Expired Enterprise Bargaining Agreements (EBAs): Operation and Recommendations

CRISPIN LAW

Newsletter

June 2024: Issue 2

In this Newsletter, we delve into a discussion of enterprise bargaining agreements (EBAs). In particular, we will focus on the operation of EBAs once and after they reach their nominal expiry date. As part of our discussion, we consider the roles of the CFMEU and the Fair Work Commission and how they relate to expired EBAs.

Introduction: What Are EBAs and Why Are They Important?

Enterprise bargaining agreements, also commonly referred to as 'enterprise agreements', is an 'agreement made at the enterprise level that contains terms and conditions of employment, including wages, for a period of up to 4 years from the date of approval'.[1]

Section 172(1) of the *Fair Work Act 2009* (Cth) defines enterprise agreement as:

> '(1) An agreement (an *enterprise agreement*) that is about one or more of the following matters (the *permitted matters*) may be made in accordance with this Part:
>
> (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
> (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
> (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
> (d) how the agreement will operate.

Enterprise *bargaining* simply refers to the process of negotiations, with the goal of establishing an enterprise agreement.

Naturally, EBAs are important because it governs the terms and conditions of *employment*. It assists employers to tailor their employment conditions to their workplace, but also allows employees to be aware of what terms and conditions they are agreeing to, such as wages, working hours and leave entitlements. Many benefits of EBAs have been recognised, including: (a) enhanced productivity and efficiency in the sense that beneficial working arrangements are *mutually* established, (b) its collaborative nature because it allows working arrangements to be flexibly *negotiated*, (c) enabling employees to feel valued and motivated by involving them in the

[1] Fair Work Commission, 'What is an enterprise agreement?', *Enterprise agreements benchbook* (online) < https://www.fwc.gov.au/what-enterprise-agreement>.

 T +61 2 8042 8701 E admin@crisplaw.com.au

consultation or negotiation process, and (d) reliability as EBAs are legally binding agreements, and therefore has to comply with Australian workplace laws and/or other legal regulations.

Readers must note that there have been recent changes in rules regarding making enterprise agreements and multi-enterprise agreements, effective as of 7 June 2023. From 6 June 2023, there also have been changes to bargaining disputes and industrial action.[2]

EBAs in the Construction Industry

The CFMEU plays an important role in overseeing and/or regulating EBAs in the construction industry. The CFMEU – the Construction, Forestry and Maritime Employees Union – is a union connected to the building, construction, shipping, diving, timber, textile, clothing and footwear industries.[3] The union seeks not only to protect the health and safety standards in these industries, but also aims to protect employees' entitlements to decent wages and working conditions, and their rights under industrial and social laws.

For instance, 'Section 4 – Objects' of the CFMEU rules provides:

> **'4 – OBJECTS**
>
> (a) To uphold the right of combination of labour, and to improve, protect, and foster the best interests of the Union and its members, and to assist them to obtain their rights under industrial and social legislation.
>
> (b) To regulate and protect the wages and conditions under which all members or other persons entitled to become members of the Union may be employed, to achieve compulsory unionism and control the supply of labour… to regulate relations between the members and their employers and between the members and other employees in or in connection with the Industries of the Union and to foster the best interests of the members of the Union.

[2] Refer to https://www.fairwork.gov.au/tools-and-resources/fact-sheets/rights-and-obligations/enterprise-bargaining for more information.

[3] Fair Work Commission, 'Construction, Forestry and Maritime Employees Union (CFMEU)' (online) < https://www.fwc.gov.au/registered-organisations/find-registered-organisation/construction-forestry-and-maritime-employees#:~:text=The%20Construction%2C%20Forestry%20and%20Maritime,textile%2C%20clothing%20and%20footwear%20industries.>.

 T +61 2 8042 8701 E admin@crisplaw.com.au

...

(f) To secure preference in employment, retrenchment, promotion, demotion and transfer of employment for members.'

Expired EBAs and Their Operation

Role of the Fair Work Commission in Terminating Expired EBAs

The Fair Work Commission has the power to terminate an expired EBA. If an EBA passes its nominal expiry date, any one of the following may apply to the Fair Work Commission to terminate the agreement:[4]

- one or more of the employers covered by the agreement;
- an employee covered by the agreement; or
- an employee organisation (including a union) covered by the agreement.

Form F24b must be used to terminate an agreement *after* its nominal expiry date, but an application to terminate can still be made *before* its nominal expiry date – where in this case Form F24 must be used.

The application for termination must be accompanied by a completed, and *sworn*, statutory declaration from the applicant, using the Form F24C.

