



DECISION

Fair Work Act 2009
s.185—Enterprise agreement

The State of Victoria (Acting through its Servant who, for the purposes of this Agreement, is the relevant public service body head in the agency in which the employee is employed)

(AG2024/2648)

VICTORIAN PUBLIC SERVICE ENTERPRISE AGREEMENT 2024

State and Territory government administration

DEPUTY PRESIDENT O'NEILL

MELBOURNE, 12 AUGUST 2024

Application for approval of the Victorian Public Service Enterprise Agreement 2024

[1] An application has been made for approval of an enterprise agreement known as the *Victorian Public Service Enterprise Agreement 2024* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act). It has been made by the State of Victoria (acting through its servant who, for the purposes of this Agreement, is the relevant public service body head in the agency in which the employee is employed). The Agreement is a single enterprise agreement.

[2] I am satisfied that each of the requirements of ss.186, 187 and 188 as are relevant to this application for approval have been met.

[3] Pursuant to s.205A(2) of the Act, the workplace delegates' rights term prescribed by the *Victorian Public Service Award 2016* is taken to be a term of the Agreement.

[4] The Australian Nursing and Midwifery Federation (ANMF), the Community and Public Sector Union (CPSU) and the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) being the bargaining representatives for the Agreement, have given notice under s.183 of the Act that they want the Agreement to cover them. In accordance with s.201(2) I note that the Agreement covers the organisations. The ANMF and CPSU support approval of the Agreement. The CPSU is of the view that the Agreement passes the better off overall test.

[5] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 19 August 2024. The nominal expiry date of the Agreement is 9 April 2028.

Variation

[6] A Form F1 was simultaneously lodged with the Agreement, which sought to vary provisions of the Agreement pursuant to sections 217 and 218A of the Act (the Form).

[7] The Form highlighted errors within the Agreement that had been identified by the Applicant in a tracked changes version of the Agreement, attached as Attachment B(F1) to the Form. The amendments are also set out in Q2.2 of the Form and summarised in Attachment A(F1).

[8] On 29 July 2024, my chambers wrote to the bargaining representatives to seek their views on the amendments sought. No response was received from any bargaining representatives.

[9] I am satisfied that s.217 and s.218A applies to the variations at paragraph 7 of this Decision.

Section 217

[10] Section 217 of the Act provides that the Commission ‘*may vary an enterprise agreement to remove an ambiguity or uncertainty*’ on application. The employer (as defined) is a person entitled to make such an application. The principles applicable to an application under s.217 were considered by the Full Court of the Federal Court in *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union*¹ (*Bianco*).

[11] It is not necessary to set out those principles in detail. It is sufficient to note that the existence of a relevant ambiguity or uncertainty is a jurisdictional fact required as a precondition to the exercise of the power.² The terms “ambiguity” and “uncertainty” are not synonymous, although there is some relationship between their meaning.³

“... There may, for example, be uncertainty in an

enterprise agreement even when its terms are not ambiguous. The uncertainty may arise from the application of the unambiguous terms to a given set of circumstances. The distinction between patent ambiguity (linguistic ambiguity) and latent ambiguity (ambiguity in application) provides an illustration by analogy...”⁴

[12] It is not necessary to interpret or construe an enterprise agreement for the purpose of s.217. “A provision may be ambiguous even though it is capable of interpretation”.⁵ The ambiguity may be apparent on the face of the document or may become apparent only when extrinsic evidence is adduced.⁶ Any established ‘common intention’ of parties concerning the impugned provision can be considered.⁷

[13] As s.217 makes clear, if the jurisdictional requirements are met, the Commission “may” (not must) vary the agreement. Whether to exercise its discretion to vary the agreement will necessarily depend upon the circumstances of the matter.

[14] In the Form, the Applicant seeks to vary clauses 31.4(a)(ii) and 49.4(a)(i) pursuant to s.217 of the Act. The Applicant submits clauses 31.4(a)(ii) and 49.4(a)(i), which address eligibility requirements for progression or top of grade or value range payment and leave

entitlements for employees in receipt of workers compensation payments respectively, are required to be amended to remove ambiguity and to clarify clauses to reflect the intent of the parties during bargaining. The Applicant submits that the proposed amendments and corrections are supported by the CPSU.

[15] In the circumstances, I am satisfied that the proposed variations address ambiguity and uncertainty within the Agreement. The variations have the support of the CPSU. No employee bargaining representatives have indicated opposition and there are not matters of which I am aware which would weigh against the exercise of my discretion to vary the Agreement in the manner proposed. The Agreement will be amended as per the Order at the end of this Decision.

