

[2024] FWCFB 233 [Note: A copy of the zombie agreement to which this decision relates ([AC315057](#), [AG842110](#), [AC315059](#), [AG843654](#), [AG847885](#), [AC316003](#), [AC318743](#), [AC310793](#), [AC314279](#), [AC318158](#), [AC314629](#)) 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

Applications by Australian Education Union to extend default period for the collective agreement based transitional instruments listed in schedule 1.

(AG2023/4842 and ors)

Social and community services industry

DEPUTY PRESIDENT SLEVIN
COMMISSIONER CRAWFORD
COMMISSIONER ALLISON

SYDNEY, 24 APRIL 2024

Introduction

[1] The Australian Education Union (AEU) applies pursuant subitem 20A(4) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**), to extend the default period for 11 zombie agreements that apply to disability services workers and educators in regional Victoria (**the Agreements**).

[2] The Agreements are:

- *George Gray Centre Disability Services Victoria (Part 1) Collective Agreement 2008* (AC315057)
- *Windarring ATSS Disability Services Victoria (Part 10) Enterprise Agreement 2005* (AG842110)
- *Whittlesea District ATSS Disability Services Victoria (Part 1) Collective Agreement 2008* (AC315059)
- *Milparinka Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005* (AG843654)
- *Mirridong Services Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005* (AG847885)
- *Asteria Services Inc Disability Services Victoria (Part 1) Collective Agreement 2008* (AC316003)
- *Murray Valley Centre Disability Services Victoria (Part 1) Collective Agreement 2008* (AC318743)
- *Distinctive Options Day Services Collective Agreement 2006-2009* (AC310793)
- *Noweyung Ltd Disability Services Victoria (Part 1) Collective Agreement 2008* (AC314279)

- *Moe Life Skills Community Centre Disability Services Victoria (Part 1) Collective Agreement 2008 (AC318158)*
- *McCallum Disability Services Disability Services Victoria (Part 1) Collective Agreement 2008 (AC314629)*

[3] The Agreements were made and approved under the *Workplace Relations Act 1996*. They are collective agreement-based transitional instruments for the purpose of Sch 3 of the Transitional Act.

[4] The Transitional Act was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) (SJPB Act)* to provide for the automatic termination of all remaining transitional instruments. The SJPB Act refers to agreements of this kind as ‘zombie agreements.’ The main features of item 20A of Sch 3 are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd*.¹ 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 Agreements continued to apply pursuant to item 20A(11) pending our decision in this matter.

[5] Under subitem 20A(6) of Sch 3, where an application is made for the default period to be extended, the Commission must grant the application 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.

[6] Bargaining for replacement agreements is not occurring so subitem (7) does not apply. The Agreements are collective agreements and subitem (8) does not apply.

[7] The applications to extend the default periods were ostensibly made on the ground that subitem (9) applies as the employees covered by the Agreements would be better off overall if the Agreements continued to apply to them than if the relevant modern award applied and that it is otherwise appropriate to do so. It is put in the alternative that it is reasonable in the circumstances to extend the default period. In a number of cases the AEU abandoned the first ground and the ground simply became that it is reasonable in the circumstances to extend the default period.

[8] The relevant modern award is the *Social, Community, Home Care and Disability Services Industry Award 2020 (SCHADS Award)*.

[9] Where the Commission is satisfied that the subitem (9) applies it must also consider whether it is appropriate to extend the default period. In *Suncoast Scaffold Pty Ltd* the Full Bench described the ‘appropriateness test’ in this way²:

Under subitem (6)(a) of item 20A, in addition to being satisfied that subitem (7), (8) or (9) applies, the Commission must also be satisfied that ‘it is otherwise appropriate in the circumstances’ for the default period to be extended. ‘Appropriate’, on its ordinary meaning, connotes that it is ‘suitable’ or ‘fitting’ to grant the extension. ‘In the circumstances’ connotes

the relevant matters and conditions accompanying the particular case. The inclusion of the adverb ‘otherwise’ indicates that appropriateness must be assessed by reference to circumstances other than those addressed by subitem (7), (8) or (9), as applicable. A broad evaluative judgment is required to be made.

[10] In final submissions in a number of matters the AEU abandoned its contention that subitem (9) applied. Where it did so we cannot extend the default period under subitem 6(a). The AEU contended instead that the default periods should be extended under subitem 6(b) as it is reasonable in the circumstances to do so. In *Suncoast Scaffold Pty Ltd* the Full Bench described the reasonableness criterion as follows³:

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.

[11] The applications seek to extend the default periods for 12 months to 6 December 2024. The Commission may extend the default periods of the Agreements for no more than four years.

