TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER BISSETT

C2023/3720

s.604 - Appeal of decisions

Appeal by Monash University T/A Monash University (Monash) (C2023/3720)

Melbourne

2.00 PM, TUESDAY, 22 AUGUST 2023

PN1

VICE PRESIDENT ASBURY: Good afternoon, could I take the appearances, please.

PN2

MR J BOURKE: If the Commission pleases I seek permission to appear with Mr Andrew Denton for Monash University.

PN3

VICE PRESIDENT ASBURY: Thank you.

PN4

MS S KELLY: If the Commission pleases my name is Kelly, initial S, I seek to appear on behalf of the respondent, and with me I have Mr Debets.

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VICE PRESIDENT ASBURY: I take it there's no objections to the parties being legally represented.

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MR BOURKE: Correct, your Honour.

PN7

MS KELLY: No objections.

PN8

VICE PRESIDENT ASBURY: Given that and given the complexity associated with the issue we are satisfied that permission should be granted for both parties to be legally represented. Thank you.

PN9

MR BOURKE: Thank you. If the Commission please. This appeal brings into focus the use of the notion of common intention and how it is to be used if it is to be used when exercising the discretion under 217. In our submission his Honour below fundamentally misconceived how to deal with common intention in the context of this case.

PN10

Common intention in the cases can be used in different ways depending on the way the case is advanced. It can be used to seek to find the actual intention of, and I put in quotation marks, 'the parties', the employer and the relevant bargaining representative, and whether that accords with the written terms of the enterprise agreement. But common intention can also involve an exploration of the objective intention which is derived from an analysis or construction of the enterprise agreement itself.

PN11

Now, in this case there was no evidence of actual intention of either Monash or the NTEU. The only evidence was essentially the enterprise agreement itself and its predecessor enterprise agreement. All roads then led, if one was going to engage in common intention and what is to be found to be the common intention,

it had to be an objective assessment of the text, that is the relevant clauses in schedule 3, to arrive at that conclusion, and then take that into account in the exercise of discretion under 217.

PN12

Now, his Honour did not do that. His Honour was told by the NTEU below that common intention could only be actual, that is subjective intention, of the relevant, and as I said contracting parties, bargaining parties. He therefore did not undertake a textual analysis of the clauses to arrive at an objective assessment of the common intention. And in our submission that involved error in that he was only prepared to look at common intention in terms of the subjective actual intention of the parties when there was simply no basis, no evidence to support that.

PN13

DEPUTY PRESIDENT GOSTENCNIK: An objective assessment of the text falling short of interpreting it.

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MR BOURKE: And you may have to interpret it in order to arrive at what in principle is a contract, common intention of the parties.

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DEPUTY PRESIDENT GOSTENCNIK: I would have thought that's correct, but people (indistinct) think otherwise.

PN16

MR BOURKE: I will come back to that, but Bianco when analysing ambiguity or uncertainty said that's not essentially just an interpretation task. You come through the prism of section 277, 278 to apply your function, but that doesn't mean the effect is you avoid analysing the words themselves. You of course do that in order to find jurisdictional basis by way of ambiguity or uncertainty, but it's a broader task, because you may find you can find a construction, but it's nevertheless ambiguous or uncertain. But when it comes to the discretion and you want to analyse common intention, in our submission you would have needed to look at the text unless the argument in terms of the way the case was framed was to solely search for the actual intention, the actual intention of the parties.

PN17

VICE PRESIDENT ASBURY: Doesn't Bianco Walling - it deals with the first step, deciding whether there's an ambiguity or an uncertainty, and the error was in the first step. Perhaps I'm reading it differently, but on my reading of Bianco Walling once the ambiguity or uncertainty is established then it's completely permissible to look at the common intention to decide whether equity, good conscious and the standard merits of the case justify the variation that's sought. Because if it's shown that there's a common intention that it means a particular thing or a particular interpretation then you may not vary it because equity, good conscious would say why if you can establish a common intention correctly construe the agreement.

PN18

MR BOURKE: And we don't argue with that. Of course it could be relevant. There's a question between mandatory and relevant, but we would say, yes, you can undertake an inquiry as to what is the common intention of the parties in exercising your discretion whether to make a variation. But in our submission - - -

PN19

DEPUTY PRESIDENT GOSTENCNIK: In what circumstances would one vary an agreement to remove an ambiguity if not satisfied there was an identifiable common intention or an objectively ascertainable intended operation of the provision?

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MR BOURKE: It may be rare, there may be none, but Bianco is saying - I guess what we are saying is deal with common intention through the prism of 577, 578, not purely by the issue of construction. But we would say if you're going to deal with common intention, and, with respect, your Honour Deputy President, it seems an obvious thing to undertake, but undertake that means you need to undertake an analysis of the text. And what his Honour did, which with respect was fatal, he analysed the text in order to find ambiguity and he found also uncertainty.

PN21

But he then seems to quarantine that analysis, and when you read the analysis it's essentially quite favourable to the way we say the clauses should have been construed, then that seems to be parked. And then he goes to discretion, a significant matter must be common intention, but then he confines it to searching for the actual intention of the parties when there was simply no evidence of that.

PN22

VICE PRESIDENT ASBURY: Well, if there was simply no evidence of that, that may be a matter that would weigh towards the member not exercising the discretion. So if the parties don't put any evidence about common intention and there's a clause that's ambiguous and you don't have evidence sufficient to - because my view is in order to decide whether to exercise the discretion I would struggle with the proposition that you wouldn't attempt to construe the agreement. I accept you don't do it to cross the first threshold, but my reading of Bianco Walling is there's two steps, and step one, is there an ambiguity, and you don't have to construe the agreement to decide that. But to exercise the discretion, or for my part anyway I would struggle with the proposition that where there's no evidence of common intention, no one addresses it, that you would proceed to vary an agreement that's ambiguous or uncertain simply to give effect to what one party says it should say.

PN23

MR BOURKE: We don't quarrel with any of that. What we quarrelled with, because we said, yes, you can look at common intention. That's permissible under your discretion. But what we said don't confine it to a search of what is the actual subjective intention of the parties, because there's no evidence of that. Confine that task to examining the text of the clauses. That's in truth the objective

intention of the parties as voted, what is in schedule 3, and we before his Honour - and there's some suggestion we never undertook a construction task, we did.

PN24

We spent a considerable amount of time stepping through schedule 3 explaining how it worked, and we explained that there was no prohibition in clause 1 to requiring someone to schedule consultation. There was clearly ambiguity regarding what the word 'contemporaneous' meant, and we attempted to give it an industrial, sensible boundary to that of a week either side.

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VICE PRESIDENT ASBURY: But there wasn't evidence of negotiations. There wasn't evidence of the history of the clause, was there?

PN26

MR BOURKE: Other than the predecessor clauses, no - the predecessor agreements.

PN27

VICE PRESIDENT ASBURY: So where is the error in terms of - given that it's discretionary to decide to vary the agreement what do you say is the matters that the Deputy President didn't have regard to?

PN28

MR BOURKE: Because the Deputy President searched for actual subject of intention. Common intention is used in two ways in the cases. Sometimes the parties went to the Commission and said these words in the enterprise agreement did not reflect a subjective actual intention of negotiating parties, and that's the basis of the case going forward.

PN29

But there are other cases where the task of finding common intention you simply work towards analysing the text, because that's the best guide in terms of what people voted for, and then if you find in the text that there's an ambiguity or uncertainty in your discretion you can remove that, which will involve a task of construction consistent with the better construction of how the clause should work and operate.

PN30

VICE PRESIDENT ASBURY: What textual matters do you say that the Deputy President didn't have regard to?

PN31

MR BOURKE: He did not have regard to any textual matters when it came to the discretion. He only looked at can I find the actual subjective intention of the parties at the time they were drafting the clauses, and it went to an extreme. This clause I think went back to 2009. The NTEU submission was you've got to look back to what the state of the parties was in 2009. And what we said to his Honour was, no, look at the text. But his Honour reading between the lines - because Bianco said this is not an interpretation case when looking at ambiguity or uncertainty, his Honour felt constrained from undertaking any type of deep

interpretive exercise of the text in determining objectively what was the common intention in order to inform his discretion and whether to exercise it.

PN32

DEPUTY PRESIDENT GOSTENCNIK: So, Mr Bourke, the Deputy President's conclusion at paragraph 150 where the Deputy President concludes that the evidence before him didn't establish a common intention concerning schedule 3 of the 2019 agreement, regardless whether the standard of the intention was objectively or subjectively determined, you say that the difficulty is that the Deputy President did not analyse the text of the agreement to determine whether the text might objectively point to a common or mutual intention?

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MR BOURKE: Correct.

PN34

DEPUTY PRESIDENT GOSTENCNIK: Presumably you don't have a difficulty with what the Deputy President said in paragraph 114. That is where he says common intention, mutual intention, common understanding and substantive agreement appear to be used synonymously. But there are different ways in which one can establish those, and one of the ways is a textual analysis.

PN35

MR BOURKE: Correct. And if you look at the cases where they look at actual intention that's the way the parties framed the case, to apply it on that basis. But there are other cases where common intention is framed around an interpretive exercise of the text and his Honour would not do that. And further to that, compounding that, his Honour, we would say unfortunately - the NTEU cited below the High Court case of Simic. That is a common law rectification case. It is a very special type of case where parties have signed a contract, but you go to court and you say I want the contract amended, because the common subjective intention of the parties was something different and there's been a drafting mistake.

PN36

That was cited to his Honour and his Honour has essentially applied the approach in Simic in dealing with 'whether I can find actual intention.' He's found that it was an extremely high bar, which rectification is, and he's found 'I can't find it.' He's declined to look at the text. It's suggested we didn't ask him to do it, we did, and we will take you to the passages in the transcript. Time and time again we said, 'Sorry, you have to do this.' And because you see from the transcript his Honour is worried about, 'I don't want to undertake a task of construction', he goes down this actual subjective intention route.

