BRIEFING NOTE

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Enterprise Agreement Termination

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Introduction

The Fair Work Act 2009 (Cth) **(FW Act)** allows for the termination of enterprise agreements which have passed their "nominal expiry date".[1]

The provisions allow a worker, their union or an employer covered by the agreement to apply to terminate their enterprise agreement. The provisions allow workers and their unions to terminate old agreements that no longer provide terms and conditions better than the relevant award, even if the employer doesn't agree. But they've also been used by employers to unilaterally seek termination of enterprise agreements and put workers back on the minimum safety net. Employers have even done this as a bargaining tactic to seek an advantage in negotiations for a replacement agreement.

The recently enacted Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 amends the FW Act to significantly limit the circumstances in which enterprise agreements can be terminated. Under the new provisions, it will be more difficult for employers to use the threat of agreement termination to gain an upper hand in bargaining. These changes became operative on 7 December 2022 and apply to any new applications that are made, as well as any applications which have not yet been determined by the Fair Work Commission (FWC).[2]

A short history of agreement termination

A pathway to the termination of agreements is not new. Termination of agreements was available under the Workplace Relations Act 1996 (which preceded the FW Act) both by agreement and when sought by one party but opposed by another.

The agreement termination provisions of the FW Act were initially received as providing a more balanced mechanism for the termination of enterprise agreements than its predecessor legislation. However, a series of FWC decisions changed the common understanding of those provisions. Those decisions traversed the full spectrum from:

[1] See FW Act ss 225-6; See also s 186(5) which provides that an enterprise agreement must specify a nominal expiry date that is no greater than 4 years after the date of approval; Note: An enterprise agreement will continue to operate after its nominal expiry date unless it is replaced by another agreement or terminated. Note: an enterprise agreement is defined by the FW s 12 as include a single-enterprise agreement as well as a multienterprise agreement.

[2] FW Act Sch 1 Part 13 Div 10 cl 65

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- Determining that agreement termination was not appropriate during a round of bargaining, for the effect it would have on workers' negotiating position;[3] to,
- Holding that current bargaining was no reason not to terminate an enterprise agreement;[4] to
- Considering agreement termination during a round of bargaining being appropriate precisely because it may alter workers' negotiating position and encourage further bargaining.[5]

Agreement Termination – Continuing Provisions

The FW Act provides that an enterprise agreement may be terminated by agreement between the employer and employees.[6] Agreement to do so is reached when a majority of employees vote in favour of agreement termination; this is followed by approval of the termination by the FWC.[7] This avenue for terminating enterprise agreements by agreement remains in place.

Agreement Termination – New Provisions - Overview

The FW Act s 225 allows an employee, union or employer covered by an agreement that has passed its nominal expiry date (NED) to apply to terminate that agreement. Section 226 sets out when the FWC must terminate an enterprise agreement when an application has been made. The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 puts in place a new FW Act s 226.

Unfairness or lack of coverage

Under the new provisions, the FWC must terminate an enterprise agreement that has passed its NED if it is satisfied that:

1. the continued operation of the agreement would be unfair to the employees covered by it; or;
2. the agreement does not cover any employees and is not likely to.

In summary, this means that the FWC can terminate an enterprise agreement that has passed its NED if the agreement is unfair to employees or there are no employees covered by it.

Viability

The new provisions also allow for the termination of an enterprise agreement that has passed its NED if all of the following apply:

1. The FWC is satisfied that the continued operation of the agreement would pose a significant threat to the viability of a business carried on by the employer;

[3] Tahmoor Coal Pty Ltd [2010] FWA 6468

[4] The FW Act currently provides that an enterprise agreement may be terminated by agreement between the employer and employees.6 Agreement to do so is reached when a majority of employees vote in favour of agreement termination; this is followed by approval of the termination by the FWC.7 This avenue for terminating enterprise agreements by agreement remains in place.

[5] AGL Loy Yang Pty Ltd [2017] FWCA 226.

