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Dear Ms McRobert

ADM2017/6 - Application to correct obvious error(s) in relation to FWC decision: Annual Wage Review decision

We act for WaterNSW and refer to matter number ADM2017/6, your application on behalf of the CPSU (**Application**).

We are instructed to put you on notice as to our client's position prior to the directions hearing listed tomorrow morning.

We note that the Application is made pursuant to s602(2)(b) of the Fair Work Act. Section 602(1) of the Fair Work Act deals with the power of the Fair Work Commission to correct or amend any obvious error, defect or irregularity in relation to a decision of the Fair Work Commission, but expressly excludes an error, defect or irregularity in a modern award or national minimum wage order. We note that the Application does not seek to vary the minimum wage order even though this would be the practical effect of the orders sought in the Application as it would impose a different, and greater, wages outcome than currently provided on our client and any other employer with employees covered by copied state awards.

Section 603 is also relevant and provides that the Fair Work Commission may vary or revoke a decision, other than a decision referred to in subsection (3). Relevantly, subsection 3(d) provides that the Fair Work Commission must not vary or revoke a decision under Part 2-6. Part 2-6 deals with minimum wages.

In our view, the Commission does not have jurisdiction to correct the Annual Wage Review 2016-2017 as sought by the Application as this would vary the decision and fall foul of section 603(3)(d).

Further, even if jurisdiction was available, Section 602 is not intended to give the Fair Work Commission general power to amend any of its decisions, but is intended to legislate the "slip rule" used by superior courts to correct a clerical mistake or error arising from an accidental slip in a judgment. This matter has been considered by the Full Bench in *RotoMetrics Austrlaia Pty Ltd T/A RotoMetrics v AMWU and ors* [2011] FWAFB 7214 which

determined at [29] that it must be applied with caution and only in circumstances in which the use of the "slip rule" is permissible:

- *"where there has been an unintentional omission in an Order or judgment of the Court;*
- *where an Order or judgment does not conform with the intention of the Court, and would have been made if the issue had been mentioned during the proceedings;*
- *where there are no material differences of opinion between the parties; it is not suitable to apply this rule where it concerns a matter of controversy; and*
- *where the error is manifestly clear; where an 'officious bystander would reply when asked if the amendment was appropriate: "Of course".*

It is our client's position that the alleged error referred to in the Application cannot be said to fall within any of the categories outlined above. It is important that the alleged error appears in identical terms in the Annual Wage Review decisions of 2014, 2015 and 2016 yet the Application only seeks to "correct" the 2017 Decision. In these circumstances and in the absence of any logical argument that the intention of the Expert Panel was any different to those in the four years prior we do not think that the Application is sustainable and should be withdrawn.

We note that the Application is being made during protracted bargaining for a new enterprise agreement which would terminate the operation of the copied state awards in question as they apply to our client's employees and in which wages are quite obviously a significant factor.

Yours faithfully

Alice DeBoos
Partner

cc The Hon. Justice Ross, President