PN37

So we say the error is the discretion miscarried because he confined the exploration of common intention only to trying to find the actual subjective intention of the parties, and not undertaking an analysis of the text. And when you analyse the judgment his Honour makes, with respect, very valid points as to why analysing the text is preferable to trying to work out what is the subjective

intention of the parties. I will take you to the judgment shortly, but his Honour makes two points.

PN38

His Honour makes the point that now under enterprise agreements the union and the employer they're not parties to the agreement. They're covered by the agreement. So that exploration of actual subjective intent, where does it go, because they are not parties to the agreement. So his Honour makes that point.

PN39

His Honour makes the second point, again, with respect, a very valid point. The agreement is voted by the employees. They don't know what the employer's thinking or what's in the head of the union. The employees vote for the agreement. So if you're going to look at their intent, if you're going to try and find actual intent you're going to have to lead evidence of what the employees thought. That's impossible. So why not then go back to the text, to an objective assessment, and his Honour would not do that, and we say that's a fundamental error. As a consequence the discretion miscarried and we would say has to be redone.

PN40

Can we first - and we will take you to the judgment. His Honour looked for, in quotation marks, 'evidence'; not the agreement, not the terms themselves, in trying to work out common intention. His Honour thought this was an issue of evidence. That's consistent with a rectification case where you're coming to court saying there's been a mistake in drafting. Both parties intended 'X'. But his Honour then applying those principles of the rectification cases said, 'I haven't got any evidence of that.' His Honour did not undertake the very best evidence, which is a textual analysis of the agreement itself.

PN41

If I can have a moment, I will take you to the judgment. So if we go to the decision. Can I just step through how his Honour deals with the decision. You have first at 87 the finding of ambiguity or uncertainty. You then have a discussion at 92 through to 94 where his Honour discusses the notion of whether under clause 1, where there was debate, whether a teaching associate could be required to schedule consultation, and we would say on that analysis 92 to 94, which has not been criticised on appeal, he favours our construction.

PN42

And then you move to the issue of contemporaneous, and if the court could go to 101 there's a discussion about the less clear position of the NTEU and that they initially at 102 said it meant immediately they moved from that. And you had a situation below where before the Federal Court case was filed the NTEU was saying contemporaneous meant immediately.

PN43

During the hearing before his Honour below that was disavowed. They said it didn't mean immediately and the NTEU never said what it meant. We were the only party coming to the Commission saying this is ambiguous and we need to find a solution, it's unworkable, and the NTEU saying we're not going to tell you

what it means. That was the effect. And his Honour finds at 105 it is ambiguous and uncertain.

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And then you have importantly, we go to 104, his Honour quotes with approval the passage from Snaden J in *NTEU v Monash*, and if one just looks at the last sentence of that passage, the fact that the very nature of the word 'contemporaneous' with questions of degree, want of clear boundaries, lends itself to disputation. And we were trying to fix that and the NTEU was not coming up with any solution at all.

PN45

Then there's a discussion at 105 where his Honour returns to required, we would say consistent with our construction. As discussed in Bianco dealing with these issues through the prism of 577 and 578 where one of the objects is promoting harmonious workplace relations, we would say we were coming up with a variation to minimise disputation, to secure harmonious workplace relations in circumstances where we were in dispute with the NTEU whether we could ask people to schedule consultation. And we were in dispute about the meaning of contemporaneous with the NTEU shifting its position and not telling us what it meant.

PN46

VICE PRESIDENT ASBURY: But the fact you come up with your preferred way that the clause should operate is not necessarily - and you say it's ambiguous and we think the most efficient, effective way for the clause to operate is 'X', is not of itself a ground to vary, is it?

PN47

MR BOURKE: It's, we would say, a factor. We are putting forward in circumstances where there has been a finding which is not challenged on appeal that the provisions are ambiguous and uncertain, and part of the objects of exercising your function under 577 is to promote harmonious workplace relations where there's an ambiguity or uncertainty that's going to promote disputation, disharmony. So we say we were putting forward a proposal consistent with the exercise of the object behind 577, 578.

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DEPUTY PRESIDENT GOSTENCNIK: Isn't the vehicle for resolution of that dispute - - -

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MR BOURKE: Sorry, your Honour?

PN50

DEPUTY PRESIDENT GOSTENCNIK: Isn't the vehicle for the resolution of that dispute an application to deal with a dispute under the terms of the agreement about its operation?

PN51

MR BOURKE: That might be one way. That might be one way. But this was an ongoing dispute with retrospective claims, and in our submission it was absolutely convenient that it be dealt with under 217, and we would also note that there was no submission made to that effect below. In fact we initially filed a disputation application and there was objection to that by the NTEU and we decided to proceed therefore under 217.

PN52

And then if you go to 119 there's rejection of the NTEU's submission that it's a mandatory matter, but you will see from the analysis of the case his Honour is only using common intention directed to the actual subjective intention of the parties. And then if you - sorry.

PN53

DEPUTY PRESIDENT GOSTENCNIK: I am not sure that that submission holds given what he says at 114. He seems to use it as (indistinct).

PN54

MR BOURKE: But when you analyse how his Honour applies it he's only searching for actual intention, not objective intention. Could we take - and this is crucial - at 140 there's a discussion:

PN55

> *Objective intention of the parties to an agreement, and the action for rectification searches for the actual intention of the parties.*

PN56

There is then the citation of Simic which NTEU relied upon, which is a search for the actual intention that has caused the document to be drafted in error. And his Honour then cites the test of Kiefel J at 141 of the judgment. And then at 142 discusses the high bar of actual common intention. None of this is looking at the text. And then at 143 concludes:

PN57

> *A search for actual mutual intention through the prism of considering the admissible evidence probative of actual intention.*

PN58

Now, that's error, because his Honour is confining his search for the actual intention of the parties, not an objective analysis of mutual intention as understood equivalent to be in contract where you analyse the text. He's looking for things outside the text.

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DEPUTY PRESIDENT GOSTENCNIK: Which paragraph of the decision do you say bears that out, given what he said in the second sentence of 142?

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MR BOURKE: Yes. We say at 143 he still applies the approach:

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I would approach the task in the sense described by Kiefel J, namely as a search for actual mutual intention - - -

PN62

That is subjective.

PN63

- - - through the prism of considering and weighing the admissible evidence probative of actual intention.

PN64

Not starting and finishing with the text of the clauses to derive what was objectively. And then he moves on at 144, 'If it were otherwise, then it would' - sorry, your Honour.

PN65

DEPUTY PRESIDENT GOSTENCNIK: That's all right. The second sentence of 143 'I approach that task', that task being to objectively determine common intention. That's the task.

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MR BOURKE: Correct.

PN67

DEPUTY PRESIDENT GOSTENCNIK: Which can be determined in several ways.

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MR BOURKE: Correct.

PN69

DEPUTY PRESIDENT GOSTENCNIK: But you say he then goes on to concentrate only on one way.

PN70

MR BOURKE: Correct. And we said to him, 'You need to assess the text, because there's no evidence of actual intention, it won't assist.' Everyone agreed there was no evidence of actual intention. The clause has its ancestry I think back to 2009. And as the NTEU said if you're going to get actual intention you're going to have to call people back 2009. You're talking over 11, 12 years.

PN71

VICE PRESIDENT ASBURY: Well, there was arguably some evidence because wasn't there some evidence about how it was applied; that in some cases people were paid in one way and in other cases people were paid in another way?

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MR BOURKE: And the end result of that was you couldn't find a custom and practice which demonstrated a particular construction, because the clause was applied various ways across Monash.

PN73

VICE PRESIDENT ASBURY: To put in a nutshell, at least for my part, there's this enormous discussion about the approach to identifying ambiguity and uncertainty, no issue. Paragraph 118, the point I was making earlier about Bianco Walling, it was about step 1, not about step 2. It didn't really deal with step 2. And there's all discussion about objective and subjective intention. So you say the Deputy President erred by not looking at the objective intention. What did he disregard? What submission, what text, what argument do you say was disregarded or not given sufficient weight so that the discretion miscarried?

PN74

MR BOURKE: Because he did not look at the text and attempt to analyse the objective intent. We stepped him through the clauses and explained how our construction was correct, and we will come to the clause; that we were entitled under clause 1 to ask someone to schedule student consultation, and that contemporaneous could not mean immediate. It had to be given a sensible construction. We said it could be said as consultation within the same semester, but we said giving a sensible industrial solution to an issue clearly in dispute as recognised by Snaden J and his Honour below that it was ripe for disputation. We said let's put it a week either side, but it's got to be consultation. If it's after the tutorial it's got to be before the next tutorial.

PN75

VICE PRESIDENT ASBURY: Where is the argument disregarded that you put, because it seems that the Deputy President has dealt at some length with the earlier versions of the agreement. He's dealt with a range of textual things. So what is missing in his - because as I understand it you're saying we made submissions about the objective intent based on the textual analysis of the agreement and the Deputy President had no regard to them. So what were those submissions that he had no regard to?

PN76

MR BOURKE: We will take you to the way the argument developed, but can we say his Honour was not prepared to go down the route of analysing objectively the common intention of the parties as derived from the text of the clauses. His Honour was only prepared to search for actual, that is subjective intention of Monash and the NTEU, and that is a discrete type of common intention which arises in particular cases where there's for example been a mistake.

PN77

And we took you to 143 that makes it clear he's only searching for actual intention. That is again confirmed at 144. And then he moves at 145 to talk about common intention not lightly found. That's a discussion about actual subjective intent. And then he discusses the difficulties at 148 about the fact of even searching for actual subjective intent, because under enterprise agreements the employer and the bargaining representative they're not parties. But he recognises the weakness of that, but he doesn't then undertake the task of construction.