[6] W Act Part 2-4 Div 7 Sub-div C

[7] FW Act Part 2-4 Div 7 Sub-div C

2. The FWC is satisfied that terminating the agreement would be likely to reduce the potential of terminations of employment of the employees covered by the agreement for the following reasons:
    a. The employer no longer requires the employee's job to be done by anyone, except due to ordinary and customary turnover of labour (redundancy); or
    b. Because of the insolvency or bankruptcy of the employer;
3. If the agreement contains terms providing entitlements relating to the termination of the employees' employment, the employer has given a guarantee of those entitlements; (as per s. 226A).

In summary, this means that if there are employees covered by the agreement, and its continued operation would not be unfair to them, the FWC must (in order to terminate the agreement) be satisfied that the agreement is a significant threat to the employer's viability and that terminating the agreement would prevent future job losses.

Common requirements

Whether an application to terminate an enterprise agreement that has passed its NED is made for reasons of unfairness, lack of coverage or on the grounds of viability, the FWC must:

1. Only terminate the enterprise agreement if it is satisfied that doing so is appropriate in all of the circumstances;
2. In deciding whether to terminate the enterprise agreement, have regard to:
    a. the views of:
        i. The employees (unless there are none);
        ii. each employee organisation;
        iii. each employer;

    covered by the agreement.

    b. Whether
        i. the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same group of employees as the existing agreement;
        ii. bargaining for the proposed enterprise agreement is occurring;
        iii. the termination of the existing agreement would adversely affect the bargaining position of the employees.

This means that no matter which reason is being relied on to terminate an agreement that has passed its NED, the FWC has to be satisfied that terminating the agreement is appropriate and must consider a range of factors, such as the views of workers and their unions, as well as the effect that termination of the agreement might have on employee's bargaining position.

Making an application to terminate an enterprise agreement

It is more conceivable that a union would make an application to terminate an enterprise agreement due to its continued operation being unfair to employees, or where there are no employees covered, than due to business viability (in these circumstances it is expected that the employer would make the application).

Unfairness

A union may wish to apply to terminate an enterprise agreement that has passed its NED if it leaves workers worse off than the relevant award. In this scenario, the union would argue that the continued operation of the agreement would be unfair to the employees covered by it.

Applications to terminate an enterprise agreement have succeeded under the previous legislative provisions in circumstances where the FWC is satisfied that "termination of the Agreement is likely to have a beneficial impact on the terms and conditions applicable to the relevant employees".[8] Whilst the legislation has changed, it should be argued that the new provisions (which contemplated fairness to the employees) more directly import this consideration than the previous legislation (which contemplated the circumstances of the employees). It should also be noted that unlike other provisions of the FW Act, the new provisions are concerned with fairness to employees as opposed to fairness between the parties.

It can readily be anticipated that considerations of fairness will heavily involve analysis of the terms of the enterprise agreement to be terminated against the terms and conditions (usually derived from the relevant award) that would otherwise apply. If employees would be better off under the relevant award than under their current agreement, a union would have a strong argument in relation to fairness (and one would have to consider why an application is brought if this is not the case).

Previous cases (again under the previous legislative provisions) have resulted in the termination of an enterprise agreement that has passed its NED where doing so would move workers onto conditions under the relevant award that were overall superior.[9] The FWC is not required to conduct the Better Off Overall Test (BOOT) in relation to an agreement termination.10[10] However, given the similarity of the considerations at play, a similar exercise could be persuasive. Conducting the BOOT involves identifying:

- the relevant modern award;
- which terms in the agreement are more beneficial than the award;
- which terms of the award are more beneficial than the agreement;
- which terms of the award are not in the agreement.

and using this to make an overall assessment.

Where a union is able to show that an award which would otherwise apply provides more beneficial terms and conditions than an enterprise agreement that has passed its NED, this should present a compelling case for termination.

Lack of Coverage

Where an enterprise agreement that has passed its NED no longer covers any workers and is not likely to, this should present a fairly uncontroversial reason for termination.[11] The exception to this would be where there is a factual contest as to whether or not the agreement is likely to cover employees in the future (see further Unfairness or lack of coverage).

