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Workplace relations policy and research paper

Termination of enterprise agreements

19 August 2022

Introduction

The public debate about whether any changes are warranted to the provisions of the *Fair Work Act 2009* (FW Act) concerning the termination of enterprise agreements, needs to be based on the facts.

This paper reports on an analysis by Actus Workplace Lawyers of Fair Work Commission (FWC) decisions in 2020, 2021 and 2022 to terminate enterprise agreements with nominal expiry dates between 1 January 2020 and 1 August 2022.

The analysis shows that of 95 enterprise agreements that were terminated by the FWC in 2020, 2021 and 2022 with nominal expiry dates between 1 January 2020 and 1 August 2022, **97% (92 applications) were not contested by any party.**

Of the 3 applications which were opposed by one or more unions, two of the agreements did not apply to any employees and, in the other case, the FWC was satisfied that the employees covered by the agreement would not lose any entitlements.

More than 50% of the 95 FWC decisions refer to the application to terminate the agreement being brought to the attention of one or more unions. In 94% of these cases, the union/s either supported the termination of the agreement or did not oppose the termination.

Given the facts, there is no justification for amending the FW Act to impose any further limits on the ability of a party to apply to the FWC for the termination of an enterprise agreement.

Relevant provisions of the FW Act

An application to terminate an enterprise agreement can be made under either section 222 or 225 of the FW Act.

An application under section 222 can only be made by agreement between the employer and employees covered by the agreement. Given that the termination is by agreement, the application can be made either before or after the nominal expiry date of the enterprise agreement.

An application under section 225 can be made by the employer, an employee or a union covered by the agreement, and can only be made after the nominal expiry date of the agreement. The FWC can only terminate an enterprise agreement under section 225 if:

- The Commission is satisfied that it would not be contrary to the public interest to terminate the agreement; and
- The Commission is satisfied that it is appropriate to terminate the agreement taking into account all the circumstances including the views of, the circumstances of, and the likely effects on, the employees, the employer and each union covered by the agreement.

The number of applications to terminate enterprise agreements has fallen over recent years

It can be seen from the following information extracted from the FWC's annual reports that the number of applications to terminate enterprise agreements have fallen since 2015. The number of section 222 applications peaked in 2018/19 and the number of section 225 applications peaked in 2017/18.

Applications under section 222 of the FW Act	
Year	Number of applications
2015-16	92
2016-17	97
2017-18	130
2018-19	221
2019-20	57
2020-21	60

Applications under section 225 of the FW Act	
Year	Number of applications
2015-16	311
2016-17	303
2017-18	388
2018-19	263
2019-20	323
2020-21	270

Analysis of recent FWC decisions to terminate enterprise agreements

On 17 August 2022, Actus Workplace Lawyers carried out a search of FWC decisions in 2020, 2021 and 2022 to terminate enterprise agreements with a nominal expiry date between 1 January 2020 and 1 August 2022. These decisions were located through entering the relevant search criteria into the search function on the FWC's website.

Each of the decisions identified through the FWC's search function were reviewed. Any decisions that did not fit the search criteria were excluded (e.g. because the decision related to the approval of an enterprise agreement, not the termination of an agreement, or the date of the decision and/or nominal expiry date was not within the relevant date range).

The search identified 93 decisions relating to enterprise agreements that were terminated by the FWC in 2020, 2021 and 2022 with nominal expiry dates between 1 January 2020 and 1 August 2022. An additional two decisions handed down on 16 August 2022 were added.

Of the applications which resulted in the termination of the 95 enterprise agreements:

- **97% (92 applications) were not opposed by any party.**
- 3% (3 applications) were opposed by one or more unions. However, two of these agreements did not apply to any employees, and in the other case the FWC was satisfied that the employees covered by the agreement would not lose any entitlements
- 99% (94 applications) were made by the employer covered by the enterprise agreement.
- 1% (1 application) was made by an employee covered by the agreement.
- None of the applications were made by a union covered by the agreement.
- More than 50% of the decisions of the FWC to terminate the agreement (48 decisions) refer to the application being brought to the attention of one or more unions. In 94% of these cases (45 decisions), the union/s either supported the termination of the agreement or did not oppose the termination.