PN78

VICE PRESIDENT ASBURY: Mr Bourke, speaking for myself if I am dealing with a case where it's a construction of an enterprise agreement, if I went off on a frolic and just started reading old agreements and writing a decision that's said,

you know, this clause should be read in the context of that clause that parties didn't put, that's arguably an error.

PN79

So what I'm interested in is what arguments were put to the Deputy President about the objective intention of the parties based on - and I accept you start with the provision, you look at the text of the provision, you look at its position in the agreement, you look at its position in the context of the section it's in, a whole range of things. So what do you say was put in terms of that textual analysis that was not considered by the Deputy President?

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MR BOURKE: There's no contextual analysis done when it came to a discretion.

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VICE PRESIDENT ASBURY: But did you ask him to do one?

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MR BOURKE: Yes, we did.

PN83

VICE PRESIDENT ASBURY: Right, okay. That's what I am asking you.

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MR BOURKE: I will take you to - - -

PN85

VICE PRESIDENT ASBURY: Where is it?

PN86

MR BOURKE: I will take you to that.

PN87

VICE PRESIDENT ASBURY: You asked him to do that, but he didn't do it.

PN88

MR BOURKE: Bear with me. If the Commission could please go to the transcript which is at part C of the appeal book.

PN89

VICE PRESIDENT ASBURY: Can you give us a page reference at all?

PN90

MR BOURKE: Yes. The first relevant page is at 61.

PN91

VICE PRESIDENT ASBURY: Yes.

PN92

MR BOURKE: So you will see there's some discussion from 221 through to 226 that I read. And then at 227 - so there's a number of things that emerge from

this. The NTEU say we can't make out common intention of the parties. His Honour is making clear, and this was a reference to Snaden J, that:

PN93

Common intention of the parties doesn't necessarily mean subjective. It can mean objective common intention.

PN94

I then refer to the Telstra case, which I will take the Commission to, where they make it clear the task of finding common intention is exactly the same as in contract. And then I say:

PN95

In our submission the concepts overlap, because common intention, you're really talking about the task of interpretation, and in undertaking that task you may identify ambiguity or uncertainty.

PN96

And then his Honour says:

PN97

You mentioned contract then, but if it was a contractual rectification case then the common intention is the actual intention of the parties.

PN98

Correct. But that can be also inferred by the objective surrounding circumstances. But common intention is also used as a tool simply for defining, 'Well what was the intention' by looking at the words of the contract.

PN99

And then his Honour says:

PN100

In which case? What's the difference between that and construction?

PN101

There's probably little difference, no difference. And you'll see that in Bianco they're not really searching for common intention, they're just asking, 'Is there an ambiguity or uncertainty?' So we really say to the extent common intention has any factor to play, it's really a matter that can be assessed objectively, which is, what was the common intention of the parties. Well, you look at the enterprise agreement and the words, unless you're in the rectification type space, which we're not here.

PN102

No one was saying there's some mistake of drafting. Then if the Commission could go to PN 241:

PN103

But we would say to the extent you want to consider common intention that can be found objectively by the parties are bound by the agreement they signed, and we say on that basis the amendments we want are in fact consistent with

the best construction of schedule 3. But there is some cases where extrinsic evidence around the negotiations may demonstrate or be an aide to what is common intention and may suggest something different from what, on its face, is a textual analysis, but we don't have that here because both parties agree there is no extrinsic material that suggests a particular construction.

PN104

So you then have to come back to the text.

PN105

VICE PRESIDENT ASBURY: I agree. I'm in resounding agreement that you have to come back to the text. What I'm asking is where did your client or you put an argument that says here's the text, look at clause this, clause that, read this, the term 'contemporaneous' was used somewhere else in the agreement in this context. It should be read.

PN106

Where was the submission on that textual analysis that you say the Deputy President didn't have regard to, because I agree it starts with the text. I accept that without reservation, but where is the error in - because if it's just he didn't look at schedule 3, well, yes, it probably shouldn't have stopped at schedule 3, should it, it should have gone to the whole agreement. So what was put?

PN107

MR BOURKE: Just bear with me. If one goes from page 50 - - -

PN108

VICE PRESIDENT ASBURY: Page 50 of the appeal book?

PN109

MR BOURKE: The appeal book, sorry.

PN110

DEPUTY PRESIDENT GOSTENCNIK: Still in the transcript? Are we still in the transcript?

PN111

MR BOURKE: Sorry, still in the transcript.

PN112

VICE PRESIDENT ASBURY: Yes.

PN113

MR BOURKE: Yes, so we start at 135 stepping through the construction of schedule 3. We take his Honour to it. We then talk about clause 1 and repeat tutorials. We then at 139 we talk about that it needs to be read in the context of an effective educational experience. That's the scheme. We then talk about how you have the repeat tutorial, purpose of the payment.

PN114

We talk about then at 145 associated work and what that encompasses, and we talk about how it includes contemporary consultation. We then discuss at 147 the

meaning of contemporaneous. We talk about the ordinary dictionary meaning. At the same time we talk about how in fact that can't work because it contemplates prior to or following a tutorial. We then say - we point out how the NTEU say it means before or after, and that doesn't assist.

PN115

Then at 150 we talk about notions of contemporaneous. There's no bifurcation in clause 1 that contemporaneous consultation must be either required consultation or not required consultation. We then keep going at 155, that we say there's potential, that it simply means contemporaneous with the subject taught in that semester. We then point out at about clause 7 - if the Commission have our schedule 3 which we circulated yesterday we make the point that because the NTEU said we cannot require a teaching associate to consult with a student, and we pointed out that the other clause that involves payment contemplates other required academic activity. It starts in terms of other required academic activity. And we point out the fact the carve out of consultation with students other than contemporaneous consultation. So that shows that contemporaneous consultation can be required.

PN116

The only way you get into clause 7 is if the consultation was not contemporaneous. We step through that at 157. Also if one looks at 159. At 160 there's the carve out. At 162 we talk about the carve out and the submission we just put. And then we go through to 164:

PN117

If a teaching associate decides to organise for consultation hours immediately before or after tutorial for, let's say, one hour. But if the tutor in the very next room organises exactly the same consultation hours straight after their tutorial, but that's at the suggestion or requirement of the university - - -

PN118

Apparently they get paid differently under clause 7. We have dealt with that.

PN119

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Mr Bourke, in substance you say that the text of the agreement discloses that there are carve outs for contemporaneous consultation which are not contemporaneous with actual tutorial for example, which would have no practical utility unless contemporaneous consultation was something other than immediately after the (indistinct).

PN120

MR BOURKE: Correct. So we can go on, but we then move to 167, we say our common sense approach given latitude. We discuss that. Then we suggest at 176, we suggest a boundary. So it wouldn't be disputation about what contemporaneous means and we propose the one week either side. We go through to 178. I can go on, but we did a very deep submission analysis of the text and his Honour declined to take that into account when it came to a discretion. Declined to take it into account in assessing common intention. Proceeds to pursue only actual intention informed by the high test discussed in Simic in relation to rectification.

PN121

Could we just go back if we could, continuing with the transcript. We further pursued this in reply. If the court could please go to 112, still with the transcript, and this is in reply.

PN122

VICE PRESIDENT ASBURY: Sorry, 112, page 112 or - - -

PN123

MR BOURKE: Yes, page 112, sorry.

PN124

VICE PRESIDENT ASBURY: That's all right.

PN125

MR BOURKE: And it's PN 665. And we've said:

PN126

We come to common intention. We have not heard a clear articulation what the common intention is. We're not hiding behind common intention. My learned friend is 100 per cent wrong in saying that common intention is some type of search for the subjective intention of the parties, and we heard going back years to when the clause was first created.

PN127

That was I think 2009. That was the submission we got.

PN128

That is heresy contrary to Codelfa, contrary to Telstra. It's an objective task and unless there is extrinsic material you concentrate on a textual exercise to arrive at that, and we have done that.

PN129

And we have spelt out a deep textual analysis.

PN130

We took you to the schedule and we demonstrated that there is no requirement or no bifurcation of schedule 3 to suggest that if the scheduling is required in the sense of you're told to schedule it, then it's clause 7. If you're not told, it's clause 1. You simply cannot get that structure from the clause.

PN131

We move finally to 678:

PN132

There is no suggestion in the judgment that common intention must dominate that or be given substantial weight, let alone be mandatory. They make it clear that it's one of the matters you assess through the prism of equity, good conscience and merits. We say because common intention you must go back to the objective language; the textual analysis supports us in the amendment we are seeking.

PN133

And it wasn't done.

PN134

VICE PRESIDENT ASBURY: The Deputy President might have just said, 'I think this is what it means. There's two types of activity that academic staff were engaging in. One is this, one is that. Contemporaneous means if they have to sit in the tutorial after their tutorial and talk to students or have to meet them before the tutorial or about the tutorial. That's contemporaneous and everything else isn't.'

PN135

MR BOURKE: The problem is his Honour when saying it's a significant factor in the absence of common intention, so that was pivotal in the exercise of the discretion, and when deciding whether common intention existed only looked at actual intention of the parties. Of course common intention must exist if you're analysing the text. So his Honour completely miscarried the discretion in focusing on what type of common intention and then concluding that was the significant factor is us having any discretion in our favour declined.

PN136

In our submission his Honour does in a limited way analyse the text, particularly around the question of whether you can require consultation in that aspect of ambiguous or uncertainty, and the observations are all favourable to us. But they are simply left behind when it comes to the exercise of a discretion.

PN137

Can we also say that the approach his Honour has adopted of ruling out an objective assessment of the text is contrary to the way Telstra, the Full Bench approached the task of common intention, and it's contrary to the approach adopted in the Australian and International Pilots Association case. I will just give you those references. But simply both those cases they adopt a contractual Codelfa approach of concentrating on the text. Just bear with me.

