement was made in 2009 and approved under the *Fair Work Act 2009* (FW Act). It was made during the bridging period as defined in Sch 2 Item 2 of the Transitional Act.

[3] Item 30 of Sch 7 to the Transitional Act provides for the automatic sunseting of agreements made during the bridging period at 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 similar provisions in item 20A of Sch 3 are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd (Suncoast)*.<sup>1</sup> The provisions in item 30 of Sch 7 are relevantly the same and we rely upon what is said in that decision.

[4] The application is made under subitem (4) of item 30 of Sch 7 on two bases. First, that the Commission can be satisfied under subitem 30(6)(a) that subitem 30(7) applies and it is otherwise appropriate in the circumstances to extend the default period. Subitem 30(7) applies if bargaining for an enterprise agreement to replace the zombie agreement is occurring. The second basis is that the Commission can be satisfied under subitem (6)(b) that it is reasonable in the circumstances to extend the Agreement.

### **Background**

[5] Surf Hogs operates two Hogs Breath Cafe restaurant franchises in Surfers Paradise in Queensland. It employs around 30 employees under the Agreement. If the Agreement did not apply, the *Restaurant Industry Award 2020* (the Award) would apply to the employees. Surf Hogs 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] Surf Hogs lodged its application to extend the default period for the Agreement on 6 December 2023, the last day it was permitted to do so. The application attached a copy of a Notice of Representational Rights (NERR) that had been provided to employees by email on 6 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] The Agreement covers full time and part time employees. The Award is expressly excluded from the Agreement. Surf Hogs has not provided any information about the hours of operation for the business or common rosters worked by employees covered by the Agreement. It is likely, given the nature of the business, employees are required to work evenings and on weekends. The Agreement was originally approved with a number of undertakings to meet concerns over the better off overall test in the FW Act. The undertakings form part of the Agreement.

[8] As the Agreement was reached in 2009 the Agreement rates of pay have fallen well below the Award. However, in accordance with s.206 of the FW Act, rates of pay under the Agreement are taken to be equal to the Award.

[9] The Agreement contains the following terms which are less beneficial than the Award:

- Less beneficial rostering provisions.
- No weekend, shift or public holiday penalties.
- No annual leave loading.
- Voluntary additional hours paid at ordinary rates rather than overtime penalties.
- Reduced or lack of allowances.
- Reduced break entitlements.

[10] In response to questions posed by the Commission, Surf Hogs drew our attention to the following provisions in the Agreement which are said to be more beneficial to employees than the Award:

- All staff are employed full-time or part-time as the Agreement only provides for full-time/part-time rates of pay.
- The Agreement provides for Junior Employees to be paid a percentage of the adult rate of pay that is 5% higher than the Award for juniors employees aged 18, 17, and under 17 years.
- The Agreement provides for an unpaid 30 minute meal break after 5 hours of work.
- The Agreement provides for food, beverage and retail discounts of between 25-50%.

[11] Our attention was also drawn to the following current pay practices which are not required by the Agreement or the Award:

- All hourly staff are currently paid between 8.5%-12.5% above the relevant Modern Award Monday to Friday rate of pay.
- All Level 1 and Level 2 Front of House staff aged 19, 18, 17, and under 17 years staff are paid no less than \$23.23 (which is between 13.5% to 100% additional on the relevant minimum hourly rate of pay).
- All salaried staff are paid salaries no less than \$62,000 per annum.
- Where any terms of the Agreement are less beneficial than the National Employment Standards (NES) then the NES is complied with not the Agreement term.

[12] In information provided following the filing of the application Surf Hogs indicated that it intended to provide employees with a copy of a proposed replacement agreement on 29 December 2023, conduct a group information session for employees on 25 January 2024, and conduct the first bargaining committee meeting on 25 January 2024.

### 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. Issuing an NERR indicates agreement to bargain for the purpose of s173(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 NERR for the proposed agreement to the coverage clause of the zombie agreement. The NERR here satisfies that 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 Surf Hogs has taken some steps towards commencing bargaining. It relies upon those steps to establish that bargaining is occurring. However, given Surf Hogs has yet to establish a bargaining committee 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 Surf Hogs 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 is not 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. It appears Surf Hogs pays some of its employees an hourly rate that is above the Award. It provided a sample of payslips for its employees. Those payslips indicate that the employees are by and large students and persons working in accordance with visa arrangements. The payslips also indicate that wages are paid as a flat

hourly rate with no payment being made for overtime or other penalties. The payslips do not say when the employees work, so we are unable to determine whether the application of Award penalties for evening work and weekend work would result in the employees receiving more under the Award than they currently receive. Again, given the nature of the business, it is likely they would. In any event, if the over award pay rates result in the employees receiving more, the termination of the Agreement will have no impact on the 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 also excessive. We do not consider negotiating a new enterprise agreement would take the 12 months that the Applicant seeks.

[18] Surf Hogs 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 Agreement. 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] 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.<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>

[21] Taking those matters into account we do not think it is reasonable to extend the default period for the Agreement. The Agreement contains inferior conditions to the Award, in particular in relation to penalty rates. We have taken into account that Surf Hogs has taken some steps to commence bargaining for a new enterprise agreement. These factors however do not convince us that we should extend the life of a zombie agreement that provides for terms and conditions that are inferior to the relevant modern award. We are of the view that the Agreement should be replaced by a modern instrument that meets the requirements of the FW Act.

[22] As we are not satisfied that it is reasonable in the circumstances to extend the default period of the Agreement the Application is dismissed.

[23] As our decision is to refuse to extend the default period under subitem 30(6) of Sch 7 and our decision is made after the sunset date in the Transitional Act, subitem 30(10) 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 sunsetting of the Agreement the default period is extended 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 Kalium Labour Trust T/A Kalfresh Pty Ltd* [\[2023\] FWCFB 217](#).

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