The Applications

[12] The grounds relied upon in each of the applications are identical, albeit there was some difference in the way the entitlements in the Agreements were described in the applications. Those difference are noted but they are not material. The common grounds are:

1. The Collective Agreement covers the group of employees of the employer performing disability support work in day-services, referred to as “instructors”.
2. On 9 November 2023, the Australian Education Union and Health and Community Services Union filed an application for a supported bargaining authorisation (SBA Application), in respect of a proposed agreement to cover this employer (Attachment B).
3. The applicable modern award that covers this group of employees is the Social, Community, Home Care and Disability Services Industry Award 2020 (SCHADS Award).
4. The AEU believes that award covered employees covered by this Collective Agreement are better off overall than under the SCHADS award having regard to the following terms and conditions⁴:

	Collective Agreement	SCHADS Award
Annual Leave	CL 23 - SIX WEEKS ANNUAL LEAVE ENTITLEMENT	Cl 6 - Four weeks annual leave entitlement
Personal Leave	Cl 24 – 15 days personal leave entitlement	Cl 6 – 10 days personal/carer’s leave

Non-contact time	CI 20.3 – 5 hours weekly non-contact time	N/A
Study Leave	CI 28 – up to 12 months study leave recognized as continuous service	N/A
Professional Development and Program Development Days	CI 20.5 - entitlement to four professional development and program development days each year	N/A

5. It would be otherwise appropriate in the circumstances to extend the default period, given the following:

- a. If the supported-bargaining authorisation is issued there would likely be multiemployer bargaining that can impact standards in the disability services industry;
- b. There is a prevalence of modern award dependence in the disability services sector, such that maintaining terms and conditions better than the award will have some bearing on maintaining better terms and conditions in the sector, and the ability to recruit and maintain a workforce;
- c. The workforce in the sector is highly feminised. It is likely that gender-based assumptions in relation to the nature of the work and skills involved in caring for persons living with disability has contributed significantly to the undervaluation of work in the sector.

[13] While the Agreements are in similar terms, the workplaces in which they apply are disparate. The number of employees to whom the agreements apply, the sizes of the workplaces they apply to, and the manner in which the work performed under the Agreements is organised, varies. One employer asserts that the Agreement no longer applies to any employees. The largest employer, Aurora Support Services Inc., has a total of 71 employees covered by the zombie agreement. The Agreements are all over a decade old and it is apparent that there have been many changes both in the workplaces at which they apply and in the disability sector more generally in that time.

[14] Of the 11 applications, 8 are opposed. George Gray Centre Incorporated (George Gray), Windarring Ltd (Windarring) and Aurora Support Services Inc (Aurora) support the applications for extensions to the default periods of their agreements.

[15] The grounds of opposition in the other 8 matters are in essence that the Agreements are old, they apply in organisations with workforces that have a number of industrial instruments applying, and the respondents believe the employees will be better off under the relevant modern award. We will deal with the common elements of the applications first and then move to the circumstances and opposition to each application.

Common Matters

[16] In its applications the AEU seeks the extension of the default periods of 11 zombie Agreements. The terms of the Agreements are similar. The Commission’s Agreements Team conducted analyses of each of the Agreements and concluded in each case that, contrary to the

view of the AEU, it could not be said that it is likely that as at the time the applications were made the award covered employees, viewed as a group, would be better off overall if the agreement continued to apply rather than if the SCHADS Award applied. The analyses were provided to the parties and they provided responses.

[17] The analysis was that the Agreements cover full-time, part-time and casual employees. The Agreements cover employees who would otherwise be covered by the SCHADS Award. The Agreements operate to the exclusion of the Award. On their terms the Agreements leave employees generally worse off than if they were on the Award.

[18] More specifically, the rates of pay under the Agreements are below the SCHADS Award and so are taken to be the same as the Award, having regard to Item 13 of Schedule 9 of the Transitional Act.

[19] Further, the Agreements provide the following entitlements which are less beneficial to employees when compared to the Award:

- The Agreements provide that part-time employees are engaged to work less than 38 hours per week but are silent on other part-time Award provisions such as having reasonably predictable hours of work, usual hours of work agreed in writing prior to commencement, variation of hours by consent, and minimum engagement of 3 hours.
- The Agreements provide a casual loading of 20%, compared to 25% under the Award and are silent on the 3-hour minimum engagement provided for in the Award.
- There is a varied span of ordinary hours of 7am to 10pm compared to 6am - 8pm in the Award.
- The Agreements are silent on maximum daily hours. The Award provides a maximum of 8 hours per day or 10 by agreement.
- They are also silent on all shift definitions and penalties including a shiftworker definition for the purposes of the NES.
- The Agreements have less beneficial penalties for working ordinary hours on Saturdays and Sundays providing for ordinary rates with an equivalent of 25% of the hours worked to be taken as time off in lieu (TOIL). The Award provides a penalty of 150% for ordinary hours of Saturdays and 200% for ordinary hours on Sunday. Casual employees are also paid weekend penalties on a cumulative basis.
- They also provide less beneficial penalties for working ordinary hours on Public Holidays of 200%. The Award provides a penalty of 250% for working ordinary hours on public holidays. Casual employees are also paid public holiday penalties on a cumulative basis.
- The Agreements provide TOIL instead of overtime although provide that overtime payments can be made by agreement at the same rates as TOIL which is 1 hour of TOIL for each overtime hour worked on weekdays and 1 and half hours of TOIL for each overtime hour worked on Weekends.
- The Agreements are silent on all TOIL safeguards provided in the Award such as TOIL must be taken within 6 months or at an agreed time or times or be paid to the employee at the relevant overtime rates. Further, any accrued but unused TOIL must be paid to the employee at the relevant overtime rate upon termination or upon request of the employee.

- The Agreements provide a travelling allowance but is silent on all other award allowances.

[20] The Commission's analysis was based on responses from the employers to the applications which suggested employees generally work between 8.30am to 5pm, Monday to Friday. That being the case, full-time and part-time employees would not be better off overall given all of the less beneficial terms, if required to work overtime, weekends, public holidays or at times when they would otherwise be considered shiftworkers. With respect to casual employees, given the lower casual loading, lack of minimum engagement per shift and less beneficial overtime, weekend and public holiday penalties, casual employees cannot be considered better off overall. All employees would be worse off should they be entitled to an Award allowance not otherwise provided for in the Agreements.