PN138

VICE PRESIDENT ASBURY: It's well established that the starting point is always the text, the textual activity, the starting point is the text. So you're saying, essentially your complaint is that when both parties agreed there were no extrinsic matters, there was no evidence about objective or subjective intentions when agreements were negotiated because it was - so no one put any evidence about that. The arguments you put about the text of the schedule were not properly considered.

PN139

MR BOURKE: Correct. They weren't considered at all, and his Honour thought, clearly influenced by Bianco saying this is not interpretation cases, was of the view, 'I can't undertake a task of construction', and simply confined his task to, 'I've just got to search for the actual subjective intention of the parties and I can't find any evidence of that.' Doesn't look at the text, and look at another means or another type of common intention that is objectively found from the words of the clauses themselves. And that second approach is entirely consistent with the

approach adopted in Telstra. I will just give you the paragraph references. It's case number 6 of our bundle, paragraphs 36, 38 and 51. The Full Bench make it clear that they are searching for a Codelfa type common intention. Paragraph 36 starts at PDF 108 in the bundle of cases.

PN140

VICE PRESIDENT ASBURY: So it's 6 re Telstra. I'm sorry, can you give that reference again.

PN141

MR BOURKE: Sorry. Yes, it's case number 6 on our list.

PN142

VICE PRESIDENT ASBURY: Yes, I'm in there.

PN143

MR BOURKE: It's PDF 108. One starts at paragraph 36.

PN144

DEPUTY PRESIDENT GOSTENCNIK: 'What is clear about the principles.' It's that paragraph?

PN145

MR BOURKE: The Full Bench at 36 - yes.

PN146

What is clear from these principles of construction of contracts, and they apply a contractual approach to finding common intention of the enterprise agreement, is the resolve of the courts to give effect to the contract. Once it is established that the parties intended to be bound by their agreement the courts will impute a common intention by reference to the terms of a contract and its surrounding circumstances.

PN147

There is then a quotation from McHugh J. And then there's a discussion at 38:

PN148

In a matter before us the fact that the agreement is not in issue the question is what meaning is to be given to the words used by the parties in expressing their agreement. The learned vice president stated correctly, in our view, that a certified agreement is not an ordinary contract. However that is not a proper basis for discarding the well-established principles of construction for resolving ambiguity contracts.

PN149

And then one goes to 51:

PN150

We turn now to consider the mutual intention of the parties to the agreement as suggested by the authorities, and that's the contract cases. The starting point is the words of the agreement themselves.

PN151

His Honour did not even start there or finish there or ever go there. He searched for what he called was evidence of actual subjective intention, found none and that was the end of the issue and found no common intention. How can you find no common intention when you've got the words on the page, and they can be construed. And then a similar approach was taken by Watson VP in Australian and International Pilots Association. If the court, please, could go to appeal book or PDF in this bundle at 205. At paragraph 17 there's a discussion, and this is important, the fact there can be overlap between the analysis involved in ambiguity and uncertainty and the ultimate discretion. This was completely quarantined, that analysis, regarding ambiguity and uncertainty which is quite favourable to us in terms of construction when it came to looking at mutual intention. At 17 his Honour Watson VP said:

PN152

The discretion of the Commission in the case of an ambiguity or uncertainty involves two questions. First, is it appropriate to vary the agreement. If so then secondly what variations are appropriate. Similar considerations will often be relevant to both questions, and hence the two questions frequently overlap. It is well established that a significant factor is the objectively ascertained mutual intention of the parties at the time the agreement was made. It is not appropriate to rewrite an agreement or install something that was not inherent in the agreement when it was made.

PN153

These principles reflect the notion that an agreement is made by the parties usually without any arbitrated content or independently determined standards of industrial fairness. To exercise a discretion conferred on the Commission in relation to an ambiguity or uncertainty does not give rise to a general discretion to determine the matter based on industrial fairness.

PN154

The task is to place the parties in the position they intended by their agreement insofar as the wording of the agreement does not reflect their intention. Although a significant factor, the objectively ascertained mutual intention of the parties, is not the only consideration. However it would be unusual for other considerations to weigh in favour of the variation that was inconsistently (indistinct) to the parties.

PN155

And then 18:

PN156

The task of identifying the objectively ascertained mutual intention of the parties does not depend on evidence of what each party says they intended. That was the type of evidence, with respect, his Honour was looking for. It is a more confined task.

PN157

And then there's a reference to Codelfa and the focus on the language. In our submission his Honour's approach is entirely contrary to Telstra, entirely contrary

to the Australian and International Pilots Association case, and compounded by adopting a test that's come from the rectification case, that is of Simic.

PN158

DEPUTY PRESIDENT GOSTENCNIK: I take it that the passages you say where it was evident that the Deputy President rejected the textual construction or the textual analysis. It's 143 and with reference at 144, particularly where he says:

PN159

> *If it were otherwise, then it would appear that the task of finding common intention is essentially a constructional one, from which the parties' imputed intention can be determined.*

PN160

MR BOURKE: His Honour is making it clear, 'I'm searching for actual intention.' And that's pivotal. And that resulted in the exercise of a discretion not being exercised in our favour, and a pivotal point was at 155 where he said, 'The absence of common intention' - which he means subjective actual - 'is to be given significant weight.' So we could never recover from that error. And the additional error compounded is not to look at the standard form of common intention, which is the words, and they were the words that were voted on.

PN161

So that's what we say front and square is the error. Can we move to in our submission the discretion now needs to be exercised afresh, and in our submission the variation should be made. Firstly, because it's clear it's ripe for dispute that we have no agreement what contemporaneous means, and in our respectful submission we have come up with a reasonable boundary having regard to equity, good conscience. Let's make it a week either side, but at least it's got to occur before the next tutorial. That's when the subject matter of the tutorial is fresh in the tutor's mind, fresh in the student's mind.

PN162

We heard no submission below there was anything wrong with that. They didn't say that's no way (indistinct) contemporaneous. They would not say what contemporaneous meant. All they would concede below is it no longer meant immediate, which is what they previously argued.

PN163

VICE PRESIDENT ASBURY: So, Mr Bourke, what makes a week reasonable as opposed to four days or two days or two weeks?

PN164

MR BOURKE: There's no clear dividing line. As we said in submissions below, it could be the same semester.

PN165

COMMISSIONER BISSETT: So it really is just, 'We think a week is reasonably. No one's said anything else, therefore a week should be it'.

PN166

MR BOURKE: That's having regard to 577, (57)(a), which is, 'Exercising your functions consistent with promoting a harmonious workplace relations'.

PN167

COMMISSIONER BISSETT: To the extent that a week gives you an answer, okay, if it's a week it's a week, we know, presumably, whether we sit one side of it or another, and I accept that it, in that respect, would promote harmonious workplace relations, but so would four days.

PN168

MR BOURKE: Four days might. But we would call on our own personal experience that tutorials are normally once a week, they're not normally once every four days. You normally have one tutorial a week, you might have another tutorial.

PN169

DEPUTY PRESIDENT GOSTENCNIK: Mr Bourke, in a trial, if a witness produced a note that was prepared a week after an event you'd hardly regard that as contemporaneous. So we can't ignore the word 'contemporaneous' in the assessment. There may well be sound reasons why contemporaneous doesn't mean immediately, but why should it mean a week?

PN170

MR BOURKE: Well, in our submission, because it contemplates - it's unworkable if it's given it's ordinary meaning which is, 'at the same time', particularly in circumstances where the clause contemplates the communication, the consultation, might be my email, so you need some latitude.

PN171

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN172

MR BOURKE: It's notorious that tutorials - a tutor could have a number of tutorials lined up one after the other so, in our submission, contemporaneous might be more directed to the actual semester where the tutorial was delivered. So, in those circumstances, where that is, in our submission, a respectable ambit, choosing a week is an appropriate boundary line because - and where are we left otherwise? We're left with the NTEU saying, 'We won't tell you where we think the boundary line is'.

PN173

COMMISSIONER BISSETT: If tutorials are held every week, then all other consultations would be contemporaneous because you would always be within a week of a tute, either before or after it, except at the end of semester.

PN174

MR BOURKE: Yes, unless there's a consultation - yes, unless end of semester.

PN175

COMMISSIONER BISSETT: So there would be no circumstance where anyone ever fell outside your view of what is reasonable.

PN176

MR BOURKE: There may not be. There may be circumstances where the tutorial is every fortnight, but - - -

PN177

COMMISSIONER BISSETT: You just told me they were every week.

PN178

MR BOURKE: I'd say traditional every week.

PN179

COMMISSIONER BISSETT: Well, traditionally every week, or occasionally every week, or - - -

PN180

MR BOURKE: But we have a situation at the moment where his Honour found, and Snaden J found, 'This is right for disputation'. Are we going to leave it with the NTEU saying, 'We're not going to come up with an alternative'. They didn't say why one week was wrong.

PN181

COMMISSIONER BISSETT: Yes. Well, I wasn't asking that, I was asking why one week was right.

PN182

MR BOURKE: The other aspect is the consultation has to be associated with the tutorial.

PN183

VICE PRESIDENT ASBURY: The tutorial which is, arguably, the connection, for the purposes of contemporaneous.

PN184

MR BOURKE: Correct.

PN185

VICE PRESIDENT ASBURY: So the lecture or the - a particular lecture, a particular tutorial, because, you know, it's back in the dim, distant past where I do recollect they were different topics every week, so is that really the connection, that it's - because it refers to email consultation prior to and following a lecture which, logically would not be while you're still hanging around in the lecture theatre or the tutorial room afterwards?

