

Addressing errors in enterprise agreements

14 February 2023, **BN15**

Overview

The amendments relating to errors in enterprise agreements are directed towards allowing the Fair Work Commission (**FWC**) to remedy errors or defects that occur in the agreement making and approval processes. They do this by giving the FWC the power to amend typographical errors or obvious omissions in an agreement that has been approved and to validate an approval decision where an agreement (or a variation to an agreement) has been approved in circumstances where the parties have submitted an incorrect version of the agreement (or variation) for approval.

Former Provisions

The *Fair Work Act 2009 (Cth)* (**FW Act**) gave the FWC the power to vary enterprise agreements to remove 'ambiguity or uncertainty' (s. 217) and to 'deal with' disputes about proposed variations (s. 217A).

The presence of ambiguity or uncertainty was a jurisdictional prerequisite to the FWC exercising its power under this section (*Re Tenix Defence Systems Pty Ltd PR917548*). However, the section does not act as a 'slip rule' to correct, for example, typographical errors in the absence of ambiguity or uncertainty in the agreement (ANF [2011] FWC 2430). Nor can the section be used to 're-write an agreement to install something that was not inherent to the agreement when it was made.' (CFMEU Print Q2603 30 June 1998 at [12]). A dispute over the meaning of terms is not enough for the FWC to act to remove ambiguity or uncertainty. An arguable case must be made out for the competing contentions (*Thiess John Holland Joint Venture* (2007) 166 IR 363).

There is no capacity for the FWC to arbitrate any dispute it is dealing with under s. 217A (see subsection (3)).

The New Provisions

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**) has inserted a new Subdivision BA into Division 7 of Part 2-4 of the FW Act. This new subdivision allows the FWC to vary an agreement to correct or amend 'an obvious error, defect or irregularity (whether in substance or form) in section 218A. Such variations can be made by the FWC on its own initiative or on application by specified parties. Where the FWC decides to vary an agreement, the variation operates from the day specified in the decision to vary the agreement (which could be before, on or after the date of the decision itself).

This new section allows agreements to be corrected by FWC variation to deal with typographical errors or obvious omissions. This change is designed to address a regulatory gap, as the existing 'slip rule' in section 602 enables the FWC's decisions, but not enterprise agreements themselves, to be corrected (*Advantaged Care Pty Ltd v Health Services Union* [2021] FWCFB 453).

A new section 602A deals with the situation that arises where a party erroneously submits the wrong version of an agreement to the FWC for approval (i.e. a draft, not being the enterprise agreement or variation that was made by the parties), and it is subsequently approved.

The section allows the FWC to validate the relevant approval decision, as if the error had not occurred, and the decision had been made by reference to the correct version, provided it is satisfied that had the correct agreement been submitted for approval, the FWC would have approved that agreement. The validation process could commence on the FWC's own initiative or on application.

Equivalent provisions relating to variations are contained in section 602B.

Operative Date

The new provisions relating to errors took effect on Royal Assent on 6 December 2022.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.*