[8] Shop, Distributive and Allied Association [2022] FWCA 3035 at [19]

[9] Cairns Bus Charters Enterprise Bargaining Agreement 2014 [2022] FWCA 1390 at [29]; See also Nielsen's Transport Pty Ltd, Concrete Agitator Drivers Enterprise Agreement [2022] FWCA 1869 at [21]

[10] Concrete Agitator Drivers Enterprise Agreement [2022] FWCA 1869 at [21].

[11] See e.g. Shop, Distributive and Allied Union [2022] FWCA 3627, however note: in this case it appeared that the employer had ceased trading entirely.

Responding to an application

Unfairness or lack of coverage

It's unlikely that an employer would apply to terminate an agreement that was unfair to employees. However, it is conceivable that an employer could mount this argument for their own purposes. The same arguments (albeit the reverse thereof) would apply whether the union or the employer was the applicant (see Unfairness).

Viability

The main ground that an employer would be expected to rely on is business viability.

To make out their case, an employer would need to show:

- Continued operation of the agreement poses a "significant threat" to the "viability" of a business carried on by the employer (note: this could be an associated business);
- Terminations of employment due to redundancy or insolvency are less likely if the agreement is terminated.

Viability, in the business context, appears to be existential, rather than qualitative. Accordingly, in responding to an employer application, unions should put the employer to the task of proving that the continued operation of the agreement would have such a significant effect on the employer's business as to threaten its very ability to remain a going concern.

The employer would also need to show that redundancies are likely but would be less likely if the agreement were terminated. Once again, this should be the subject of evidence, not speculation or assertion.

Unions should also carefully scrutinise the employer's guarantee of termination entitlements to ensure that it satisfies the legislative requirements as per new s 226A.

Guarantee of Entitlements

If an employer presses "viability" as its grounds for application, it is now required to give a guarantee of termination entitlements if the agreement contains terms providing entitlements relating to the termination of employees' employment.[12] FW Act s 226A sets out what is required in relation to a guarantee of termination entitlements.[13] The guarantee is an undertaking that the employer will comply with any terms of the agreement (as if it were still in operation) that relate to termination of employment due to redundancy or insolvency.[14] The guarantee must be in writing and comply with any requirements set out in the regulations.[15] It comes into force when the agreement is terminated and remains in force:

- If the FWC has set a period of operation which it considers appropriate, that period;[16]
- Until another enterprise agreement, covering the same or substantially the same group of workers, comes into operation; [17] or

[12] FW Act s 226(1)(c)(iii)

[13] FW Act s 226A

[14] FW Act ss 226A(1)(a), 226A(3)

[15] FW Act s 226(1)(b)-(c)

[16] FW Act ss 226A(4)(b)(i), 226A(5)

[17] FW Act s 226A(b)(ii)

- For a maximum of 4 years (from when it is given) otherwise.[18] Unions should carefully scrutinise any guarantee of termination entitlements given by the employer to ensure that it complies with the legislative requirements. The guarantee of termination entitlements is directed squarely at redundancy and insolvency-related entitlements – although this could include non-monetary entitlements, such as consultation, also. Other terms and conditions such as wages etc. are not captured (for undertakings generally, see Undertakings).

Consideration for any application

Applicant

A union is only eligible to apply to terminate an enterprise agreement that has passed its NED if it is covered by that agreement.[19] If the union is not covered by an agreement, an employee who is covered will need to make the application with the union's assistance.

Circumstances

The FWC is required to consider whether termination is appropriate "in all of the circumstances".[20] Consideration of the circumstances of the employees or the union is clearly encompassed by this.[21]

The more extensive evidence that a union can marshal in relation to the effects of terminating an enterprise agreement (whether it is positive or negative), the more likely they will be able to persuade the FWC of their case. Evidence should be lead from multiple employees that goes to the effects, including the financial effects in particular, that agreement termination would have. Evidence should also be lead from union officials as to the effect that termination will have on the union, particularly on any organising and health and safety rights, and any factors relevant to the industry or the employer. Finally, strong consideration should be given to the role of expert witnesses, particularly with respect to interrogating the employer's evidence in relation to viability.