Under s 226 of the *Fair Work Act 2009* (Cth), the Fair Work Commission (upon receipt of the application of termination) must terminate the agreement if it is satisfied that it is not contrary to the public interest to do so, and if the Commission considers that it is appropriate to terminate the agreement taking into account all circumstances including the views of the employees, each employer and union (if any) covered by the agreement, and the circumstances of the employees, employers and organisations (including the likely effect of termination).[5]

[4] *Fair Work Act 2009* (Cth) s 225, also see https://www.fwc.gov.au/after-its-nominal-expiry-date.
[5] See https://www.fwc.gov.au/after-its-nominal-expiry-date.

 T +61 2 8042 8701 E admin@crisplaw.com.au

Can CFMEU Make Directions In Relation to an Expired EBA?

Overview

There are little case laws (let alone published orders from the Fair Work Commission) that concern the issue of whether the CFMEU is lawfully permitted to make directions with respect to an expired EBA.

This means more case laws or published orders on the matter are needed to reach a clear, conclusive answer. Nonetheless, existing resources still demonstrate that the CFMEU *may* be prohibited from making directions on certain areas. At the very least, it is observed that the CFMEU can be stopped, by an order from the Fair Work Commission, from giving directions to employees (who are also members of the CFMEU) on organising or inciting *industrial action*. Whether the union can permissibly make directions on other matters such as payments (or whatever else it may be) is yet to be confirmed.

Despite the uncertainty, sources indicate that *generally*, the CFMEU is likely unable to make directions pertaining to an expired EBA where it is either replaced with a new enterprise agreement or terminated. This is because in both cases, the expired EBA will be deemed as ceasing to apply and hence being of no effect.

Order of the Fair Work Commission

In *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd t/as AGL Loy Yang* [2017] FWCFB 1019, the Fair Work Commission made a stop order against CFMEU, ordering that the union must not give directions, advice, or authorisation to employees to organise any industrial action. Specifically, the CFMEU was stopped from directing its members (the employees) (a) to engage in the refusal of overtime work and (b) to implement a practice on the taking of personal/carer's leave, in light of the suspected taking of such leaves.

The stop order stated:[6]

[6] Refer to Fair Work Commission Order PR589496.

 T +61 2 8042 8701 E admin@crisplaw.com.au

'**3. INDUSTRIAL ACTION MUST STOP, NOT OCCUR AND NOT BE ORGANISED**

3.1. The CFMEU and Mr Hardy must not organise any industrial action involving any of the Employees including without limitation:

(a) Giving any direction, advice or authorisation to the Employees who are members of the CFMEU to implement a ban limitation or restriction on the performance of overtime contrary to clause 15.2 or 73 of the Loy Yang Power Enterprise Agreement 2012 (Agreement), or contrary to custom and practice regarding availability for and the performance of overtime.

(b) Giving any direction, advice or authorisation to the Employees who are members of the CFMEU to implement a practice in relation to the taking of personal/carer's leave under clause 18 of the Agreement, or under the *Fair Work Act 2009*, the result of which is a restriction or limitation on the performance of work.'

This case importantly demonstrates that the Fair Work Commission *can* stop the CFMEU from giving directions. However, caution must be exercised in concluding that the Fair Work Commission may stop the CFMEU from making any and every direction possible, as the stop order in this case extended only to directions on *organising industrial action*.

Further, this case signals the importance of terminating an expired EBA expediently. The employer in this case successfully applied to the Fair Work Commission to have the expired enterprise agreement terminated, and *then* applied to a stop order (application under section 418 of the *Fair Work Act 2009* (Cth)). While this case does not explicitly address whether the CFMEU can be stopped from giving directions with respect to an expired EBA *not yet terminated*, insofar as this case demonstrates, it can still be concluded that it is prudent that a termination of an expired EBA be sought in a timely manner. Similarly, although section 418 of the *Fair Work Act 2009* (Cth) does not expressly state that a stop order will only be made

 T +61 2 8042 8701 E admin@crisplaw.com.au

subsequent to the termination of the expired EBA, this does not make it any less recommended for one expediently terminate an expired EBA.[7]

Relevantly, section 418 empowers the Fair Work Commission to stop CFMEU from organising unprotected industrial action:

> '**S 418 – FWC must order that industrial action by employees or employers stop etc.**
>
> (1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would be not, protected industrial action:
>
> (a) is happening; or
>
> (b) is threatened, impending or probable; or
>
> (c) is being organised;
>
> the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the ***stop period***) specified in the order.
>
> (2) The FWC may make the order:
>
> (a) on its own initiative; or
>
> (b) on application by either of the following:
>
> (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;
>
> (ii) an organisation of which a person referred to in subparagraph (i) is a member.'

A commentary on this case also emphasised the importance of being *meticulous in the gathering of evidence* when applying for a stop order:

> '*Implications for members*

[7] This is also consistent with the case discussed as part of the 'Federal Court case' section.

 T +61 2 8042 8701 E admin@crisplaw.com.au

Despite being subject to losses and damages as a result of unprotected industrial action, this case further demonstrates that in the current economic environment, employers can be successful in having expired enterprise agreements terminated by the Fair Work Commission in instances of protracted bargaining.