PN186

MR BOURKE: Yes, we're talking about, and the defined term is 'associated work'. To give that meaning, in an educational context, and we make that clear. There needs to be a connection with the tutorial where, we would say, your Honour, Gostencnik DP, you look at the experience of a tutorial, it is relatively fresh in someone's mind within a week of a tutorial, to raise something for discussion. But the proposed amendment we seek, we make it clear that it has to be associated with a tutorial.

PN187

VICE PRESIDENT ASBURY: And you say had the textual matters you raised being properly considered it would have driven the decision to grant a variation to clarify the ambiguity.

PN188

MR BOURKE: Correct.

PN189

VICE PRESIDENT ASBURY: I understand your submission, thanks.

PN190

MR BOURKE: Including the textual analysis which provided, by way of clarification, the fact that the consultation could be requested to be scheduled. There were two issues in dispute, the contemporaneous aspect of the amendment but also the fact that the parties were in dispute whether you could ask a teaching associate to schedule a consultation and we said there's no limitation in clause 1 that the consultation not be scheduled or not be required to be performed, and that's consistent with the drafting of clause section, which talks about other required academic activity.

PN191

VICE PRESIDENT ASBURY: But does that - I mean, arguably, the term 'contemporaneous' is a one-on-one direct communication and if the university can say, 'You need to talk to student X at this time next week', is that contemporaneous or is that another activity?

PN192

MR BOURKE: Well, in our submission, the fact that something is required doesn't divorce it from being contemporaneous. When one goes to clause 7, which talks about other required academic activity, it talks about, in the third last dot point:

PN193

Consultation with students, other than as contemporaneous consultation for a tutorial or lecture.

PN194

So it is contemplating that contemporaneous consultation could involve a required academic activity of the university.

PN195

VICE PRESIDENT ASBURY: But, arguably, the purpose of the contemporaneous consultation provision, it's essentially the clause operates so that some activity is included in the rate for the lecture or the tutorial and some activity isn't, it's extra, has to be paid for separately.

PN196

So why wouldn't contemporaneous be construed so that it just means the student initiates a discussion by - when you look at it in context it talks about by email. It's unusual for a tutor or a lecturer to go up to students and go, 'Hi, let's

have a chat'. It might be the student - usually the student would initiate the contact, or arguably anyway, why isn't that the contemporaneous aspect? That it's initiated by the student, whereas if the university says, I don't know, you've got to have an extra session on this topic because everyone failed the mid-term exam, or you've got to - I don't know, but anything like that, that is then the other activity.

PN197

MR BOURKE: The consultation. He's not saying it won't be initiated by the student, it's simply that the academic may be required to make themselves available at a particular time and then it's a matter for the student whether they want to consult. But that is consistent with clause 7, that that activity, that is, consultation, may be required of the university but it involves a separate payment if it's not contemporaneous. It doesn't focus on, 'It has to be a spontaneous act of the student', there's no reason why the same day or the next day that an academic keeps office hours, a student chooses to come in and speak about a tute that was held the day before. We would say that clearly comes within clause 1. It's not a separate payment and that's confirmed by the carve out that some required consultation, if it's contemporaneous, does not involve a separate payment.

PN198

Coming back to email, an email doesn't have to be the same day. It might be four, five or six days later, or before the next tutorial.

PN199

VICE PRESIDENT ASBURY: But it may have to relate to the subject matter of the tutorial or the subject matter of the lecture, rather than the students just dropped in to have a philosophical discussion about their career plans, or something like that.

PN200

MR BOURKE: And we don't argue with that. And we make it clear, in our amendment, that the consultation has to be associated with a tutorial that occurs within the week. We make that clear.

PN201

VICE PRESIDENT ASBURY: Yes, understand.

PN202

MR BOURKE: So in our submission, the discretion needs to be exercised again. We've got a situation where both his Honour below and Snaden J has said, 'The use of the word 'contemporaneous' is prone to lead to disputation' and, we would say, consistent with meeting the objects of a harmonious workplace relations, in 57(7). Our proposed amendment is a sensible solution, particularly in - as we said, the NTEU did not specifically say why it was wrong and they refused to come with an alternative proposal.

PN203

We say it's consistent with the clause being read in the context of an educational environment where, within a week, the issues would still be fresh within student and tutor minds.

PN204

You then have the fact that we are clarifying whether the consultation can be required, and we say that's consistent with the fact there's no specification, in clause 1, that it is not to be required or is to be required, and clause 7 confirms that, with particularly the carve out, it's other required academic activity, there's no impediment on requiring consultation to occur. So, in our submission, another basis to avoid disputation.

PN205

Then we are left with Snaden J, he stayed the Federal Court case for this issue to be resolved, with the Commission's power, under section 217, recognising it was a specialist - - -

PN206

DEPUTY PRESIDENT GOSTENCNIK: That was good of him.

PN207

MR BOURKE: Sorry?

PN208

DEPUTY PRESIDENT GOSTENCNIK: That was good of him.

PN209

MR BOURKE: The tribunal, in our submission, this Commission has the flexibility to deal with this in a way that minimises disputation in the future.

PN210

VICE PRESIDENT ASBURY: At the time Snaden J determined that, was the dispute still on foot, or only this matter?

PN211

MR BOURKE: No, the dispute was on foot.

PN212

VICE PRESIDENT ASBURY: So he might have meant do it that way, because that would have required a construction of the agreement, one way or the other. I mean the dispute note, the 739.

PN213

MR BOURKE: Sorry, I misunderstood your question, I apologise. I'm pretty sure we have withdrawn the dispute notice, which was otherwise that there was going to be a jurisdictional fight over it.

PN214

DEPUTY PRESIDENT GOSTENCNIK: That seems to be conceded by Ms Kelly.

PN215

MS KELLY: It is.

PN216

MR BOURKE: Now, can I move to dealing with discretion? I've dealt with the common intention point, can I then come to other matters his Honour - other matters his Honour dealt with, as to why they were really very much secondary. As he said, the significant factor was the absence of common intention.

PN217

But if the Commission can go back to the judgment, at 158. His Honour recognises that our proposal is properly targeted at removing the ambiguities or uncertainty. There's then a discussion about the absence of common intention and it's again clear his Honour is talking about actual intention. Then his Honour talks about the risk of people's positions changing.

PN218

If the amendments are made there's a possibility that (indistinct) rights may be adversely affected.

PN219

He focuses on that, as distinct from undertaking a task; are the amendment proposed consistent with common intention, in terms of construction of the agreement.

PN220

In our submission, there's, in effect, an extreme reluctance because there might be adverse consequences, there might not. But to simply not engage with the process, in our submission, was unhelpful.

PN221

There is then a discussion, at 160, that, 'The contemporaneous might mean one hour either side'. No one advanced that. And, as we point out, it's contrary to the concept that there could be an email, day, days later, contrary to the concept that there might be back to back tutorials.

PN222

There's then a reference to the bargaining process, at 161. The reality is, whatever occurs in the bargaining process won't fix these problems and, as his Honour recognised, bargaining is going slowly. If you look at the history of bargaining, there's often several years in between enterprise agreements passing their nominal expiry date.

PN223

Then there's a reference, at 164, the potential that someone may be exposed to pecuniary penalty. That was never argued. There's no explanation what his Honour has in mind with that. It's purely speculative. There's no explanation how any academic could be exposed and if Monash is exposed, we brought the application.

PN224

Then there's a reference to new employees and what they may think. That is clearly a reference to, 'Well, they can't be visited with the actual knowledge regarding the agreement'. That's another example how his Honour is focusing on

actual intention, not objective intention. It simply does not assist in the exercise of the discretion.

PN225

Unless there's any other matters.

PN226

VICE PRESIDENT ASBURY: Sorry, just to confirm, the disposition of the appeal, should you succeed, is that the matter is redetermined on the basis of the material that was before the Commission, at first instance?

PN227

MR BOURKE: Correct, your Honour. Could we also add, we also did our outline submissions on construction, at our submissions in chief, paragraphs 15 to 37, from appeal book 334 and in reply 60 to 74, appeal book 346.

PN228

VICE PRESIDENT ASBURY: Thank you.

PN229

MS KELLY: Thank you.

PN230

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Ms Kelly, before you do, I do have one issue, Mr Bourke. I did read your submissions (indistinct) paragraph 73 you talk about, this is your submissions in reply, you talk about the custom and practice taking place for the last six years. I was just trying to understand how that was relevant?

PN231

MR BOURKE: Sorry, I - - -

PN232

DEPUTY PRESIDENT GOSTENCNIK: In your submissions below, at paragraph 73 in your reply submissions, you make reference to, 'Despite this custom and practice taking place for the six years, the NTEU has never raised a complaint or raised an issue about it'. How is that relevant to the construction of the (indistinct)?

PN233

MR BOURKE: It doesn't take the case any further.

PN234

DEPUTY PRESIDENT GOSTENCNIK: Because that's in the paragraph you just cited as relevant.

PN235

MR BOURKE: Yes.

PN236

DEPUTY PRESIDENT GOSTENCNIK: All right, thank you. Sorry.

PN237

MS KELLY: Not at all.

PN238

There's a five minute answer to the propositions put by my learned friend. I'm going to give you the five minute answer and then I'll turn to a slightly longer answer that contains additional references that support what I'm about to say.

PN239

DEPUTY PRESIDENT GOSTENCNIK: I'd quit while you're ahead but - - -

PN240

COMMISSIONER BISSETT: Stick to the five minutes.

PN241

MS KELLY: I might be able to do it, let's see.

PN242

My learned friend opened by saying that this matter brings into focus the way in which common intention should be dealt with in matters of this kind. The reason that proposition fails is that below it was not urged that the Deputy President find that the variation proposed by Monash reflected the common intention of the parties, either subjective or objectively ascertained. Let me make that good by six propositions.

