



# Zombie Agreements – The Demise of the Living Dead

On 2 December 2022, the Federal Government passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) (**Bill**). On 6 December 2022, the Bill received royal assent and became the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJ BP Act**).

Key changes being introduced as a result of the new SJ BP Act include:

- multi-employer bargaining;
- broader powers of Fair Work Commission (**FWC**) to intervene in workplace determinations;
- enterprise agreement approval process (BOOT and pre-approval requirements)
- pay equity: equal remuneration orders and prohibition on pay secrecy clauses
- restrictions to fixed/maximum term contracts
- expanded scope for flexible working arrangements
- sexual harassment and discrimination; and
- sunseting of ‘zombie agreements’.

In this article we will be focusing on the demise of the living dead, being the end to agreements which were made prior to the commencement of the *Fair Work Act 2009* (Cth) (**FW Act**), have long since passed their nominal expiry dates, but continue to operate today - more commonly known as ‘zombie agreements’ (**Zombie Agreements**).

Zombie Agreements:

- were made prior to 2009 or during the bridging period under the FW Act (1 July to 31 December 2009);
- have nominally expired but remain operational;
- usually include references to ‘pre-modern awards’, now-outdated legislation and tribunals (eg the Australian Industrial Relations Commission);
- are usually titled as a ‘collective agreement’ or ‘workplace agreement’; and

- most significantly merely require that an employee be paid no less than the minimum base rate of pay to the corresponding modern award.

Most Zombie Agreements contain terms and conditions of employment that are considered much less favourable to employees when compared with the provisions of the current modern awards and enterprise agreements. Under Zombie Agreements employers are only legally required to pay a flat base rate of pay which must not fall below the base rate of pay in the modern award, however, this rate of pay excludes penalties, overtime or allowance provisions, and for casual employees, can include a lower rate of casual loading.

## The Demise of Zombie Agreements

With the introduction of Part 13 of the SJ BP Act, Zombie Agreements will automatically expire on 7 December 2023.

## Employer Notification Obligations

Employers currently operating under a Zombie Agreement must:

- provide written notice to covered employees on or before 6 June 2023, informing employees that:
  - they are covered by a Zombie Agreement;
  - on 7 December 2022, the sunset provisions regarding Zombie Agreements came into effect;
  - unless an application is made to extend the Zombie Agreement’s termination date, the Zombie Agreement will automatically terminate on 7 December 2023; and
  - with effect 7 December 2023 the terms of the applicable modern award will cover the employee’s employment (unless a new enterprise agreement is negotiated and approved by the FWC).

### Disclaimer

The information contained in this update is intended as a guide only. Professional advice should be sought before applying any of the information to circumstances. While every reasonable care has been taken in the preparation of this update, Law Ensure (ACN 168 990 261) does not accept liability for any errors it may contain.

## Employer Requests for Extension

Employers (and employees and industrial associations) can seek an extension from the FWC for the continued operation of the Zombie Agreement, for a further period of up to four years, however, extensions will only be granted if the:

- request for the extension is made with the FWC on or before 6 December 2023; and
- FWC is satisfied that:
  - the relevant employees, viewed as a whole, would be better off overall (ie passing the 'Better Off Overall Test' - the BOOT) under the Zombie Agreement than under the relevant applicable modern award (or under a new enterprise agreement applied for), and it is otherwise appropriate to extend; or
  - it is reasonable in the circumstances to extend the life of the Zombie Agreement.

In most cases it would appear unlikely that these conditions will be satisfied, given most Zombie Agreements would fail a modern BOOT assessment and that there is a 12 month period in which an employer can commence bargaining and lodge an application with the FWC for the approval of a new enterprise agreement. Accordingly, employers with Zombie Agreements should immediately start planning their future industrial arrangements, giving consideration to negotiating a new enterprise agreement or reverting to coverage and adherence to the relevant applicable modern award.

## Do You Need Help?

If you are unsure if your organisation is currently covered by a Zombie Agreement, or would like support or advice concerning your strategy or assistance negotiating a new enterprise agreement, call us today and we can guide you through every step of the process, including:

- providing assistance to gain a clear understanding of the strengths and weaknesses of the existing Zombie Agreement, and benchmarking proposed terms and conditions against similar businesses and current FW Act compliant enterprise agreements;
- businesses and current FW Act compliant enterprise agreements;

- training managers in negotiation and agreement making;
- managing the entire process, including drafting, lodging and implementing agreements;
- providing new enterprise agreement based employment agreements; and
- ensuring compliance with new obligations, including the duty to bargain in good faith, passing the BOOT, the Fair Work Information Statement and the Casual Employment Information Statement, and adhering to strict new procedures and rules.

In our next article we will discuss other key SJ BP Act changes, including, multi-employer bargaining, pay equity (equal remuneration orders and prohibition on pay secrecy clauses), restrictions to fixed/maximum term contracts, expanded scope for flexible working arrangements, and sexual harassment and discrimination.