[21] The analysis took into account the matters raised by the AEU, the Agreements do provide more beneficial annual leave provisions of 6 weeks' annual leave, more beneficial personal/carer's leave of 15 days per year of service, provision for non-contact time, study leave and additional development days. However, the analysis concluded, having regard to the less beneficial terms outlined above, it is not likely that these benefits, which are in some cases conditional, would result in employees being considered better off overall when compared to the Award.

[22] The AEU disagreed with the Commission's analysis. It submitted that a global assessment of the Agreements against the Award was not appropriate because subitem 20A(9) directs the Commission's attention to the specific group of award covered employees who are covered by the Agreements. It also submitted that to make the relevant assessment the Commission needs to know how those particular employees work so as to assess how the Agreements regulate their particular employment compared to how the Award would regulate that employment. In 7 cases the AEU contended that there was insufficient material before the Commission to allow a proper assessment of whether the relevant group was better off overall under the Agreement. This issue was compounded by the limited scope of the Agreements which apply to a small number of classifications of employees who are engaged as "instructors" ostensibly in educational roles running courses or conducting training for people with disabilities. The AEU pointed out that the SCHADS Award applies to a far greater scope of work.

[23] The effect of the AEU's submissions in the 7 matters where the Commission is said to have insufficient information to make an assessment on the better off overall ground is that we cannot be satisfied that the subitem (9) applies. The AEU does not press the item (9) ground in those cases. It follows that in those cases we cannot extend the default period under subitem 20A(6)(a).

[24] The AEU makes an alternative submission, that where we cannot be satisfied that the requirements of subitem (9) are met we should extend the default period under subitem 6(b) because it is reasonable in the circumstances to do so. In those matters the AEU relied on the following circumstances in support of its submission that it is otherwise reasonable in the circumstances to extend the default periods of the Agreements:

- (a) The Respondent and Applicant are both named in one of the first contested Supported Bargaining authorisation applications (B2023-1235);
- (b) Many of the employers named in that supported bargaining authorisation application had or have Zombie Agreements, which contain beneficial

entitlements that are not provided for in the SCHADS Award, which the Applicant seeks to preserve for consideration in any multi-employer agreement bargaining process that occurs if the supported bargaining authorisation is granted; and

- (c) There is a high prevalence of modern award dependency in the disability services sector, which has low-rates of pay. Extending the default period of this Zombie Agreement with beneficial entitlements greater than the modern award would be reasonable in the circumstances.

[25] These grounds become the sole basis of the applications for those matters where the AEU submitted there was insufficient material to find that subitem (9) was satisfied. They were provided as alternative grounds to extend the default periods under subitem 6(b) in those matters where the ground that the employees would be better off under the Agreements and the Agreements should be extended under subitem 6(a) was pressed.

[26] The AEU grounds under subitem 6(b) are telling. They identify the purpose of these applications. The grounds make it clear that the AEU seeks to preserve the more beneficial terms in the zombie Agreements being the better annual leave, personal leave, study leave and professional development leave so that they are not disadvantaged in the multi-employer bargaining that it proposes occur under a supported bargaining authorisation.

[27] We turn to the circumstances at each of the workplaces where the Agreements apply. We deal first with the applications that are supported by the employers, second with the applications where approval under subitem 6(a) is pressed and lastly with the applications that proceed solely on the basis of subitem 6(b).

George Gray Centre Disability Services Victoria (Part 1) Collective Agreement 2008 (AC315057)

[28] George Gray Centre Incorporated (George Gray) is covered by the *George Gray Centre Disability Services Victoria (Part 1) Collective Agreement 2008*. It supports the application. George Gray provides support for persons with disabilities both in a day centre and out in the community. It provides support to individuals with disabilities and in group programs.

[29] The number of employees covered by the George Gray zombie agreement is 32. Three are full time, 18 are part time and 11 are casual. The centre operates Monday to Sunday between 8.00 am and 4.00 pm. George Gray has made a commitment to its current staff that should the Agreement terminate, it will maintain the more beneficial conditions of 6 weeks annual leave per year and 15 days personal leave.

[30] The AEU contends that the default period should be extended under item 20A(6)(b) to preserve important terms and conditions while bargaining is occurring. It also points to the fact that the employees are employed in the disability sector which is characterised by a high level of award coverage meaning employees are engaged on minimum standards rather than terms and conditions negotiated in collective agreements.

[31] We are of the view that in the circumstances it is agreeable to reason and sound judgment to extend the default period for the Agreement. The circumstances that lead to this conclusion include those relied upon by the AEU. The AEU's attempts to negotiate a multi-employer agreement to replace the zombie Agreements in the sector is also a reasonable course of action

in circumstances where the employees under the Agreements have been covered by similar terms and conditions across numerous employers for some time. The circumstances in the case of this Agreement include that the employer supports the extension.

[32] The employer respondents to these applications all operate in the disability sector. They are heavily reliant on government funding. Accordingly, they perform an important community service with finite resources. One of the many challenges they face is to balance the allocation of funds fairly. In doing so they need to ensure the terms and conditions afforded to employees are fair while maintaining flexibility to provide important services to the community. We are of the view that this is best done by engaging with employees and their representatives. Extending the default period of this Agreement, and others, will allow time for such engagement.