PN243

First, what was put from Monash below is radically different to what is now put. What was put below, and you will find this at page 63, which is the transcript, commencing at 238. Here you see the primary position put by the university, which was that not only is common intention not a mandatory consideration, let's put to one side, but it's a consideration to which the Commission need not have regard at all.

PN244

So we see, at 238, the only task you have to ask for jurisdiction is ambiguity or uncertainty and then, consistent with Bianco, you have a broad discretion. You do not have to get caught up in, 'Does it go through some common intention'. That is then repeated at 240 and then at PN 242 and following.

PN245

I draw your attention, in particular, to PN 243 where, in response to a question from the Deputy President about common intention my learned friend says, 'That's effectively something, 217, you won't find it'. Then, critically, PN 245, at the bottom of that page. My learned friend adds, by way of almost comment:

PN246

But if I can just say, to the extent you want to give weight to common intention, we know it can only be a textual task because the parties can't point to anything that shows a meeting of the minds.

PN247

So the primary position is, you do not even have to go to common intention, Deputy President but if you do then the NTEU is wrong and you approach it on the textual basis. That's how it was put.

PN248

Proposition 2, it was agreed between the parties that there was no evidence of actual intention, subjective intention.

PN249

Three, and this is the key one, there was no argument made below that the variation proposed reflects the common intention of the parties, ascertained by reference to the text of the provision and some of the historical provisions that Monash put into evidence. You won't find it.

PN250

You will, of course, find extensive discussion of the clause. Certainly my client construed it and offered a construction, but Monash did not. It discussed the clause, it highlighted various aspects of the clause, but it did so for two purposes. First, it did so in support of it's ultimately successful submission that there was ambiguity or uncertainty and, second, it did to demonstrate that it's proposed variation was workable within the framework of schedules 2 and 3. Not that it met the common intention of schedules 2 and 3, construed by reference to the text but that, within the text as it existed, it was a workable, industrial, common sense solution. That's what was put.

PN251

I'll take you to some references in a moment but if you were to read the transcript of the submissions made you will not find a text context purpose analysis of the clause from the schedules, in the context of the agreement, as a whole. You will not find it there.

PN252

Can I make this good, in part, by reference to two further transcript references? Could I ask you to take up page 74 of the appeal book? At PN 346, well, in fact, if we could go back to PN 345:

PN253

So when is the use of common intention?---As your Honour says, parties may not have really properly concentrated their mind on how all this is going to work but you are bound by the language and then you are only left with a textual task.

PN254

That's the proposition. But it then follows this submission was put:

PN255

We say once you get to that, in terms of equity and good conscience, we have struck an appropriate balance in clarifying the construction issues that are in dispute and coming up with a common sense industrial outcome to try and make the clause workable. It is not, (indistinct) said, that this is the proper construction of the clause reflecting common intention.

PN256

Then 356 puts this, in my submission, to rest. Page 76.

PN257

We can't, straight-faced, go on a proper construction, 'It's one week'. It's some reasonable amount and we could have cases where you look at all the circumstances and maybe in circumstances it's two weeks, or it could be on all semester. But weighing up your discretion and exercising industrial common sense, (indistinct) really good conscience put some boundaries around it because otherwise it's just going to be more disputation and the current disputation won't go away.

PN258

That is proposition 3, the common intention task, assessed by reference to the text and the history was not done.

PN259

What was done, this is proposition 4, it was put that when you look at the text what we are proposing can sit harmoniously with what is there. This is a practical, industrial, workable outcome.

PN260

When that is all seen, in its proper context, we then have two paragraphs of the decision that explain how the Deputy President then dealt with this. The first is paragraph 150, at page 42, which has already been the subject of some discussion.

PN261

When the Deputy President says:

PN262

The evidence before me did not establish a common intention, regardless of whether the standards of intention was objectively or subjectively determined.

PN263

My learned friend focused on the word 'evidence', I think that close reading of the word 'evidence' is an unfair reading. What was put to the Deputy President is, there's no actual attention, that's accepted. But it was not put that you could look to the agreement and the text in the history and say that the variation reflected common intention. That is what we see in paragraph 150. Nobody submitted to the Deputy President that a common intention could be found, nor what that common intention was.

PN264

Then, of course, 160, which is at page 44, this is in his Honour's analysis of whether or not to exercise discretion. His Honour is here identifying the consequences of there being neither party submitting that the variation reflected common intention. He is saying, 'This is one workable way of varying this agreement but there may be others and they will all have different consequences'. That, in my submission, is a matter he was (a) entitled to have regard to but reflects the way the argument about the common intention progressed below.

PN265

That is the five minute answer to what my learned friend has put this morning.

PN266

VICE PRESIDENT ASBURY: Could I just ask - - -

PN267

DEPUTY PRESIDENT GOSTENCNIK: Six and a half.

PN268

MS KELLY: Typical barrister's estimate.

PN269

VICE PRESIDENT ASBURY: Could I just ask, the fact that it didn't happen that, as you say, there wasn't a construction of the agreement, should it have happened?

PN270

MS KELLY: If common intention is, at a minimum, a significant factor. But it's Monash's case to make.

PN271

VICE PRESIDENT ASBURY: Sure.

PN272

MS KELLY: So - - -

PN273

VICE PRESIDENT ASBURY: Should the Deputy President have considered - - -

PN274

MS KELLY: No.

PN275

VICE PRESIDENT ASBURY: - - - the text of the agreement in the way that's - - -

PN276

MS KELLY: No.

PN277

VICE PRESIDENT ASBURY: Because it wasn't argued.

PN278

MS KELLY: I understand now, Vice President.

PN279

VICE PRESIDENT ASBURY: Sorry.

PN280

MS KELLY: No. This is, today, a jurisdiction in error and it is a very unattractive proposition to say that the Deputy President ought to have engaged in a task that he was not asked to engage in. At its highest, my learned friend's

submissions were that if you want to look at common intention then you do it through a traditional, textual analysis.

PN281

But the next step of actually engaging in that textual analysis did not occur. It was not then for the Deputy President to go searching for a common intention when none had been put to him. Proposition 1.

PN282

Proposition 2, it comes in the context, Vice President, of the paragraph in the transcript I took you to, where my learned friend says, 'We can't, hand on heart, say this reflects the common intention'. That was the rubric within which the Deputy President was asked to decide the case, and that is how he did decide it, referencing paragraphs 150 and 160. He did precisely the task the parties asked him to do.

PN283

VICE PRESIDENT ASBURY: I understand your submissions.

PN284

MS KELLY: I am anxious to make good the proposition that the construction task wasn't undertaken. I'll do it briefly, however, with some references to the material below.

PN285

As to the written submissions, which are at tab E1, commencing at page 331, and you needed go to these unless you wish to. But paragraphs 15 to 26, the clauses are described and there is some observations about how the clauses operate, but you will not find there the text, context, purpose analysis that one would find if one was looking for common intention.

PN286

At 27 to 37 there's some relevant history, which might be taken into account in a common intention inquiry but was not put to that use.

PN287

There was then a move into two propositions, one of which was that the proposed variation reflected, perhaps, a custom and practice and that, ultimately, wasn't made good.

PN288

Then, in the oral submissions, which are at tab C, commencing at page 51, again we see this traverse of the clauses. There's no doubt the clauses were traversed but, again, if you look at PN 138 to PN 167 you will find discussion of the word 'contemporaneous' for the purpose of demonstrating the ambiguity or uncertainty, you will not find the text, context, purpose analysis. There's then, at PN 168 to PN 180, discussion of the variation. Then at 181 the submissions move into the ambiguity task.

PN289

At 227 and following there is the dialogue with his Honour about common intention, which arises not because it was part of Monash's case, but it was part of the case that my client put in response.

PN290

There is then the material that I took you to about the primary position of the university, being that common intention is not required at all, at PN 241 to 245. There's then an extensive consideration of Bianco, at 256 to 292. And then at 294 it moves into the argument about why the variation should be made.

PN291

Now, I've done that in very short compass and at a very high level but if regard was to be had to those materials it would make good the principle proposition I am putting, which was that common intention search was not done for the university.

PN292

VICE PRESIDENT ASBURY: And that's why the provisions of the agreement are traversed starting at paragraph 11 and it's simply your argument is, it traverses them, it's not an analysis of how they will operate together, how they operate in the context of the agreement?

PN293

MS KELLY: That's right.

PN294

VICE PRESIDENT ASBURY: And that didn't need to occur if none of the parties argued?

PN295

MS KELLY: That's so.

PN296

I want to be clear, Vice President, there is discussion about certain aspects of the clauses but it's done for the purpose of demonstrating ambiguity or uncertainty or by way of commentary about how something operates.

PN297

VICE PRESIDENT ASBURY: And it's unworkable and you should vary the agreement. So you say you can't now, given that to decide to vary the agreement is an exercise of discretion, you say that you can't come now and say the Deputy President didn't consider the textual, properly analyse the text when that argument wasn't put to him.

PN298

MS KELLY: Precisely so.

PN299

VICE PRESIDENT ASBURY: Yes, I understand your submission. Thanks.

PN300

MS KELLY: And to put it beyond doubt, the paragraphs my learned friend refers to, where he is discussing common intention as a textual analysis, see Telstra, was responsive to what the union was saying about common intention but did not, at any point, go on to then actually engage in that task. It was dealt with as a matter of principle but it ultimately wasn't done in this case.

PN301

VICE PRESIDENT ASBURY: Yes. There's a lot of discussion about what it means - - -

PN302

MS KELLY: Indeed.

PN303

VICE PRESIDENT ASBURY: - - - in the cases and not a lot of application and it's because no one argued specifically.

PN304

MS KELLY: Precisely so.

PN305

VICE PRESIDENT ASBURY: Yes.

PN306

MS KELLY: Precisely so.