Section 218A

[16] Section 218A, which came into effect on 7 December 2022 as part of the reforms contained within the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, provides for the variation of enterprise agreements to correct or amend an obvious error, defect or irregularity:

“(1) The FWC may vary an enterprise agreement to correct or amend an obvious error, defect or irregularity (whether in substance or form).

(2) The FWC may vary an enterprise agreement under subsection (1);

(a) on its own initiative; or

(b) on application by any of the following:

(i) one or more of the employers covered by the agreement;

(ii) an employee covered by the agreement;

(iii) an employee organisation covered by the agreement.

(3) If the FWC varies an enterprise agreement under subsection (1), the variation operates from the day specified in the decision to vary the agreement.”

[17] As has been noted in recent decisions of the Commission,⁸ s.218A of the Act is akin to the slip rule found in s.602 of the Act, which allows the Commission to correct or amend an obvious error, defect or irregularity (whether in substance or form) in relation to a decision of the Commission. The evident purpose of s.218A is to remove complexity associated with varying enterprise agreements containing obvious errors, defects or irregularities by simplifying the process by which corrections may be made.

[18] Before an amendment under s.218A can be made, there first must be satisfaction of the existence of an obvious error, defect or irregularity (whether in substance or form). Upon the finding of such an error, defect or irregularity, the Commission may, not must, vary the enterprise agreement. The power to vary should only be exercised to the extent necessary to remove the error, defect or irregularity.

[19] The Applicant submits that the amendments at clauses 29.7(b)(i), 31.8(d), Schedule G, Clause 1 and Appendix 4, Part 3 Clause 20.7, seek to address typographical errors and drafting errors resulting from replicating irrelevant text. The Applicant submits that the proposed amendments and corrections are supported by the CPSU.

[20] I am satisfied that the typographical and drafting errors referred to above are obvious errors. I am satisfied the amendments should be made, and that it is appropriate to do so by varying the Agreement pursuant to s.218A of the Act. The variations have the support of the CPSU. No employee bargaining representatives have indicated opposition to the variations proposed. In the present case, the errors are readily identified, as are the corrections needed to make the Agreement accurately reflect what was clearly intended. There are no reasons not to exercise my discretion and good reasons to do so. The errors identified above, will be amended as per the order below.

Order

[21] I order, pursuant to s.217 and s.218A of the Act, that the Agreement be varied as set out below

Clause Number	Clause Title	Proposed correction
29.7(b)(i)	Classification and salary on appointment	Amend <u>Sherriff's Officers</u> to <u>Sheriff's Officers</u>
31.4	Eligibility requirements for Progression or a Top of Grade or Value Range Payment	Amend 31.4(a)(ii), to insert clause reference to the qualifications on the operation of this term as follows: <u>"subject to the operation of clause 31.4(c)(ii) and 31.4(c)(iii)</u> has been employed at their current substantive classification and progression point for 12 months at the end of the Performance Cycle
31.8(d)	Operation of Progression Steps or Top of Grade of Value Range Payment where progression is achieved	Delete struck-through text: "Top of Grade or Value Range payments will be paid as a lump sum processed by the Employer at the same time as other progression outcomes resulting for the Performance Cycle following the Employee's return to work. "
49.4(a)(i)	Leave Entitlements for Employees in receipt of workers compensation payments	Amend "take and accrue annual and personal leave, and" to "take and accrue annual and personal <u>/ carer's</u> leave, and"

Clause Number	Clause Title	Proposed correction
Sch G Clause 1	VPS Aligned Adaptive Classification Structures	Amend <i>Sherriff's Officers</i> to <i>Sheriff's Officers</i>
Appendix 4, Part 3, Clause 20.7 [Table 91]	Child Protection Practitioner Structure – Children, Youth and Families (CYF) Stream	Amend Table 91 Heading “...CYF Grade 3 to CYF Grade 42” to “...CYF Grade 3 to CYF Grade 4”

[22] The variations pursuant to s.217 and s.218A above will operate from 19 August 2024.

[23] The Applicant has simultaneously submitted a copy of the Agreement with the variations listed above. The Agreement, as varied, will be published with this Decision.



DEPUTY PRESIDENT

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¹ *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* (2020) 275 FCR 385; [2020] FCAFC 50

² *Bianco*, [49].

³ *Bianco*, [67].

⁴ *Bianco*, [75].

⁵ *Bianco*, [67].

⁶ *Bianco*, [67].

⁷ *Bianco*, [68].

⁸ See for example [\[2023\] FWCA 844](#) per Gostencnik DP, and [\[2023\] FWC 115](#) per Asbury DP (as Vice President Asbury then was).