[33] We will extend the default period for the Agreement to 6 December 2024.

Windarring ATSS Disability Services Victoria (Part 10) Enterprise Agreement 2005 (AG842110)

[34] Windarring Ltd (Windarring) is the employer covered by the *Windarring ATSS Disability Services Victoria (Part 10) Enterprise Agreement 2005*. Windarring supports the application. The Windarring Agreement covers that group of employees of the employer performing disability support work in day-services, referred to as “instructors” and as program managers.

[35] Windarring is a registered Disability Service provider, providing disability services to approximately 230 clients in North Central Victoria. Windarring has 30 employees covered by the Agreement, 5 of whom are full time, 24 permanent part time and 1 is a casual. It appears unclear whether 5 of the employees are properly covered for various reasons the AEU raises, however notwithstanding the issues regarding coverage in respect of these employees, the union submits that the Commission should have regard to the work performed by the 25 employees that are evidently covered. The centre’s hours of operations vary, depending on which part of the business the employee works. Generally, the operating hours are from 9 am – 3 pm or 5pm. In some parts of the business, services are available to be delivered 24 hours per day, every day of the year.

[36] Windarring submits there are a number of benefits to the SCHADS Award which have not been recognised in the application made by the AEU. Windarring has expressed an intention to allow the following benefits in the Agreement to continue if the Agreement terminates:

- Personal leave provided for at clause 24 – 15 days of annual personal leave entitlement.
- Study leave provided for at clause 28 – up to 12 months study leave recognised as continuous service.
- Professional Development Day provided for at clause 20.5 - entitlement to three professional development days each year

[37] Windarring also submits they would not be agreeable to extending the 6 week annual leave allowance provided for at clause 23 and non-contact time provided for at clause 20.4, as under current NDIS funding arrangements this would be financially unsustainable.

[38] The AEU submits that subitem (9) applies as the Commission can be satisfied that the covered employees when viewed as a group are likely to be better off overall under the zombie Agreement compared to the SCHADS award and that it is also appropriate in the circumstances to extend the default period for a period of 12 months. In the alternative the AEU submits for the reasons already set out that it is reasonable in the circumstances to extend the default period under subitem 6(b).

[39] We are not satisfied that subitem (9) applies. There is too much uncertainty associated about the identity of the group of employees covered by the Agreement. It is also unclear as to what part of Windarring's business the employees covered by the Agreement work. This makes it difficult to assess how the Agreement would apply. Consequently, we cannot extend the default period under subitem 6(a).

[40] We do find that it is reasonable in all of the circumstances to extend the default period. Our reasons are the same as for the George Gray Agreement.

[41] We will extend the default period for the Agreement under subitem 6(b) until 6 December 2024.

Whittlesea District ATSS Disability Services Victoria (Part 1) Collective Agreement 2008 (AC315059)

[42] Aurora Support Services Inc (Aurora) is the employer covered by the *Whittlesea District ATSS Disability Services Victoria (Part 1) Collective Agreement 2008*. Aurora supports the application. Aurora provides group-based support for adults with disability and is a not-for-profit organisation.

[43] The number of employees covered by the Agreement is 71. Aurora has 72 employees. Its finance officer is covered by another modern award. The centre operates Monday to Friday between 9.00 am and 3.00 pm. The Centre also operates programs which run on evenings and weekends as well as camps that will span a number of days, however staff work these days on an opt in basis in addition to their regular hours. The majority of employees covered by the zombie Agreement are Support Workers (referred to in the agreement as 'instructors') who provide direct care to the participants and other staff include managers, directors and administrative staff. There are 27 full time, 23 part time and 21 casual employees.

[44] Aurora also submitted that without an extension of the Agreement, it may be required to transition to the SCHADS Award, and then potentially need to transition again to another agreement, should the application for supported bargaining be accepted and result in a new multi-employer agreement. This would require an administrative burden for the organisation, as well as being disruptive and confusing for staff.

[45] Aurora has made the decision to allocate 7 days of 'ex gratia' leave to all permanent employees from 7 December 2023 to 5 December 2024 should the Agreement terminate and the organisation transition to the SCHADS Award. The 'ex gratia' leave period would coincide with a service closure for these dates, which when coupled with the Public Holidays at this time of year would have given all permanent employees a 2-week paid holiday break in addition to the annual leave entitlements provided in the SCHADS Award. It is Aurora's intention to continue to allocate these 'ex gratia' days annually, provided that the organisation can sustain this financially.

[46] The AEU maintains that when looking at the context of the entire group of employees covered by the Whittlesea agreement the Commission can be satisfied that the covered employees are likely to be better off overall compared to the SCHADS Award such that item 20A(9) applies and that it would be appropriate in the circumstances to extend the default period of the Zombie Agreement for 12 months. Again, we disagree. There is insufficient certainty about the coverage of the Agreement to determine with certainty the relevant group for the better off overall assessment. Consequently, we cannot be satisfied that 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.

[47] For the reasons above concerning the George Gray Agreement we are of the view that it is reasonable in all of the circumstances to extend the default period for the Aurora Agreement.

[48] We will extend the default period for the Agreement under subitem 6(b) until 6 December 2024.