PN307

DEPUTY PRESIDENT GOSTENCNIK: Ms Kelly, was your response to the Vice President's question about whether the Deputy President ought to have taken into account or ought to have conducted a textual analysis to try and ascertain the common intention objectively, after having found that the provisions are ambiguous or uncertain, would that answer be different if the jurisdiction would able to be invoked, on the Commission's own motion? Because 217 is on application.

PN308

MS KELLY: Yes. I think the answer to your question, Deputy President, is, yes, provided that procedural fairness was observed.

PN309

DEPUTY PRESIDENT GOSTENCNIK: Of course. Yes, of course.

PN310

MS KELLY: So here it is true that my client engaged in the constructional task, for the purpose of saying there's some ambiguity or uncertainty - - -

PN311

DEPUTY PRESIDENT GOSTENCNIK: Yes, I understand.

PN312

MS KELLY: - - - but we didn't engage in it, in a responsive say, because, ultimately, it wasn't put and we weren't called on to do so.

PN313

VICE PRESIDENT ASBURY: But the Deputy President could have, on his own initiative, said, 'I want to be addressed on the text of the agreement', but did not and that's not an error, that's just what happened in the way the proceedings - - -

PN314

MS KELLY: Precisely.

PN315

VICE PRESIDENT ASBURY: - - - were conducted. Yes, I understand.

PN316

MS KELLY: The Deputy President was entitled to determine the case on the basis of how it was put.

PN317

DEPUTY PRESIDENT GOSTENCNIK: And the provisions at 217 are to be compared with 160, where the Commission is able, of it's own motion, to make a determination to remove an award ambiguity or uncertainty.

PN318

MS KELLY: That's so. And perhaps, even in the context of the various other clauses that deal with how an agreement might be amended, during the course of its life.

PN319

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN320

MS KELLY: Can I deal, again, I had much to say but I might truncate a significant amount of it. Not quite five minutes, but not much more. I do want to work through the grounds in sequence, because we are dealing with a jurisdiction in error and none of the errors identified are there.

PN321

As to ground 1, I think it is incontrovertible that the Deputy President did not make the finding there alleged. That is grounds that said he found that it was a mandatory requirement that a common intention supported proposed that variation be established. Paragraphs 119, at page 36, read with 128, at page 37, and 153, at page 152 put that argument to rest. He said, in terms, that he rejected that and we dispensed with that ground in that way.

PN322

Ground 2, about which I had intended to say much, I may now say little, because we dealt with this, at length, in the written submissions and my learned friend didn't develop this particularly today. There are two aspects to this; one is the Bianco ruling controversy and then the second is the orthodox nature of the principles that the Deputy President acquired.

PN323

We have, in our written submissions, traversed at length why the Bianco ruling does not stand with the proposition relied upon by Monash, and I think that is incontrovertible. It says nothing, almost nothing whatever, about the principles that guard the exercise of discretion if the jurisdictional fact is established.

PN324

It does, in terms, refer to common intention being a significant consideration, once you reach the discretion stage, and you'll find that at paragraphs 68 to 69 of the Bianco ruling, at page 56 of the bundle of authorities. That is all that I'll say in addition to what we've put in writing about that aspect.

PN325

In relation to then the principles applied by the Deputy President, can I take up three points. First, it's put, in Monash's written submissions, that his Honour made a finding that the power in section 217 is strictly confined, by reference to common intention. You'll find that in Monash's submissions at 7, 10 and 14. In fact, that is not what his Honour said. A decision, 153 at page 42 of the book, he says the opposite. The Deputy President says that he does not accept that it is strictly confined. Then he does go on to say that there will be limited circumstances. That's been inverted by Monash to say that other than the limited circumstances it is strictly confined. It is not a fair reading of what his Honour said.

PN326

Second, the Deputy President's observation that the circumstances in which an agreement might be varied, without evidence of common intention, are limited reflects the orthodox - the consequences of orthodox application of principle.

PN327

If the jurisdiction is to remedy an agreement that was reached between parties but ambiguously reduced to writing one starts with what that agreement was. If one can't determine what that agreement is, then it is difficult to see how the power could be exercised at all. So the criticism of his Honour for making that observation is not supported by principle.

PN328

Third, Monash then submits that those two aspects are an error that are compounded by certain observations about common intention and suggest, in their submissions, at 10 to 11, that his Honour is importing principles applicable to the construction of enterprise agreements. He's doing no such thing. When those passages are looked at, the decision at 145 to 146, the Deputy President is engaging in the analysis of common intention and how it is to be found. He is not saying, on any fair reading of his reasons, that we import those principles into the task here.

PN329

As to ground 3, this ground does not arise for the reason that I've already identified. The Deputy President was not asked to engage in this task and he did not engage in the task. For that reason, the alleged error simply does not arise. Even if that weren't so, there's still no error in the reasons provided by the Deputy President and I'm otherwise content to rest on the written submissions.

PN330

Unless I can further assist, that just leaves me with ground 4, and then I'll say something quickly about the variation. Ground 4 is the irrelevant (indistinct) ground.

PN331

As we've identified in the written submissions, I just want to make sure I've made this court sufficiently clear. In the way in which his Honour deals with this, it commences at paragraph 158 at page 43, there his Honour reaches his conclusion it's not appropriate to vary and in 159, 160 and 161 he provides his reasons. At 162 he concludes that that's consistent with the Act.

PN332

Then, in 163, he turns to deal with retrospectivity. Three of the four considerations relied on by Monash as being irrelevant, his Honour dealt with only through the prism of retrospectivity. That was never reached. He didn't reach that point because he had already concluded not to exercise the discretion at all.

PN333

So three of the four allegedly irrelevant considerations, not that they're irrelevant in any event, apply only to retrospectivity and that question wasn't reached. They, therefore, cannot be demonstrative of error, unless you are otherwise satisfied that there's error in the decision about whether or not to exercise discretion at all.

PN334

The remaining consideration was the availability of alternative options to deal with the dispute. And on any view, when called on to determine whether or not to very an agreement to remove, as was Monash's case, the potential for disputation, other means by which that disputation could be resolved, is obviously a relevant consideration to be balanced against the other considerations. There's no error in that ground either.

PN335

Can I finally say something, very briefly, about the proposed variation? This was the subject of some discussion just a moment ago. Three things need to be said. The first is that the variation would have the effect - the evidence below was that tutorials are, at least, once a week across a 12-week teaching period. The variation, because it says, '7 days before or 7 days after a tutorial', would capture the whole of the teaching semester.

PN336

Now, true it is that it still needs to be connected to the tutorial, that inbuilt limitation is in the clause, but the effect of this amendment would be to capture consultation throughout the whole of the 12-week period, irrespective of when it occurred. Now, that is plainly a variation that favours Monash's commercial interests and certainly doesn't balance those interests against the interests of the employees.

PN337

The second point to be made is this. The variation itself is ambiguous. Does the Bench have the three page document that Monash provided? Thank you.

PN338

VICE PRESIDENT ASBURY: Just bear with me one minutes. I decided to go electric and I'm not that good at it.

PN339

DEPUTY PRESIDENT GOSTENCNIK: Vice President, it's digital rather than electric.

PN340

VICE PRESIDENT ASBURY: I do mean digital, thank you.

PN341

DEPUTY PRESIDENT GOSTENCNIK: Otherwise we might have to plug her in somewhere.

PN342

VICE PRESIDENT ASBURY: Thanks, I've got it.

PN343

MS KELLY: Thank you. I went digital on the last occasion and promptly deleted all of my notes shortly before rising to my feet, so I too have gone hard copy.

PN344

But if we take what is said under tutorials and we see the underlying where the variation is. So for the avoidance of doubt, already when we see the words, 'for the avoidance of doubt', we are creating a problem because we are introducing a new sentence intended to clarify an earlier sentence. If the two sentences don't sit together there is further conflict between them.

PN345

Then we see the word 'proximate in time', 'proximate', in the phrase 'proximate in time to the tutorial'. So it must be contemporaneous, that is, proximate in time to the tutorial and then, 'For example, within a week'. Not that it is a week but that it is within a week, 'before or after the relevant tutorial but prior to the next tutorial'.

PN346

This is not a variation that adds any clarity to the situation whatsoever, by reason of the way in which it has been crafted. And the same issue exists in the language in the proposed variation at clause 2 of the schedule. It introduces an avoidance of doubt phrase which only adds doubt. It introduces an additional temporal element, being 'proximate', with no indication of what that might mean, and then maintains the period 'before or after the lecture'. It is not going to resolve the ambiguity or uncertainty, it is only going to add to the disputation and that, in itself, is a reason not to exercise discretion to vary it in those terms.

PN347

Finally, can I commend to you the submission of the union below, about why a variation in this case is not appropriate. They include, of course, that there are

many thousands of affected employees who oppose the variation and his Honour had, before him, 200 emails from affected employees, each of which opposed the variation. It had the - - -

PN348

DEPUTY PRESIDENT GOSTENCNIK: He dealt with those contemporaneously.

PN349

MS KELLY: Yes, he did.

PN350

The Federal Court proceeding, of course, which is on foot, and the reality that this would vary rights, the creation of inconsistent rights, because this does not vary the earlier agreement, which is also the subject of the Federal Court proceeding.

PN351

Then, of course, the reality that bargaining is underway and the Act gives a certain primacy to parties resolving their disputes through enterprise bargaining and that process should be allowed to take its course. I commend, in that sense, all that was put in writing and said orally, for the union, below, on why this isn't an appropriate case to vary in any event.

PN352

Unless I can assist further, they are the submissions for the union.

PN353

COMMISSIONER BISSETT: Can I just ask, Ms Kelly, how long has the bargaining been on foot?

PN354

MS KELLY: Ten months.

PN355

COMMISSIONER BISSETT: Short then.