Bargaining

Unlike the predecessor legislation, the new provisions do evince an intention to avoid agreement termination being used by employers to gain an advantage in bargaining. The explanatory memorandum makes clear that the intention of the new provisions is to avoid the disruption of bargaining through the threat of agreement termination. [22]

Views

An agreement termination application presents both an organising imperative and opportunity. Unions will need to present evidence of the views of employees, as well as their own view. However, and perhaps unsurprisingly, this will usually do not much more than offset the views of the employer. This said, there is organising value in gathering the views of employees as part of a broader campaigning strategy.

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[18] FW Act s 226A(b)(iii)

[19] FW Act s 225(c)

[20] FW Act s 226(1A)

[21] Note: The previous provisions made specific reference to the circumstances of employees and their union coming within consideration of all of the circumstances. The new provisions do not explicitly do this, but it may be strongly argued that this is the legislative intent, as supported by (e.g.) new ss 226(1)(a) and 226(4)

[22] Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 at [649]-[662]

Undertakings

Some employers seeking to terminate their enterprise agreement have given "undertakings" to the effect that they will continue to provide certain terms and conditions from the enterprise agreement following its termination. Notwithstanding concerns about its legal enforceability, the giving of such undertakings has been taken into account by the FWC in determining applications to terminate agreements.[23] The new provisions now require employers to give a guarantee of certain termination related entitlements (see Guarantee of Entitlements). If an employer elects to provide an undertaking in relation to other entitlements, unions should be prepared to question the enforceability of their doing so (Aurizon notwithstanding) and the extent to which the FWC should take this into account in their decision-making under the new statutory framework.

Other Industrial Avenues

If a union is considering making an application to terminate an enterprise agreement that has passed its NED, or is responding to an application, it should also consider its other industrial options, especially under the recent changes to the FW Act. All of the current options – bargaining for a new agreement, industrial action, bargaining disputes etc. – remain available, but there are some new options available also. Under the new provisions, multi-employer bargaining will soon be more available through the single interest and supported bargaining streams. These bargaining streams provide an alternative to bargaining with a single employer that could be used in lieu of an agreement termination application, or to replace an agreement which has been terminated. The new provisions also allow for unions to initiate bargaining for a new agreement where an existing agreement is in operation and passed its NED less than 5 years ago. This could provide a way of initiating bargaining that can be used where there is confidence that a replacement agreement can be secured. Another option to consider is the new provisions allowing for the FWC to arbitrate over bargaining where agreement cannot be reached. If bargaining has been occurring for an extended period but agreement is unlikely to be reached, taking steps toward obtaining an intractable bargaining order could be an alternative to seeking the termination of an existing enterprise agreement or a strategy to secure a new agreement even if the current one is terminated. Unions should also take into account the possibility that employers might pursue this avenue.

Making the most of new laws

The laws relating to termination of enterprise agreements have now changed significantly. However, changing the words of the FW Act isn't the end of the story. The true application of the new legislative provisions will not be fully determined until they have been tested by the FWC, and potentially the courts (see A short history of agreement termination). This means that it's really important that the union movement selects and runs cases which support our preferred interpretation of the legislation and defend against cases which do not. Making sure that we run the best "test cases" to make sure the laws are operating for working people will require careful coordination and information sharing across the union movement.

Some of the key questions of interpretation that will guide how the new laws operate include:

- What constitutes a significant threat to "viability"? (see Viability)

[23] See e.g. Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd [2015] FWCFB 540 at [111]

- How far do the new protections for employees during bargaining extend? (see Bargaining)
- When is an agreement "unfair" to employees? (see Unfairness)
- What other circumstances should the FWC consider? (see Circumstances)

One case that is already making its way through the FWC is an application by Svitzer Australia to terminate its enterprise agreement. This application was made prior to the introduction of the new laws but has not been determined yet, which means that it will be decided according to the new provisions. This makes it the first key test of the new legislation. The ACTU has intervened in support of its affiliates, who are opposing the termination of the enterprise agreement.[i]

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[i] *The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement.*