[2023] FWC 1148 [Note: An appeal pursuant to s.604 (C2023/3720) was lodged against this decision - refer to Full Bench decision dated 4 October 2023 [[2023] FWCFB 181] for result of appeal.]

DECISION

Fair Work Act 2009
s.217—Enterprise agreement

Monash University T/A Monash University (Monash)
(AG2022/4262)

Educational services

DEPUTY PRESIDENT BELL MELBOURNE, 7 JUNE 2023

Application for variation of the Monash University Enterprise Agreement (Academic and Professional Staff) 2019 – ambiguity and uncertainty established – circumstances did not justify variation – application dismissed.

[1] The Applicant, Monash University (the **University**), is the employer covered by the *Monash University Enterprise Agreement (Academic and Professional Staff) 2019* (**2019 Agreement**). It has applied under s.217 of the *Fair Work Act 2009* (Cth) (**Act**) to vary the 2019 Agreement, so as to (on the University's case) remove an ambiguity or uncertainty relating to terms in that agreement pertaining to certain associated work performed by "Teaching Associates".

[2] Section 217 of the Act is as follows:

> "**217 Variation of an enterprise agreement to remove an ambiguity or uncertainty**
>
> (1) The FWC may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following:
>
> (a) one or more of the employers covered by the agreement;
>
> (b) an employee covered by the agreement;
>
> (c) an employee organisation covered by the agreement.
>
> (2) If the FWC varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement."

[3] The University seeks an order that the specified date of variation be 12 February 2020, being the date that the 2019 Agreement commenced operation.

[4] The application was opposed by the National Tertiary Education Industry Union (**NTEU**). The NTEU is named as a "Party" to the 2019 Agreement and, in any event, is properly entitled to represent its members, many of whom are employed by the University.

[5] In the hearing before me, the University was represented by Justin Bourke KC and Andrew Denton of counsel, instructed by Clayton Utz. The NTEU was represented by Siobhan Kelly of counsel, instructed by the NTEU. In each case, the parties were granted permission to be represented.

[6] The NTEU called as witnesses two officers from the NTEU, being Linda Gale (Senior Industrial Officer) and Kelly Thomas (Director, Industrial and Legal). The NTEU also called six current Teaching Associates from the University and one former Teaching Associate. None of those witnesses were required for cross-examination. The University did not call any witnesses but tendered a number of documents.

Non-parties

[7] As the application to vary the 2019 Agreement had the potential to affect the interests of both current and former employees, I issued directions to the University requiring certain steps to be taken to notify that cohort of this proceeding. In this proceeding, that cohort have been generally described as the "non-parties" (in the sense that they were not the applicant nor a principal contradictor) and I will use that term in these reasons.

[8] The University reported – and there was no issue taken – that approximately 4540 non-parties were identified, comprised of 3098 current sessional staff and 1442 former sessional staff. Of these, save for 38 individuals, reasonable attempts to contact them in accordance with my orders were as follows: 4508 by email; 4499 by text message; and 32 by letter (where an email address was not held).

[9] I am satisfied that the steps taken by the University to contact current and former staff were sufficient and, on the information available to me, largely successful. Perhaps some measure of that success can be viewed by the response to those notifications. My directions for the non-parties set down a timetable for any such person to file any material in the event that they wished to be heard. My chambers received approximately 200 such emails, all opposing the application. Approximately 140 were a pro forma statement, recording their opposition to the University's application and support of the NTEU's position. Approximately 60 emails contained (with some variation) more substantive descriptions of their activities as a Teaching Associate and a number of those (again, with some variations) provided detail of underpayment claims broadly connected to those activities. For avoidance of any doubt, I was not required to express a view on any underpayment claim and I do not do so.

[10] Following agreement between the University and NTEU, the NTEU relied upon aspects of some non-party material that was filed. The non-parties were not otherwise required for cross-examination nor did any seek to appear.

The 2019 Agreement and proposed variations

[11] The 2019 Agreement was approved on 5 February 2020, with an operative date[1] of 12 February 2020. It was varied under s.210 of the Act on 9 July 2020, although the variations are immaterial to the application. The nominal expiry date of the 2019 Agreement is 30 June 2022.

[12] Relevantly, the 2019 Agreement applies to a class of employees described as "Teaching Associates".

[13] A Teaching Associate is defined in cl.16.12 of the 2019 Agreement to be an academic staff member employed in "sessional employment". By the same clause, "sessional employment" means:

> "the casual employment of academic Teaching Associate staff who are appointed to undertake a single or specific number of sessions related to demonstrating, tutoring, lecturing, marking, supervision, academic research assistance, music accompanying with special educational service, undergraduate clinical nurse education or other required academic activity."