Some key features of the 95 FWC decisions are set out in **Annexure A**, together with weblinks to each decision.

Annexure A does not include any FWC decision rejecting an application to terminate an enterprise agreement. For example:

- On 9 August 2022, the FWC [rejected](#) an application by an employer under section 222 of the FW Act in the medical care industry to terminate an enterprise agreement with a nominal expiry date of 31 December 2021, following opposition being expressed by the Australian Workers Union.
- On 15 August 2022, the FWC [rejected](#) an application by a private international language school under section 222 to terminate an enterprise agreement with a nominal expiry date of 30 September 2021. The Independent Education Union of Australia opposed the termination.

This latest analysis by Actus Workplace Lawyers has yielded results with some similarity to an analysis carried out by the FWC five years ago. In a July 2017 [submission](#) to an inquiry by the Senate Education and Employment References Committee, the FWC reported that: “*Analysis of applications to terminate enterprise agreements in 2015–16 showed that less than 3 per cent of applications were contested*”.¹

The unions’ proposal to prevent employers applying to terminate an enterprise agreement while bargaining is underway is not supported by the facts

The union movement is urging the Labor Government to vary the FW Act to prevent employers applying to vary an enterprise agreement while bargaining is underway. However, the facts do not support the unions’ proposed amendments, nor do the facts identify any problems that exist with the current provisions in the Act.

There are obvious problems with preventing an employer applying to terminate an agreement at any time when bargaining is underway. Other than in very exceptional circumstances, the FW Act does not include any mechanism for bargaining to reach an end point. The good faith bargaining requirements continue indefinitely. Therefore, bargaining could be technically continuing 10 years after an agreement has expired.

¹ Submission 14, Paragraph 76.

Conclusion

A tiny proportion of applications to terminate enterprise agreements are opposed by any party and in a large proportion of cases the applications are expressly supported or not opposed by unions.

Further, the number of applications to terminate enterprise agreements has decreased over recent years.

Given the facts, there is no justification for amending the FW Act to impose any further limits on the ability of a party to apply to the FWC for the termination of an enterprise agreement.

Attachment A

FWC decisions terminating enterprise agreements with nominal expiry dates between 1 January 2020 and 1 August 2022

No.	Decision	Date of Decision	Nominal expiry date	Application made by	Was the application opposed?
1.	[2022] FWCA 2776	16 August 2022	1 March 2024	Employer	No (CEPU supported)
2.	[2022] FWCA 2769	16 August 2022	24 June 2023	Employer	No
3.	[2022] FWCA 2666	5 August 2022	30 June 2020	Employer	No (AMWU did not oppose)
4.	[2022] FWCA 2593	5 August 2022	27 November 2021	Employer	No (TWU did not oppose)
5.	[2022] FWCA 2516	26 July 2022	1 July 2022	Employer	No (CFMMEU did not oppose)
6.	[2022] FWCA 2517	26 July 2022	31 May 2022	Employer	No (AMWU did not oppose)
7.	[2022] FWCA 2512	26 July 2022	1 April 2022	Employer	No
8.	[2022] FWCA 2462	15 July 2022	31 August 2021	Employer	No
9.	[2022] FWCA 1802	1 June 2022	1 March 2022	Employer	No
10.	[2022] FWCA 1670	20 May 2022	31 December 2021	Employer	No (AMWU supported)
11.	[2022] FWCA 1647	19 May 2022	28 February 2022	Employer	No (AMWU supported)
12.	[2022] FWCA 1552	11 May 2022	31 December 2021	Employer	No (TWU, AWU & ANMF did not oppose)
13.	[2022] FWCA 1439	2 May 2022	31 March 2020	Employer	No (AWU did not oppose)
14.	[2021] FWCA 6099	4 October 2021	25 November 2020	Employer	No
15.	[2021] FWCA 5993	29 September 2021	3 July 2020	Employer	No
16.	[2021] FWCA 5901	21 September 2021	1 September 2021	Employer	No (UWU supported. AWU did not oppose)
17.	[2021] FWCA 5656	21 September 2021	31 December 2021	Employer	No (TWU did not oppose).
18.	[2021] FWCA 5869	17 September 2021	31 December 2020	Employer	No (IEU did not oppose)
19.	[2021] FWCA 5868	17 September 2021	31 December 2020	Employer	No (IEU did not oppose)
20.	[2021] FWCA 5846	15 September 2021	25 August 2021	Employer	No
21.	[2021] FWCA 5655	13 September 2021	30 June 2021	Employer	No (AMWU & UWU did not oppose)
22.	[2021] FWCA 5501	6 September 2021	30 June 2021	Employer	No (AMWU did not oppose)
23.	[2021] FWCA 5390	31 August 2021	1 July 2021	Employer	No
24.	[2021] FWCA 4666	20 August 2021	20 June 2020	Employer	No
25.	[2021] FWCA 5081	17 August 2021	2 July 2022	Employer	No (CFMMEU supported)
26.	[2021] FWCA 4869	12 August 2021	1 July 2021	Employer	No (TWU did not oppose)