PN356

MS KELLY: Approximately, I'm told. It's an important qualifier. Approximately 10 months.

PN357

COMMISSIONER BISSETT: Thank you.

PN358

MS KELLY: Thank you, Commissioner.

PN359

MR BOURKE: Can I deal with a number of things? Firstly, we clearly unpacked the schedule. We provided you with the written references and the oral argument. We did so in depth to discuss why you could have a required consultation and why contemporaneous could, in fact, include a semester. That

was dealt with at PN 155, appeal book 53. See also appeal book 54, PN 166 and 167. But we said, as an industrial solution, we wear one week.

PN360

VICE PRESIDENT ASBURY: But isn't there a distinction between saying this variation is needed because we need an industrial solution, to - that's a completely different argument, isn't it, from saying the context - the text of this agreement means this, this is how it should be construed. It's a completely different argument, isn't it?

PN361

MR BOURKE: In our submission, first, we did say, as a matter of construction, which is common intention, we have an entitlement to ask people to consult. So that's a major part of the amendment.

PN362

We, secondly, said the scope of contemporaneous and, of course, that word, in itself, has clear ambiguity, as recognised by Snaden J and his Honour below, we said could contemplate a semester. We then moved from that to say, as a solution the variation will be conservative. So we have put forward a common intention and we did so with detailed submissions as to how you construe schedule 3.

PN363

VICE PRESIDENT ASBURY: And then what you referred to earlier.

PN364

MR BOURKE: Correct.

PN365

VICE PRESIDENT ASBURY: Okay.

PN366

MR BOURKE: And can we just add this, and this is important. The NTEU, they came to the case below saying proving common intention is mandatory. It's a mandatory requirement. Two, common intention must be actual, that is, subjective.

PN367

So if you read our submissions, what we are saying is, the statute does not make a finding of common intention mandatory. That doesn't mean it's not a relevant matter. But we said, once you look at it, as a relevant matter, don't go down the actual subjective intention of the parties route because you can't do that, there's no evidence. Go through the textual route, consistent with Telstra and the Australian International Pilots' Association case, to a textual analysis, which we time and time again told his Honour to do, and his Honour did not do.

PN368

So, effectively, although his Honour has expressly said, 'I don't find that common intention is a mandatory thing that I need to consider', he effectively treated it as such by saying, 'It was a significant factor and I'm only going to look for actual

intention of the subjective parties'. Now, that's plain wrong, in our respectful submission.

PN369

Could I then come to - - -

PN370

DEPUTY PRESIDENT GOSTENCNIK: One answer to that submission - - -

PN371

MR BOURKE: Sorry.

PN372

DEPUTY PRESIDENT GOSTENCNIK: - - - might be that the union's case, you say the union came along, the union's case was simply responding to your case, it wasn't advancing a case.

PN373

MR BOURKE: Yes, the union's case, correct, they were responding to our case.

PN374

VICE PRESIDENT ASBURY: Which is, do nothing, nothing to see here. Do nothing and let us deal with it.

PN375

MR BOURKE: But all I'm pointing out is, in the context of them coming before his Honour and saying, 'You can't prove actual intention, where there was no evidence, therefore - and this is a mandatory obligation you need to find to exist'. We said, 'That's wrong'.

PN376

VICE PRESIDENT ASBURY: But he didn't agree with that, he specifically disagreed with that.

PN377

MR BOURKE: In the - I didn't mean to cut you off, sorry.

PN378

No, he didn't agree but I'm just saying that you need to read out submissions to meeting that. We were saying, 'It's not a mandatory matter, but of course it can be a relevant matter'. We make that clear, for example, in our reply submissions, at paragraph 21, appeal book 1, 940.

PN379

So there's a difference between whether it's a statutory mandatory consideration, as distinct from whether it is a relevant matter to consider, in the exercise of your discretion. We never said it wasn't a relevant matter, but if you're going to do this, make it a textual task. Because there was no evidence and no one put a case about actual intention, and his Honour did not do that. His Honour confines the task to actual intention, can't find it, that's the significant matter that we not exercise the discretion. That's error and means it has to be exercised afresh and, in our respectful submission, there's no meaningful analysis, on any fresh exercise of

discretion, of sections 577, 578 which is at the fundamental object of harmonious industrial relations. We are going to be left in dispute if nothing is done.

PN380

VICE PRESIDENT ASBURY: Well, are you, if the Federal Court - if there's a case before the Federal Court it will decide it, won't it?

PN381

MR BOURKE: But that will take time. That will take time and where are we in the meantime? The Federal Court case does not raise the issue of what contemporaneous means. That's left completely to one side. That's clearly as his Honour and - his Honour below and Snaden J said, right for disputation. There's no proposal to fix it, the only proposal was what we came up with.

PN382

There's then a suggestion that the variation is ambiguous. Only very minor parts were criticised. The fact that we put, 'For avoidance of doubt', what is the problem with that and if it is a problem, remove it.

PN383

COMMISSIONER BISSETT: It's generally the one thing that's going to create doubt, Mr Bourke, in my experience.

PN384

MR BOURKE: We have no issue with that being removed, if that is an issue. Then there's the complaint about, 'That occurs approximate in time to the tutorial, for example'. If that caused an issue, and we say it doesn't, remove it, and we just confine it to the specific boundary. In our submission, that's consistent with an exercise of discretion being formed by sections 577 and 578.

PN385

DEPUTY PRESIDENT GOSTENCNIK: Mr Bourke, it seems to me that, at least looking at your written reply submission below, that the point that Ms Kelly made about your position about objectively assessed common intention was a throwaway, that is the only thing - you say the only thing that is required of the Commission is to identify ambiguity or uncertainty and that such ambiguity or uncertainty may be removed by the amendment. Those requirements, you say, this is at paragraph 23 of your reply submissions, those requirements are satisfied in regards to the 2019 agreement. They're the only two matters that you identify. Then you go on to, in 24, to talk about there being no challenge to the submission about the way in which the clauses have been applied. Then you say:

PN386

Any common intention of the parties should ultimately be objectively assessed. Such assessment can be made when you go the language of the provisions and its history, which, on both counts, supports Monash's position.

PN387

That's - - -

PN388

MR BOURKE: So we made it clear. Textual analysis, and then we spelled it out orally, a number of times, both in chief, and orally in reply, we said, 'Come back to the text', but we said, 'What you don't do is confine the task to try to find the actual subjective intention of the parties when there's no evidence either way on that'. That is the only task his Honour undertook when looking at common intention.

PN389

Unless there's any other matters.

PN390

DEPUTY PRESIDENT GOSTENCNIK: Well, Mr Bourke, let's assume all of that is correct. There's some force, is there not, in Ms Kelly's point, that (indistinct) proposed solution is, itself, ambiguous and wouldn't resolve or remove any ambiguity (indistinct).

PN391

MR BOURKE: In our submission, as we said, there's no ambiguity of the words. The only two bits complained of are 'for the avoidance of doubt' - - -

PN392

DEPUTY PRESIDENT GOSTENCNIK: There's no ambiguity in the word 'contemporaneous', is there, usually?

PN393

MR BOURKE: 'For the avoidance of doubt', which we said, fine, remove it'. Then some reference to the use of 'Approximately in time for the tutorial, for example', that was complained about below, not 'For the avoidance of doubt', and we said to his Honour below, if you're concerned about it remove that.

PN394

VICE PRESIDENT ASBURY: But then what do you have? The only temporal element you then have is 'contemporaneous', isn't it? If you take out 'proximate'?

PN395

MR BOURKE: You have:

PN396

The contemporaneous consultation means consultation associated with the tutorial that occurs within a week before or after the relevant tutorial but prior to the next tutorial and may be scheduled by either the teaching associate or the university.

PN397

That completely deals with the current dispute about whether a tutor can be asked to arrange consultation and deals with the current dispute or what 'contemporaneous' means.

PN398

DEPUTY PRESIDENT GOSTENCNIK: In that context the word 'contemporaneous' doesn't have any work to do. It's just any consultation in a week.

PN399

MR BOURKE: Correct, but it has to be associated with the tutorial.

PN400

DEPUTY PRESIDENT GOSTENCNIK: Of course, but it needn't be contemporaneous.

PN401

MR BOURKE: Well, the question is, contemporaneous is such a difficult - - -

PN402

DEPUTY PRESIDENT GOSTENCNIK: Well, you say 'contemporaneous' means within a week.

PN403

MR BOURKE: We say it actually could mean within the semester, but we've chosen to be conservative and we've confined it to a week, in terms of the variation, to avoid the risk of disputation.

PN404

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN405

MR BOURKE: If your Honour pleases.

PN406

MS KELLY: Might I just add one thing? The paragraph, Deputy President, of the reply submissions that I think you just took my learned friend to refers to a common practice, which, of course, by the time the matter was heard, Deputy President, had been accepted that there was no common practice.

PN407

DEPUTY PRESIDENT GOSTENCNIK: Yes, I understand that.

PN408

MS KELLY: Yes, that's all.

PN409

DEPUTY PRESIDENT GOSTENCNIK: That's why I (audio malfunction) by suggesting that the submission, second sentence, yes, the second sentence of 24 was a throwaway.

PN410

MS KELLY: Yes, indeed, if you engage in that task.

PN411

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN412

MS KELLY: As opposed to here how you're going to - - -

PN413

DEPUTY PRESIDENT GOSTENCNIK: I understand that. Consistent with their earlier point - - -

PN414

MS KELLY: Indeed.

PN415

DEPUTY PRESIDENT GOSTENCNIK: - - - at least on one reading of it, yes.

PN416

MS KELLY: On one reading of it. Thank you, Deputy President.

PN417

VICE PRESIDENT ASBURY: All right. We'll reserve our decision and issue it in due course. We'll adjourn.

ADJOURNED INDEFINITELY **[4.06 PM]**