Milparinka Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005 (AG843654)

[49] Milparinka Support Services Inc (Milparinka) is the employer covered by the *Milparinka Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005*. It opposes the application. Milparinka provides a range of support services to people with intellectual disabilities. These services include direct support (in group based and individual settings), support coordination, housing support and plan management. It has 64 employees covered by the Agreement – 24 full time, 11 part time and 29 casual. The employees covered by the zombie agreement work across all areas including organisational administration.

[50] Milparinka pays all employees' wages in accordance with the classification levels contained in the SCHADS Award. Most permanent employees work between the span of hours 8:30 a.m. to 4:30 p.m. Monday to Friday. Casuals work when work is available. The vast majority of casual work occurs between the hours of 8:30 a.m. and 8:00 p.m. Monday to Saturday, with some employees working on Sundays and Public holidays.

[51] Milparinka contends that the only benefits in the zombie Agreement that are more beneficial than the Award are 6 weeks annual leave and 15 days personal leave. Milparinka has implemented various improvements to employee terms and conditions to ensure compliance with the National Employment Standards (NES) and SCHADS Award. Milparinka applies the following benefits from the Award and NES to all staff:

- All staff transitioned across to the SCHADS pay tables which are more beneficial than the pay tables in the Agreement.
- SCHADS has a minimum engagement shift of 2 hours duration, the Agreement had no minimum shift length.
- Pay rates are 250% for work on public holidays as opposed to 200% in the Agreement.
- Pay rates are 200% for work on Sunday as opposed to 150% in the Agreement.
- Broken Shift Allowances which are not provided for in the Agreement.
- Any ordinary hours worked on a Saturday are paid at 150% and Sunday are paid at 200% as opposed to 125% in the Agreement.

- If an employee works a shift of more than 10 ordinary hours, overtime applies after 10 hours. There is no such provision in the Agreement.

[52] Milparinka has agreed in writing with all 35 permanent employees that it will continue to provide 6 weeks annual leave and 15 days personal leave accruals in perpetuity as over Award entitlements.

[53] The AEU submits that without further information about the specific work the 64 employees that Milparinka considers to be covered by the Zombie Agreement perform, the Full Bench cannot make a proper consideration of whether sub-item (9) applies for consideration under item 20A(6)(a). This is because, it is unclear what portion of the ‘award covered employees’ perform work covered by the Agreement. Further, or alternatively, the AEU submits we are not in a position to determine whether the major and substantial proportion of the duties performed are those of an “instructor” or those of an employee performing attendant carer duties. There is some uncertainty about the relevant group of employees covered by the Agreement. Although that uncertainty is not as great as other applications being considered here. It appears that the relevant group of employees, so far as it can be ascertained by the material provided, would be better off on the SCHADS Award. This is due to the number of casuals engaged who would be entitled to the higher loading and not be entitled to the more generous leave provisions. In either scenario we are not satisfied that the employees covered by the Agreement would be better off overall if the Agreement continued to apply to them than if the relevant modern award applied. We are not satisfied that sub-item (9) applies. Consequently, we cannot extend the default period under subitem 6(a).

[54] We are satisfied for the reasons already referred to in relation to the three Agreements dealt with above that it is reasonable in all of the circumstances to extend the default period of the Agreement.

[55] We will extend the default period for the Agreement under subitem 6(b) until 6 December 2024.

Mirridong Services Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005
(AG847885)

[56] Mirridong Services Inc (Mirridong) is the employer covered by the *Mirridong Services Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005*. It opposes the application. It describes the zombie Agreement as a historical document which has had no practical application since 2012, which is to say Mirridong had not applied the Agreement since 2012, when it commenced applying the SCHADS Award.

[57] Two permanent employees are still afforded 6 weeks annual leave and 15 days personal leave on the basis that those 2 employees were employed prior to 2012. The Agreement conditions have not been applied to employees engaged since 2012.

[58] The AEU submits that there is insufficient information before us to determine the group of employees the performing work under the Agreement and the hours of work in day-services at Mirridong. Accordingly, there is insufficient information for us to consider sub-item 9(b) that award-covered employees, when viewed as a group would be better-off-overall if the zombie Agreement applied compared to the modern award. The AEU submits that on that basis it cannot properly maintain the application pursuant to s.20A(6)(a) of Schedule 3 of the Transitional Act. We agree with the submissions and find that we cannot be satisfied that subitem (9) is satisfied and so cannot extend the default period for the Agreement under subitem 6(a).

[59] The circumstances in which and reason Mirridong ceased to apply the Agreement are unclear. There does not appear to have been a transfer of business that led to no employees transferring which is the most likely way in which the Agreement would no longer apply. The uncertainty about this issue combined with the reasons already set out in relation to the other Agreements that are dealt with in this decision lead us to be satisfied that it is reasonable in the circumstances to extend the default prior for this Agreement.

[60] We will extend the default period for the Agreement under subitem 6(b) until 6 December 2024.

Asteria Services Inc Disability Services Victoria (Part 1) Collective Agreement 2008
(AC316003)

[61] Asteria Services Inc (Asteria) is the employer covered by the *Asteria Services Inc Disability Services Victoria (Part 1) Collective Agreement 2008*. Asteria is a not for profit disability support organisation providing support to people with disability under the NDIS. Asteria also provides out of home care services and is a provider of community social housing.

[62] Asteria opposes the application. It describes the zombie Agreement as a historical document which has had no practical application since 2016, which is to say Asteria had not applied the Agreement since 2016 which was a period of major restructure. It commenced applying the SCHADS Award in 2016. Since 2016, Asteria submits that the vast majority of its disability services is in the community and not in 'day programs' by instructors, the group of employees which the Agreement is expressed to cover.