No.	Decision	Date of Decision	Nominal expiry date	Application made by	Was the application opposed?
27.	[2021] FWCA 4568	29 July 2021	30 June 2021	Employer	No
28.	[2021] FWCA 4365	29 July 2021	31 May 2021	Employer	No
29.	[2021] FWCA 4232	29 July 2021	28 February 2021	Employer	No (SDA did not oppose)
30.	[2021] FWCA 4442	28 July 2021	10 May 2020	Employer	No (FSU did not oppose)
31.	[2021] FWCA 4370	23 July 2021	30 June 2020	Employer	No (AWU did not oppose)
32.	[2021] FWCA 4096	13 July 2021	30 June 2021	Employer	No
33.	[2021] FWCA 4033	13 July 2021	18 March 2021	Employer	No (AWU supported)
34.	[2021] FWCA 3862	7 July 2021	30 June 2021	Employer	No
35.	[2021] FWCA 3737	1 July 2021	31 December 2020	Employer	No
36.	[2021] FWCA 3574	1 July 2021	22 February 2021	Employer	No
37.	[2021] FWCA 3602	22 June 2021	25 March 2021	Employer	No
38.	[2021] FWCA 3505	18 June 2021	1 January 2021	Employer	No
39.	[2021] FWCA 3471	16 June 2021	4 October 2020	Employer	No (UWU did not oppose)
40.	[2021] FWCA 3372	11 June 2021	10 November 2020	Employer	No (AWU did not oppose)
41.	[2021] FWCA 3255	4 June 2021	6 July 2021	Employer	No
42.	[2021] FWCA 3117	31 May 2021	31 December 2020	Employer	No (CEPU did not oppose)
43.	[2021] FWCA 3063	27 May 2021	26 October 2020	Employer	No
44.	[2021] FWCA 457	20 May 2021	30 June 2020	Employer	Yes (CFMMEU opposed, but the agreement did not apply to any employees)
45.	[2021] FWCA 2600	10 May 2021	27 June 2020	Employee	No
46.	[2021] FWCA 2560	7 May 2021	30 June 2021	Employer	No
47.	[2021] FWCA 2447	4 May 2021	2 March 2021	Employer	No
48.	[2021] FWCA 2053	28 April 2021	2 September 2020	Employer	No (UWU supported)
49.	[2021] FWCA 2133	19 April 2021	31 March 2021	Employer	No
50.	[2021] FWCA 2042	15 April 2021	13 June 2021	Employer	No
51.	[2021] FWCA 1722	14 April 2021	1 March 2021	Employer	No
52.	[2021] FWCA 2003	13 April 2021	31 January 2021	Employer	No (TWU did not oppose)
53.	[2021] FWCA 456	2 March 2021	30 June 2020	Employer	No (CFMMEU did not oppose)
54.	[2021] FWCA 1052	26 February 2021	30 June 2020	Employer	No (UWU did not oppose)
55.	[2021] FWCA 235	19 February 2021	15 November 2020	Employer	Yes (IEU and UWU opposed, but the FWC was satisfied that the employees covered by the agreement would

