



# 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

**Icon Restaurants Australia Pty Ltd**  
(AG2023/4952)

## ICON RESTAURANTS AUSTRALIA PTY LIMITED CERTIFIED AGREEMENT

Restaurant Industry

DEPUTY PRESIDENT O'KEEFFE  
COMMISSIONER CONNOLLY  
COMMISSIONER LIM

PERTH, 9 FEBRUARY 2024

*Application to extend the default period for Icon Restaurants Australia Pty Ltd – Certified Agreement*

[1] Pursuant to subitem 20A(4) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Act), Icon Restaurants Australia Pty Ltd (the Applicant) has applied to extend the default period for the *Icon Restaurants Australia Pty Limited Certified 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*<sup>1</sup> 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, 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'.<sup>5</sup>In addition, the Court determined that, in the statutory context of the FW Act, 'bargaining' incorporates a requirement to do so in good faith<sup>6</sup>with the objective of ultimately reaching agreement, if possible.<sup>7</sup>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 Applicant has provided material addressing the requirements as set out above. On the basis of that material 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.

[5] As such, we find that the requirements for granting an extension have been met and, noting that the Applicant has advised that the bargaining representatives for the proposed enterprise agreement do not oppose the extension sought, that it is appropriate in the circumstances that an extension be granted. This then raises the issue of the appropriate length of the extension.

[6] The Applicant initially sought an extension to 1 December 2024. In subsequent correspondence the Applicant has indicated that, given the progress of negotiations, it believes that an extension to 30 April 2024 will provide sufficient time for it to conduct a vote on the proposed enterprise agreement, lodge an application for approval and for the Commission to make a decision on approval.

[7] The Full Bench has considered this revised request. We have formed the view that in the circumstances it is appropriate to allow an extension to 30 April 2024.

**[8]** 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 30 April 2024.

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



**DEPUTY PRESIDENT**

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<sup>1</sup> [\[2023\] FWCFB 122](#) at [4].