Regarding the s 418 application, it is important to note that the employer's initial application in this case was rejected on the grounds that *there was insufficient evidence* for the Commission to find that unprotected action was occurring.

However on the employer's second application this was found and a stop order was issued. This demonstrates the importance of *meticulously recording evidence* that unprotected action may be occurring and to present such evidence in reoccurring applications until that action is stopped.'[8]

Federal Court case

In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126, it was held that an expired enterprise agreement cannot be expected to continue to apply unaltered perpetually. This case importantly suggests that the CFMEU will not be able to make directions where an expired enterprise agreement is (a) replaced by a new enterprise agreement or (b) terminated – because in both cases, the expired EBA will deemed to have ceased to operate, thus being no longer in force. Consistent with the case discussed above, this case again stresses the importance of *terminating* an enterprise EBA that has reached or passed its nominal expiry date.

The below extract from the case illustrates the different consequences of when a new agreement is reached before or after the nominal expiry date, and when a new agreement is not reached at all:

[8] Australian Resources & Energy Employer Association, 'CFMEU ordered to stop unprotected action at AGL power plant' < https://www.areea.com.au/help/mining-reform/mining-publications/cfmeu-ordered-stop-unprotected-action-agl-power-plan/>.

 T +61 2 8042 8701 E admin@crisplaw.com.au

'[25] … the period after the nominal expiry date of an enterprise agreement is likely to be the very time that the parties concerned are engaged in serious, if not disputatious, collective bargaining. There is, of course, no suggestion in the FW Act[9] that the relevant employer and its employees would not commence to bargain before, even well before, that date (as happened in the present case), but if they do so and conclude the terms of a new agreement, the existing agreement will cease to apply immediately it passes its nominal expiry date (s 28(2)(d)(ii)). Alternatively, if there is no new agreement until after the existing agreement has passed its nominal expiry date, the existing agreement will cease to apply when the new one comes into operation (s 58(2)(e)). In the context of an ongoing, single-enterprise, business, the most obvious situation in which recourse might be had to s 226 of the FW Act would be where an existing agreement had passed its nominal expiry date (a jurisdictional fact under the section) but where no new agreement had been made. This is the very situation in which collective bargaining is likely to be proceeding; and it is the only time in which industrial action associated with such bargaining might be – subject to compliance with other statutory requirements – protected under Div 2 of Part 3-3 of the FW Act. *The proposition that, as a matter of statutory policy, there should be a predisposition towards regarding it as contrary to the public interest to terminate an enterprise agreement during a period when collective bargaining is taking place must, in the circumstances, be regarded as a most unlikely one*.'

The last sentence of the extract in particular emphasises that an expired agreement *can* be terminated when no new agreement has been reached, despite it being a time when collective bargaining may still be proceeding or taking place.

Importantly, the Fair Work Commission provides that an enterprise agreement *will* continue to operate after its nominal expiry date unless an application to replace or terminate it is received.[10] In conjunction with this, this case can be understood as stressing the importance of expediently terminating an expired EBA (regardless of whether there is a new enterprise

[9] Reference is to the *Fair Work Act 2009* (Cth).

[10] See https://www.fwc.gov.au/agreements-awards/enterprise-agreements/terminate-enterprise-agreement#:~:text=Agreements%20and%20instruments%20have%20a,may%20apply%20to%20terminate%20it. for more information.

 T +61 2 8042 8701 E admin@crisplaw.com.au

agreement) so as to increase the chances of prohibiting the CFMEU from making directions with respect to an expired EBA.

Conclusion and recommendations

In light of the discussed cases that either expressly or implicitly address the question of whether CFMEU can make directions pertaining to an expired enterprise agreement, the following conclusions can be made:

- The precise *types* of directions CFMEU can or cannot make in light of an expired enterprise agreement have not yet been articulated by the courts or by the Fair Work Commission. However, it has been clearly provided that CFMEU cannot make directions on organising unprotected *industrial action* for an expired (and terminated) enterprise agreement.

- It is unclear whether CFMEU can make directions on an expired enterprise agreement that has not yet been terminated. Cases and/or Fair Work Commission orders relevant to the question only concern situations where an expired EBA had been terminated.

Despite the little clarity we have from cases or other resources, several recommendations can still be made. Employers and employees are recommended to expediently terminate (i.e., submit an application for termination to the Fair Work Commission) an EBA that has expired or is imminently expiring. This will increase the chances of successfully arguing that the agreement now ceases to apply, and thus directions in pursuant to that agreement cannot be made. For those submitting an application to terminate an expired EBA, it is recommended that sufficient care and consideration is exercised to ensure that the application is supported by meticulous recording and submission of evidence.

T +61 2 8042 8701 E admin@crisplaw.com.au