



Varying or Terminating an Agreement

Parties to an agreement which contains material not compliant with the National Code of Practice for the Construction Industry (National Code) and the Implementation Guidelines may consider varying the agreement to make it National Code compliant. Alternatively, they may choose to terminate the agreement.

How this is done will depend on whether the agreement was made before or after the *Fair Work Act 2009* (FW Act) came into effect.

ENTERPRISE AGREEMENTS

The FW Act regulates the following types of enterprise agreements:

- single-enterprise agreements
- multi-enterprise agreements
- transitional agreements
- greenfields agreements.

Transitional agreements made under previous legislation include:

- employee collective agreements
- union collective agreements
- Individual Transitional Employment Agreements (ITEAs)
- Australian Workplace Agreements (AWAs)
- pre-reform certified agreements.

VARIATION OF ENTERPRISE AGREEMENTS

Enterprise agreements may be varied at any time. A variation is made when a majority of employees affected by the variation who cast a valid vote approve the variation. A variation does not take effect until it is approved by Fair Work Australia (FWA).

In approving a variation to an enterprise agreement, FWA must consider various factors including whether the agreement:

- was genuinely agreed to by employees
- excludes the National Employment Standards
- passes the better off overall test
- contains any unlawful terms
- contains a term for settling disputes.

Even if FWA has a concern about any of the approval requirements it may still approve a variation if satisfied that a written undertaking from an employer meets its concerns.

VARIATION OF TRANSITIONAL AGREEMENTS

Transitional agreements can only be varied in limited circumstances such as removing an ambiguity or uncertainty in the agreement. Employers and employees must apply to FWA for a variation to be made.

TERMINATION OF AGREEMENTS

Termination by Approval

Most enterprise and transitional agreements can be terminated by approval at any time. The termination must be approved by a valid majority of the employees whose employment is covered by the agreement. The employer must take reasonable steps to give the employees notice of the time, place and method of voting and a reasonable opportunity to decide whether they want to approve the proposed termination. The termination takes effect when it is approved by FWA.

In the case of AWAs and ITEAs, termination can be agreed to at any time in writing between the employee and employer. The termination takes effect when FWA approves the termination.

Alternatively, an AWA or ITEA can be conditionally terminated subject to FWA approving a new enterprise agreement that covers the employee and employer.

Termination by FWA

FWA is empowered to terminate a collective transitional or enterprise agreement that has passed its nominal expiry date. FWA must receive an application from the employer, a union, or an employee covered by the agreement and must be satisfied that it would not be contrary to the public interest to terminate the agreement. FWA must also take into account the views, if any, of the employer, union, or employees covered by the agreement.

Unilateral Termination

A right exists to terminate an AWA or ITEA unilaterally after its nominal expiry date. The agreement can be terminated by the employer or employee covered by the agreement. The person terminating the agreement must apply to FWA for approval. The unilateral termination takes effect 90 days after FWA approves it.

Please note: The Australian Government has proposed changes to the building industry legislation. The contents of this fact sheet will apply until the BCII Act is amended.



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