[63] Asteria says there are no employees covered by the Agreement. If the Agreement were to apply to its employees Asteria raises a number of terms and conditions which it says are less

beneficial than the SCHADS Award. Asteria submits that the Commission cannot be satisfied that section 20A(7), (8) or (9) of the Transitional Act applies and that given the Agreement does not cover anyone employed by Asteria the Commission should not otherwise be satisfied that it would be reasonable in the circumstances to extend the Agreement by a further 12 months, as sought by the AEU.

[64] The AEU contends that coverage is not a matter that is determined based on an employer's operational changes but a question of fact regarding the nature of *work* being performed by employees. Since there are still some employees who perform work of an 'instructor', including to deliver group supports, the union submits these employees continue to be covered by the Agreement.

[65] The AEU acknowledges that there is insufficient information before us to determine the group of employees performing work under the Agreement and what percentage of employees work casual, part time or full time. However, when looking at the context of the entire group of employees covered, the AEU submits that the Commission can be satisfied that the covered employees are likely to be better off overall under the Agreement compared to the SCHADS Award such that item 20A(9) applies and that it would be appropriate in the circumstances to extend the default period of the Agreement for 12 months. We disagree. We are of the view that there is insufficient information before us to be satisfied that subitem (9) is satisfied and so cannot extend the default period for the Agreement under subitem 6(a).

[66] For the same reasons set out above in relation to the Mirridong Agreement, we are satisfied that it is reasonable to extend the default period for this Agreement.

[67] We will extend the default period for the Agreement under subitem 6(b) until 6 December 2024.

Murray Valley Centre Disability Services Victoria (Part 1) Collective Agreement 2008 (AC318743)

[68] Community Accessibility Incorporated (CA) is the employer covered by the *Murray Valley Centre Disability Services Victoria (Part 1) Collective Agreement 2008*. CA acquired the business from Murray Valley Centre Incorporated on 1 April 2023. The Agreement was a transferable instrument and there were employees who transferred with the business. There are 15 employees who are covered by the Agreement, 11 are full-time employees and 4 are casual employees. The rest of CA's employees are covered by the SCHADS Award. CA describes the Agreement as a legacy instrument. CA does not support the AEU application.

[69] CA is a not for profit organisation providing community activities, home support and transport assistance to disabled and older clients. The work performed by the employees covered by the Agreement is to provide supported employment and centre-based community activities for individuals and groups. The centre has operated at a loss for over 10 years. Employees covered by the Agreement work 7.6 hours per day on Monday to Friday generally between 9.00 am and 5.00 pm.

[70] CA contends that the employees would be better off overall on the SCHADS Award because it offers conditions such as casual conversion, consultation on rosters, shiftwork penalties, minimum shift lengths, broken shifts protections, obligations for pay if a client

cancel, cashing in of annual leave, benefits for part time employees, a 25% casual loading, and a more beneficial scope of hours clause.

[71] The AEU presses its contention that subitem (9) applies as the employees taken as a group would be better off if the Agreement continued to apply. It submits that while there are 4 casual employees, the majority are full time, and they benefit from the 6 weeks annual leave and 15 days personal leave. The benefits in the Award in relation to shiftwork, overtime and protections for part-time employees in the SCHADS Award do not apply to the majority of CA's employees given the hours they work.

[72] We are satisfied in this case that subitem (9) applies. We are also satisfied that it is appropriate in the circumstances to extend the default period for the Agreement. It is appropriate to do so because the employees should have certainty about their conditions of employment, in particular their leave entitlements, while the AEU attempts to negotiate an instrument to replace the Agreement.

[73] We will extend the default period for the Agreement under subitem 6(a) until 6 December 2024.

Distinctive Options Day Services Collective Agreement 2006-2009 (AC310793) and Noweyung Ltd Disability Services Victoria (Part 1) Collective Agreement 2008 (AC314279)

[74] Distinctive Options (DO) is the employer covered by the Distinctive Options Day Services Collective Agreement 2006-2009 and the Noweyung Ltd Disability Services Victoria (Part 1) Collective Agreement 2008. DO has recently acquired the business of Noweyung Ltd. DO informed us that 70 employees from Noweyung transferred with the business making the Noweyung Agreement a transferrable instrument, with the consequence that the Agreement continues to apply to the employment of the transferring employees. DO does not support the applications to extend the default periods for the agreements.

[75] Noweyung Ltd also responded to a request from the Commission for information about its employees but failed to provide any information save for an assertion that Noweyung Ltd staff transferred to the SCHADS Award a number of years ago. Noweyung Ltd contends it no longer has employees covered by the Agreement. Noweyung Ltd also does not support the applications to extend the default periods for the agreements.

[76] DO provides a wide range of disability support services and employment options to people with a disability and its employees are engaged in service coordination, financial plan management, NDIS support intake, rostering, general administration, other corporate service functions and cleaning. There are 47 employees who are covered by the DO Agreement, equivalent to 25% of its total 186 employees, and 44 are full time/part time and 3 are casual employees. We were told that 70 employees have transferred from Noweyung. It is not clear how many of those continue to be covered by the Noweyung Agreement.

[77] DO estimates that 25% of its employees work in only group-based day service roles while the majority perform other work and submits that the SCHADS Award has applied to 100% of its employees, excluding management.

