

“Zombie” Agreements

14 February 2023, **BN13**

Introduction

When the *Fair Work Act 2009 (Cth)* (**FW Act**) was introduced over a decade ago it brought in new standards for agreements, designed to ensure that those agreements did not undercut the statutory minimum. The changes applied to any new agreements that were made, but a lot of agreements that were already in place, including those made under “WorkChoices” remained in force. Some of these agreements are still in place, having lingered in existence since that time – these are called “Zombie Agreements”.

Recent changes to the FW Act became operative from 7 December 2022¹ mean that any of these agreements which remain in force will automatically “sunset” (meaning they terminate) at the end of 6 December 2023.² A worker, union or employer covered by one of these agreements may apply to maintain its operation beyond 6 December 2023.³

“Zombie” Agreements

“Zombie” agreements or “agreement-based transitional instruments” are agreements which were made under the predecessor to the FW Act or during the FW Act “bridging period” and remain in operation today, pursuant to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (FW Transitional Act). FW Transitional Act Sch 3 cl 5 provides the following list of agreement-based transitional instruments which survive by virtue of that schedule:

- workplace determinations (formed under the predecessor legislation);
- preserved collective State agreements;
- pre-reform certified agreements;
- old IR agreements;
- section 170MX awards
- ITEAs;
- preserved individual State agreements;
- AWAs;

¹ For a full list of the operative dates of all parts of the Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 see <https://www.fwc.gov.au/about-us/news-and-media/news/information-about-secure-jobs-better-pay-act-2022-changes>

² Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (FW Transitional Act) Sch 3 cl 20A; Acts Interpretation Act 1901 (Cth) s 36(1), https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6941

³ FW Transitional Act Sch 3 cl 20A(4)

- pre-reform AWAs.

As agreement-based transitional instruments have effectively been frozen since at least 2009, it is likely that many have terms and conditions significantly worse than the applicable award.⁴

The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 amends the FW Transitional Act to provide that agreement-based transitional instruments (“Zombie” Agreements) will terminate at the end of a twelve month “grace period” which starts on the day that the provisions commenced, being 7 December 2022, concluding on 6 December 2023.⁵

Employer Obligation to Notify Workers

Any employer who is covered by an agreement-based transitional instrument must notify each employee covered by that instrument of the following on or before 6 June 2023:⁶

- That the employee is covered by an agreement-based transitional instrument; and
- That, absent of an application being made, the instrument will terminate at the end of the 12-month grace period; and
- The day on which the relevant part (and the grace period) commences.

An employer’s failure to comply with this requirement to notify workers makes them liable for a civil penalty.⁷ Accordingly, unions should monitor for compliance and take action as necessary.

Applications to Extend

An employee, union or employer covered by an agreement-based transitional instrument may, prior to the end of the grace period, apply to extend the operation of an agreement-based transitional instrument for up to 4 years.⁸

The FWC may grant the application if it is satisfied that:⁹

- Bargaining has commenced and is underway for a proposed agreement which will cover the relevant employee/s;¹⁰ or
- The agreement is an individual agreement and the employee would be better off under the agreement than under the award;¹¹ or
- The agreement is a collective agreement and the employees, viewed as a whole, would be better off under the agreement than under the award;¹²

⁴ “Zombie” agreements cannot provide a base rate of pay below the base rate in the applicable Award, but can otherwise have lesser terms and conditions, including on loadings and penalties.

⁵ FW Transitional Act Sch 3 cl 20A

⁶ FW Transitional Act Sch 3 cl 20A(3); Acts Interpretation Act 1901 (Cth) s 36(1), https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6941

⁷ FW Transitional Act Sch 16 cl 4C

⁸ FW Transitional Act Sch 3 cl 20A(4)

⁹ FW Transitional Act Sch 3 cl 20A(6)

¹⁰ FW Transitional Act Sch 3 cl 20A(7)

¹¹ FW Transitional Act Sch 3 cl 20A(8)

¹² FW Transitional Act Sch 3 cl 20A(9)

and it is otherwise appropriate to do so.

The FWC may also grant the application if it is satisfied that it is reasonable in the circumstances to do so.¹³

Making an Application

There are some situations in which a union may seek to apply for an extension to the operation of an agreement-based transitional instrument. These are primarily, where bargaining is occurring (to ensure a smooth transition from one set of conditions to another) or where the employee/s is genuinely better off under their existing conditions than they would be under the relevant award. In these latter circumstances, the union should be prepared to lead evidence similar to that which might be led (in relation to the BOOT) during an agreement approval process (noting also the differences between the two tests). This would involve 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.

Dealing with an Application

A number of employers may seek to make applications extending the life of their “zombie” agreements – particularly where these agreements secure a competitive advantage for them through lower terms and conditions.

Unions will need to respond to the specific grounds of the application and marshal evidence accordingly. Dealing with an application, and gathering evidence, will also provide organising opportunities through ensuring that workers are aware of how the application will affect them and are ready to take action in support of better wages and conditions.

If an employer makes an application contending that workers will be better off under the existing arrangements than the relevant award, unions should be prepared to counter this if they do not agree. The exercise will be similar, but not identical to a BOOT analysis (see Making an Application).

If the employer relies on current bargaining as the reason for an extension, a key area of contest could be whether “bargaining is occurring” at the time the matter is considered (i.e. not merely that it has commenced).¹⁴

The final ground that extending the operation of the agreement is “reasonable in the circumstances” is more nebulous.¹⁵ Unions should be prepared to lead evidence as to the effect of continued operation on workers, conditions present in the industry, comparison to entitlements arising under the award and the fact that employers have had sufficient notice to prepare for the agreement’s termination.

¹³ FW Transitional Act Sch 3 cl 20A(6)

¹⁴ FW Transitional Act Sch 3 cl 20A(7)

¹⁵ See FW Transitional Act Sch 3 cl 20A(6)(b)

Other Options

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. This includes existing 14 FW Transitional Act Sch 3 cl 20A(7) 15 See FW Transitional Act Sch 3 cl 20A(6)(b) provisions under the FW Transitional Act, which provide for the termination of Zombie Agreements, remain in force and may be used to apply for termination prior to the sunseting date.

Under the new provisions, multi-employer bargaining will be more available through the single interest and supported bargaining streams from 6 June 2022. 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 nominal expiry date 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.ⁱ

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(s).*