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EMPLOYMENT, WORKPLACE RELATIONS & SAFETY

Countdown to the End of Zombie Agreements: Is Your Business Compliant?

By Ben Duggan & Nicholas De Pasquale

Late last year, the Albanese Labor Government secured the passage of the *Secure Jobs, Better Pay reforms*¹ to the Fair Work laws.²

An aspect of the reforms is a sunset date of 7 December 2023 for industrial instruments approved prior to the commencement of the Fair Work laws, at which time these old instruments will terminate.

The union movement has long campaigned for a sunset date for these industrial instruments, many of which were made during the Work Choices era, that are now all older than a decade.

Earlier, the union movement was disappointed that the Labor Government under Prime Minister Rudd did not include a sunset date for these industrial instruments when they enacted the Fair Work laws.

The Labor Government's introduction of a sunset date for these industrial instruments, referred to as 'zombie agreements', shall remove one of the last vestiges of Work Choices.

An ability has been provided under the reforms for the [Fair Work Commission \(FWC\)](#) to extend the operation of a zombie agreement beyond the sunset date in certain limited circumstances.

Employers are also required to provide their employees

¹ Formally the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.

² Formally the *Fair Work Act 2009*.

covered by a zombie agreement with information about the agreement, including its sunset date, by no later than 6 June 2023.

What are zombie agreements?

A zombie agreement is an old industrial instrument between an employer and its employee(s) which was entered into before the commencement of the Fair Work laws.

Many of these industrial instruments are dormant, created under earlier workplace laws that were repealed many years ago.

The most common types of zombie agreements include the following:

- Collective agreements;
- Workplace agreements; and
- Australian Workplace Agreements.

Australian Workplace Agreements, or AWAs as they became known, were an individual form of industrial instrument that could be entered into between an employer and a single employee under WorkChoices.

Do you have a zombie agreement?

Many employers have employees who are still bound to zombie agreements. Some employers might not even know of the existence of an old industrial instrument applying to their workforce.

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Obtaining information about zombie agreements can be challenging as they are not always accessible to the public. However, the FWC has published a list of potential zombie agreements that can be found [here](#)³. Please note that it is not an exhaustive list, but the FWC is updating it weekly to ensure the list is as comprehensive as possible. Therefore, employers with concerns regarding agreements pertaining to their workers are advised to seek guidance by the 6 June 2023 deadline.

What lies ahead?

Before introducing the *Secure Jobs, Better Pay* reforms, a zombie agreement could only cease to apply if it was either replaced by a new enterprise agreement or terminated by order of the FWC.

The recent lack of interest in bargaining for new enterprise agreements has meant many of these agreements continue to apply at workplaces across Australia.

Currently, the FWC has identified over 100,000 zombie agreements that will automatically terminate on 7 December 2023 unless an extension is approved by the FWC.

Without an extension or a replacement enterprise agreement, employees covered by zombie agreements will automatically revert to being covered by the relevant Modern Award.

What are employers obligations under the *Secure Jobs, Better Pay* reforms?

Employers must provide a written notice to each employee covered by the zombie agreement by no later than 6 June 2023.

The written notice must notify the employee of the following information:

1. The employee is covered by a zombie agreement;
2. The zombie agreement shall, unless an application to extend the agreement is made to the FWC, within 12 months of the commencement of the *Secure Jobs, Better Pay* reforms; and
3. The date of commencement of the *Secure Jobs, Better Pay* reforms is 7 December 2022.

³ <https://www.fwc.gov.au/agreements-awards/enterprise-agreements/sunsetting-zombie-agreements/our-list-possible-zombie>

An employer that fails to notify relevant employees in this manner will breach their employer obligations under the Fair Work laws.

Applying for an extension

Employers⁴ are permitted to request an extension of a zombie agreement under the *Secure Jobs, Better Pay* reforms.

An employer must submit an application to the FWC for an extension.

The FWC will approve an extension where either:

1. 'it is reasonable in the circumstances'; or
2. it is otherwise appropriate, and either of the following general circumstances exists:
 - bargaining is taking place for an enterprise agreement; or
 - an employee or the workforce would be better off overall under the zombie agreement than the Modern Award (which would apply if the agreement was to terminate).

The FWC has not yet provided any guidance on the criteria it will use to determine if the circumstances outlined in an application to terminate a zombie agreement 'are reasonable'.

A starting point is likely to be a comparison between the terms and conditions of the zombie agreement and those of the Modern Award that would apply if the agreement was to terminate. Other factors could be the history of bargaining between the employer and the workforce and the extent to which the zombie agreement refers to industrial concepts, rights or obligations from earlier workplace laws that have been repealed.

In the absence of such guidance from the FWC, employers will need to wait for the publication of decisions to gain better clarity as to what will be 'reasonable in the circumstances' to justify an extension of a zombie agreement.

If the FWC does grant the application, the zombie agreement may be extended for up to 4 years.

⁴ As well as employees and industrial associations which includes unions.

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Key message for employers

The sun setting of dormant zombie agreements will mean that employers will need to consider their options which include whether they apply for an extension of their zombie agreement.

We recommend employers carefully weigh their options in response to this altered workplace landscape before issuing written notices to be done by 6 June 2023.

If you require guidance on the available options, please feel free to contact one of our employment law specialists. Additionally, we will keep you updated on any notable FWC decisions that offer further clarification in this area.



MORE INFO

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