[78] DO contends that the employees would be better off overall on the SCHADS Award because it offers conditions such as on call allowances, broken shift allowances, provisions

relating to client cancellations, shift allowances and penalty rates and rostered days off. DO contends it maintains over Award entitlements for all employees through ‘grandfathering’ conditions for existing employees.

[79] The AEU submissions went to both applications. The AEU submits that there is insufficient information before us to determine the hours of operation and hours of work of employees covered by the two agreements for any proper consideration of sub-item (9) as required by item 20A(6)(a) of Schedule 3 of the Transitional Act. Further, in the absence of clear information about the group of employees employed at either or both DO and Noweyung, the extent to which the transfer of employment and merger has been completed and the hours of work and operations of both DO and Noweyung, there is insufficient information for us to be satisfied that award-covered employees, when viewed as a group would be better off overall if the zombie agreements applied compared to the modern award. The AEU concludes that on that basis it cannot properly maintain the application pursuant to s.20A(6)(a) of Schedule 3 of the Transitional Act.

[80] We agree with the AEU submissions and find that we cannot be satisfied that subitem (9) is satisfied and so cannot extend the default period for the two Agreements under subitem 6(a).

[81] The uncertainty about the extent of the coverage of the two Agreements and their application is a matter that supports the extension of the Agreements. The proposed bargaining is one way by which the uncertainty can be resolved. The factors relevant to the other applications already mentioned also apply to these two Agreements. We are satisfied that it is reasonable in the circumstances to extend the default periods for the Agreements.

[82] We will extend the default period for the two Agreements under subitem 6(b) until 6 December 2024.

Moe Life Skills Community Centre Disability Services Victoria (Part 1) Collective Agreement 2008 (AC318158)

[83] Life Skills Victoria Inc (LSV) informed the Commission it was not aware of the *Moe Life Skills Community Centre Disability Services Victoria (Part 1) Collective Agreement 2008*. LSV opposes the application. LSV is a registered National Disability Insurance Scheme (NDIS) participant and a provider of high-quality education, training, disability, and community services to enable people with disability to maximise independent lifestyles and full inclusion in the mainstream community. The service is run as a day service provider – staff work agreed hours on a term by term timetable, rostered between 8:30am – 5pm. There are 26 students attending Life Skills’ day service and it has 11 employees. It appears at least three employees are covered by the Agreement. Two of these employees are part time while the other employee is full time.

[84] LSV also lodged a separate application on 25 October 2023 to terminate the *Moe Life Skills Community Centre HSU Disability Services Union Collective Agreement 2006-2009*. At the time of applying to terminate this Agreement Life Skills stated it was not aware of the 2008 Agreement and sought to terminate both Agreements. The Applications did not proceed as item 20A of schedule 3 took effect to terminate the Agreements from 6 December 2023 or such later time that the Commission determined.

[85] LSV contends it does not believe that employees would be better off covered by the Agreement given that the three employees covered have retained all additional leave provisions.

[86] Presently, there is information before the Commission about three employees covered by the Agreement but not the other eight employees. The AEU submits that without further information about the nature of the work and employment arrangements for all 11 employees, we cannot make a proper consideration of whether these employees are ‘award covered employees’ to make an assessment of the factors prescribed in sub-item 9. While it may be assumed that all employees are covered by the Agreement, if any are performing other duties that may be covered by a different instrument, there may be an issue about coverage. We agree with the AEU submission and find that we cannot be satisfied that subitem (9) is satisfied and so cannot extend the default period for the Agreement under subitem 6(a).

[87] LSVs’ response to the application gives rise to uncertainty in the coverage of the Agreement to employees. This combined with the factors already referred to in this decision going to reasonableness lead us to be satisfied that it is reasonable in the circumstances to extend the default period for the Agreement.

[88] We will extend the default period for the Agreement under subitem 6(b) until 6 December 2024.

McCallum Disability Services Disability Services Victoria (Part 1) Collective Agreement 2008 (AC314629)

[89] McCallum Disability Services (MDS) is the employer covered by the *McCallum Disability Services Disability Services Victoria (Part 1) Collective Agreement 2008*. McCallum operates a business with a total of 555 employees. Only 41 of those employees work in the Community Connections area of the business and are employed pursuant to the AEU Agreement which is subject of this Application.

[90] MDS provides a number of services. It provides supported employment work opportunities for people with disabilities. It has 256 employees in this part of the business. These employees are employed pursuant to the *Supported Employment Services Award 2020*. There are 53 employees whose work is providing support to individuals in homes and they are employed pursuant to the SCHADS Award. MDS has 160 employees who work in residential accommodation support worker and team leader roles providing residential support and independent living services on a 24/7 roster and in related administration roles who are employed pursuant to two zombie agreements which are the subject of other applications to extend their default periods by the Health Services Union. MDS has 45 employees in other administration and management roles not covered by any Agreement.

[91] Of the 41 employees covered by the AEU Agreement, two are full time employees, 26 part time employees and 13 are casual employees. These employees work the following hours; 8.45am – 3.30pm Monday, Tuesday, Wednesday and Friday and 8.45am – 4.15pm on Thursdays. No work is performed on weekends or public holidays and overtime is rare.