No.	Decision	Date of Decision	Nominal expiry date	Application made by	Was the application opposed?
					not lose any entitlements)
56.	[2021] FWCA 735	12 February 2021	5 November 2021	Employer	No
57.	[2021] FWCA 587	5 February 2021	30 April 2021	Employer	No
58.	[2021] FWCA 345	25 January 2021	30 June 2020	Employer	No
59.	[2021] FWCA 226	18 January 2021	15 January 2022	Employer	No
60.	[2020] FWCA 6763	16 December 2020	5 November 2020	Employer	No (CFMMEU did not oppose)
61.	[2020] FWCA 6778	16 December 2020	30 September 2020	Employer	No (CEPU did not oppose)
62.	[2020] FWCA 6589	7 December 2020	31 December 2020	Employer	No
63.	[2020] FWCA 6574	7 December 2020	1 November 2020	Employer	No (AMWU and CEPU did not oppose)
64.	[2020] FWCA 6471	2 December 2020	15 October 2020	Employer	No
65.	[2020] FWCA 6360	30 November 2020	30 June 2020	Employer	No (AMWU and AWU did not oppose)
66.	[2020] FWCA 6358	30 November 2020	30 June 2020	Employer	No (CFMMEU did not oppose)
67.	[2020] FWCA 6189	19 November 2020	31 July 2020	Employer	No
68.	[2020] FWCA 6121	13 November 2020	5 February 2020	Employer	No
69.	[2020] FWCA 5944	9 November 2020	13 August 2021	Employer	No
70.	[2020] FWCA 5967	6 November 2020	4 July 2020	Employer	No
71.	[2020] FWCA 5895	5 November 2020	23 October 2020	Employer	No (UWU did not oppose)
72.	[2020] FWCA 5902	4 November 2020	19 October 2020	Employer	No
73.	[2020] FWCA 5874	3 November 2020	1 March 2021	Employer	No
74.	[2020] FWCA 5873	3 November 2020	1 March 2021	Employer	No
75.	[2020] FWCA 5539	16 October 2020	28 February 2021	Employer	No
76.	[2020] FWCA 5355	7 October 2020	30 April 2020	Employer	No
77.	[2020] FWCA 5101	2 October 2020	9 May 2020	Employer	Yes (CFMMEU opposed, but the agreement did not apply to any employees)
78.	[2020] FWCA 4952	15 September 2020	25 May 2020	Employer	No
79.	[2020] FWCA 4405	20 August 2020	13 July 2020	Employer	No
80.	[2020] FWCA 3826	18 August 2020	30 June 2020	Employer	No (UWU supported)
81.	[2020] FWCA 4261	12 August 2020	1 July 2020	Employer	No (AWU did not oppose)
82.	[2020] FWCA 3997	10 August 2020	14 June 2022	Employer	No (RTBU did not oppose)
83.	[2020] FWCA 4048	3 August 2020	30 June 2020	Employer	No (NSWNMF and HSU did not oppose)
84.	[2020] FWCA 4020	31 July 2020	30 June 2020	Employer	No
85.	[2020] FWCA 3192	18 June 2020	5 April 2020	Employer	No (UWU did not oppose)

No.	Decision	Date of Decision	Nominal expiry date	Application made by	Was the application opposed?
86.	[2020] FWCA 3070	12 June 2020	30 June 2020	Employer	No (AWU did not oppose)
87.	[2020] FWCA 2699	22 May 2020	30 June 2020	Employer	No
88.	[2020] FWCA 2529	15 May 2020	3 March 2020	Employer	No
89.	[2020] FWCA 2427	8 May 2020	2 February 2020	Employer	No (TWU supported)
90.	[2020] FWCA 2034	20 April 2020	31 March 2020	Employer	No (CFMMEU supported)
91.	[2020] FWCA 1811	6 April 2020	16 January 2020	Employer	No (UWU did not oppose)
92.	[2020] FWCA 1517	20 March 2020	14 June 2020	Employer	No
93.	[2020] FWCA 1380	13 March 2020	31 March 2021	Employer	No (CEPU supported)
94.	[2020] FWCA 1345	13 March 2020	3 January 2022	Employer	No
95.	[2020] FWCA 1018	15 February 2020	31 March 2021	Employer	No (CEPU supported)

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