

[2024] FWCFB 67[Note: A copy of the zombie agreement to which this decision relates ([AE873322](#)) is available on our website.]



## 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

**Wilderness Escape Outdoor Adventures Pty Ltd T/A Wilderness Escape Outdoor Adventures, Venture Corporate Recharge (Aust) Pty Ltd T/A Venture Corporate Recharge**  
(AG2023/4942)

### **WILDERNESS ESCAPE OUTDOOR ADVENTURES PTY LTD AND VENTURE CORPORATE RECHARGE PTY LTD ENTERPRISE AGREEMENT 2009**

Industries not otherwise assigned

DEPUTY PRESIDENT ROBERTS  
DEPUTY PRESIDENT SLEVIN  
COMMISSIONER PERICA

SYDNEY, 9 FEBRUARY 2024

*Application to extend the default period for the Wilderness Escape Outdoor Adventures Pty Ltd and Venture Corporate Recharge Pty Ltd Enterprise Agreement 2009*

[1] Wilderness Escape Outdoor Adventure Pty Ltd and Venture Corporate Recharge (Aust) Pty Ltd (**Wilderness and Venture**) have made an application under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for the *Wilderness Escape Outdoor Adventures Pty Ltd and Venture Corporate Recharge Pty Ltd Enterprise Agreement 2009* (**Agreement**). The application seeks to extend the default period for the Agreement to 6 July 2024.

[2] The Agreement is a collective agreement that was made during the bridging period under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and was approved by Fair Work Australia on 22 January 2010.<sup>1</sup> This application is to extend the default period for an enterprise agreement made during the bridging period under item 30(4) of Schedule 7 to the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009*.

[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 30(1) and (2) of Schedule 7 to the Transitional Act, the Agreement would have terminated on 6 December 2023 (the end of the default period) unless extended by the Commission.

[4] Under subitem 30(6) of Sch 7, where an application is made under subitem 30(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) or (8) 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) applies if it is likely that, as at the time the application is made, the award covered employees for the agreement under subitem (9), viewed as a group, would be better off overall if the agreement applied to the employees than if the relevant modern award or awards referred to in that subitem applied to the employees.

### **Grounds relied upon**

[5] Wilderness and Venture submit it is reasonable to extend the default period until 6 July 2024 because it would allow time to develop and bargain for a replacement agreement, it would allow a vote to occur in April 2024, and time for the Commission to review and approve the replacement enterprise agreement.

[6] Wilderness and Venture argue the extension is reasonable because “no employees would be disadvantaged by the extension.” The Agreement contains some terms that are inferior to the *Miscellaneous Award 2020 (Award)* including lower casual loading, a lower period of minimum engagement for casual employees, fewer restrictions on ordinary hours, and more restricted penalty and overtime rates. Wilderness and Venture argue, however, that the Agreement contains many terms that are superior to the Award including a minimum engagement of three hours per day and fifteen hours per week for part-time employees, higher rates of pay for junior employees, an entitlement to reimbursement of meal expenses in remote locations and free meals when working on catered programs. The Agreement also covers some managerial employees who are not covered by the Award.

[7] Wilderness and Venture state that they provide, as a matter of contract, more beneficial entitlements on top of those prescribed in the Agreement including above-Award rates, a casual loading of 25%, an additional 10% loading for casuals on additional hours worked, provision of uniforms and meal allowances and an allowance to Program Managers on top of their base rate of pay which is “more generous than leading hand allowances under the Award”.

[8] Wilderness and Venture also argue: “The Award is not specifically tailored to the industry in which they operate (i.e., running outdoor activity-based camps, programs and day trips).” They have, “over the past several years, developed working arrangements and pay structures (e.g. the payment of field loadings) that build on the Enterprise Agreement and are specifically tailored to provide the flexible arrangements necessary in its industry. It is intended these arrangements will be incorporated into the replacement agreement to be negotiated in early 2024.” Wilderness and Venture also “seek to have the Agreement extended to enable it to negotiate a replacement agreement without the need to also reorganise its arrangements to comply strictly with the Award.”

[9] Wilderness and Venture explain the delay in negotiating a replacement agreement on the following bases: It has been impacted by numerous disruptions to its business over the past several years, including COVID-19, which caused a 90% drop in income in 2020, COVID-

related restrictions such as the Department of Education (SA) stopping all school camps in 2020 for half the school year and for a three-month period in 2022, the 2022-2023 River Murray floods, which impacted a number of Wilderness and Ventures' aquatic programs, and a significant shortage of qualified instructors due to the lack of training that occurs and the mass exit of people from the industry worldwide because of COVID-19. This resulted in Wilderness and Venture “purchasing a Registered Training Organisation earlier in 2023 in order to provide suitable training within South Australia”.

[10] We are not satisfied for the purpose of subitem (6)(a) that either of subitems (7) or (8) apply. We cannot be satisfied that subitem (7) applies as bargaining has not commenced for a replacement agreement. Nor are we satisfied that Subitem (8) applies as it is likely the employees covered by the Agreement, viewed as a group, would not be better off overall if the Agreement applied rather than the Award continuing to apply.

[11] The default period may be extended under subitem (6)(b) if we are satisfied that it is reasonable in the circumstances to do so. 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.*

[12] We also consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The explanatory memorandum 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.*

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

[14] Wilderness and Venture seek an extension of the Agreement so that they can avoid reverting back to the Award while a replacement agreement is negotiated. The concern is that the award terms do not accommodate the type of business that they operate. We accept Wilderness and Venture’s submissions that the arrangements currently in place, including arrangements that are in excess of the Agreement terms mean that no employee would be disadvantaged by the extension of the Agreement. That conclusion is supported by the employer’s analysis of the current terms and conditions (including contractual entitlements). The recent circumstances of Wilderness and Venture partially explain the delay in replacing the Agreement. The extension sought is also only for a relatively short period. We are therefore

satisfied that it is “reasonable in the circumstances” to extend the default period in accordance with subitem 30(6)(b) of Sch 7.

**[15]** Pursuant to item 30(6) of Sch 7 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 July 2024.

**[16]** The Agreement is published, in accordance with subitem 30(9A), on the Fair Work Commission’s website.



DEPUTY PRESIDENT

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<[AE873322](#) PR771162>

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<sup>1</sup> [\[2010\] FWAA 377](#).

<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].