[92] MDS provided a detailed analysis of the remuneration payable under the Agreement compared to the Award based on the hours worked and submitted that all employees would be financially worse off if the Agreements continue. In particular, MDS pointed to the casual employees who, due to the 20% loading under the Agreement, rather than 25% under the

Award, would be clearly better off if the Award applied - 13 of the 41 employees are casual employees. MDS's figures suggest that permanent employees will lose \$28.00 per week and casuals \$50 per week if the Agreement continues to operate. The \$28.00 a week for permanent employees arises because if the SCHADS Award applies then the first aid allowance of \$3.38 per shift will apply.

[93] The question of whether it is likely that, as at the time the application was 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 is finely balanced. Casual employees are not better off under the Agreement. Permanent employees, due to the more generous leave provisions, are better off under the Agreement. We find that taking the employees as a group subitem (9) is satisfied as on the ratio of permanent to casual staff more employees benefit from remaining on the Agreement. Consequently, we are satisfied that the award covered employees, viewed as a group, would be better off overall if the Agreement continued to apply than if the SCHADS Award applied.

[94] We are also of the view that it is otherwise appropriate to extend the default period. The circumstances accompanying this case include the attempts by the AEU to bring some uniformity to the sector in which the Agreement operates through its supported bargaining authorisation application and the desirability for certainty in the terms and conditions applying to MDS employees while those attempts are made. MDS submit that an extension of the Agreement will disrupt the steps it has taken to transfer employees to the SCHADS Award. Its preference is to make the coverage of industrial instruments across all of its operations as uniform as possible. We do not believe the administrative inconvenience associated with having to continue to afford the terms and conditions in the Agreement for a limited period outweighs other considerations, including the appropriateness of allowing the AEU to continue to attempt to negotiate a replacement agreement, whether that is through supported bargaining for a multi-employer agreement or otherwise.

[95] We will extend the default period for the Agreement under subitem 6(a) until 6 December 2024.

Conclusion

[96] For the foregoing reasons we have decided to extend the default period for each of the following agreements:

- *George Gray Centre Disability Services Victoria (Part 1) Collective Agreement 2008 (AC315057)*
- *Windarring ATSS Disability Services Victoria (Part 10) Enterprise Agreement 2005 (AG842110)*
- *Whittlesea District ATSS Disability Services Victoria (Part 1) Collective Agreement 2008 (AC315059)*
- *Milparinka Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005 (AG843654)*
- *Mirridong Services Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005 (AG847885)*
- *Asteria Services Inc Disability Services Victoria (Part 1) Collective Agreement 2008 (AC316003)*

- *Murray Valley Centre Disability Services Victoria (Part 1) Collective Agreement 2008 (AC318743)*
- *Distinctive Options Day Services Collective Agreement 2006-2009 (AC310793)*
- *Noweyung Ltd Disability Services Victoria (Part 1) Collective Agreement 2008 (AC314279)*
- *Moe Life Skills Community Centre Disability Services Victoria (Part 1) Collective Agreement 2008 (AC318158)*
- *McCallum Disability Services Disability Services Victoria (Part 1) Collective Agreement 2008 (AC314629)*

[97] We have decided to extend the default periods to 6 December 2024. We consider this long enough to deal with the matters raised in this decision. We expect that during that time the AEU will work cooperatively with the employers to address the issues raised in the applications. We also expect that the employers will take a cooperative approach in addressing the concerns raised by the union.

[98] The Agreements are published, in accordance with subitem 20A(10A)(c), on the Fair Work Commission's website and can be accessed through the hyperlinks in Schedule 1 to this decision.



DEPUTY PRESIDENT

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Schedule 1

Matter number	Enterprise Agreement Name	Publication ID
AG2023/4842	<i>George Gray Centre Disability Services Victoria (Part 1) Collective Agreement 2008</i>	<u>AC315057</u>
AG2023/4856	<i>Windarring ATSS Disability Services Victoria (Part 10) Enterprise Agreement 2005</i>	<u>AG842110</u>
AG2023/4828	<i>Whittlesea District ATSS Disability Services Victoria (Part 1) Collective Agreement 2008</i>	<u>AC315059</u>
AG2023/4847	<i>Milparinka Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005</i>	<u>AG843654</u>
AG2023/4848	<i>Mirridong Services Inc Disability Services Victoria (Part 1) Enterprise Agreement 2005</i>	<u>AG847885</u>
AG2023/4820	<i>Asteria Services Inc Disability Services Victoria (Part 1) Collective Agreement 2008</i>	<u>AC316003</u>
AG2023/4849	<i>Murray Valley Centre Disability Services Victoria (Part 1) Collective Agreement 2008</i>	<u>AC318743</u>
AG2023/4836	<i>Distinctive Options Day Services Collective Agreement 2006-2009</i>	<u>AC310793</u>
AG2023/4854	<i>Noweyung Ltd Disability Services Victoria (Part 1) Collective Agreement 2008</i>	<u>AC314279</u>
AG2023/4844	<i>Moe Life Skills Community Centre Disability Services Victoria (Part 1) Collective Agreement 200</i>	<u>AC318158</u>
AG2023/4846	<i>McCallum Disability Services Disability Services Victoria (Part 1) Collective Agreement 2008</i>	<u>AC314629</u>

¹ [\[2023\] FWCFB 105](#).

² Id at [16].

³ Id at [17].

⁴ The clause numbers differed in the zombie agreements and the entitlement to professional development leave and program development days differed. One of the Agreements also has an additional week of annual leave referred to as supplementary annual leave.