[14] Clause 26.2 of the 2019 Agreement states:

> "A Teaching Associate staff member will be paid within 22 days of submitting a completed valid claim for payment to the appropriate representative, as identified by the University to the Teaching Associate staff member.
>
> A Teaching Associate staff member must be engaged and paid for a minimum period of two hours per occasion they are required to attend work by the University, inclusive of any incorporated time and payment for preparation or associated working time already provided for or assumed to be included in the rates table in Schedule 2 or in the descriptors in Schedule 3."

[15] Rates of pay for Teaching Associates are provided for by Schedule 2 of the 2019 Agreement, which is titled "Teaching Associate sessional rates and casual academic research assistant rates".

[16] Schedule 2 contains a table that sets out eight "activities", each with a number of subcategories. The eight activities are titled "Lecture", "Tutoring", "Music Accompanying with Special Educational Service", "Undergraduate Clinical Nurse Education", "Marking", "Supervision", "Other Required Academic Activity", and "Casual Academic Research Assistant rates: $/hour". The subcategories – none of which were relevant to the present application - broadly pertained to the level of qualifications of the Teaching Associate and what level of preparation would be required, being matters that would affect the amount of pay for a particular activity.

[17] The heading to the table in Schedule 2 states that "Descriptors for the below activities are contained in Schedule 3".

[18] Schedule 3 of the 2019 Agreement is titled "Teaching Associate sessional rates descriptors". Schedule 3 lists seven activities or clauses, which align to the first seven (of the eight) activities listed in Schedule 2.

[19] Critical to the present application are the first, second and seventh clauses of Schedule 3, being "Tutorials", "Lectures", and "Other Required Academic Activity". I have set these out in full, together with the variations (in underline) proposed by the University to clauses 1 and 2 of Schedule 3.

> "**1. TUTORIALS**
>
> "Tutorial" means any education delivery, described as a tutorial in a course or unit outline, or in an official timetable issued by the University.
>
> Except for repeat tutorials, the rates prescribed are paid per hour of tutorial delivered (or equivalent delivery through other than face-to-face teaching mode) and assume two hours' associated work as defined below.
>
> A repeat tutorial is a second or subsequent delivery of substantially the same tutorial in the same subject matter within a period of seven days. The prescribed rates are paid per hour of tutorial delivered and assume one hour's associated work as defined below.
>
> Where a tutorial is more or less than one hour in length, the payment will be pro-rata the appropriate rate for a tutorial of one hour's duration.
>
> For the purposes of payment of a tutorial or repeat tutorial rate, "associated work" may encompass the following activities:
>
> - preparation of tutorials;
> - marking of student work for which the Teaching Associate staff member is responsible where the marking is performed (or could reasonably be performed) in the relevant classroom, tutorial or equivalent teaching environment;
> - incidental administration of relevant records of students for whom the Teaching Associate staff member is responsible;
> - contemporaneous consultation with students involving face-to-face and email consultation prior to and following a tutorial. ***For the avoidance of doubt, "contemporaneous consultation" means consultation associated with a tutorial that occurs proximate in time to the tutorial, for example, 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***; and/or
> - attendance at ad hoc meetings specifically for the purpose of assisting Teaching Associate staff to prepare for their tutorial and which are intended as a substitute for preparation that the staff would have otherwise had to undertake, not including meetings formally initiated and/or scheduled by the unit or course

convenor/co-ordinator and where the meeting is scheduled on a day on which the staff member is not scheduled to undertake contact or other teaching activities.

2. LECTURES

"Lecture" means any education delivery described as a lecture in a course or unit outline, or in an official timetable issued by the University.

The pay rates are paid for one hour of delivery (or equivalent delivery through other than face to face teaching mode) and associated work as defined below.

For the purposes of payment of a lecture or repeat lecture rate, "associated work" may encompass the following activities:

- preparation of lectures;

- marking of student work for which the Teaching Associate staff member is responsible where the marking is performed (or could reasonably be performed) in the relevant classroom, lecture or equivalent teaching environment;

- incidental administration of relevant records of students for whom the Teaching Associate staff member is responsible;

- contemporaneous consultation with students involving face-to-face and email consultation prior to and following a lecture. ***For the avoidance of doubt, "contemporaneous consultation" means consultation associated with a lecture that occurs proximate in time to the lecture, for example, within a week before or after the relevant lecture but prior to the next lecture, and may be scheduled by either the Teaching Associate or the University***; and/or

- attendance at ad hoc meetings specifically for the purpose of assisting Teaching Associate staff to prepare for their lecture and which are intended as a substitute for preparation that the staff would have otherwise had to undertake, not including meetings formally initiated and/or scheduled by the unit or course convenor/co-ordinator and where the meeting is scheduled on a day on which the staff member is not scheduled to undertake contact or other teaching activities.

…

7. OTHER REQUIRED ACADEMIC ACTIVITY

"Other required academic activity" includes work that the University requires a Teaching Associate staff member to perform and that is performed as required, being work of the following nature:

- the conduct of practical classes, demonstrations, workshops, student field excursions;
- the conduct of clinical sessions other than clinical nurse education;
- the conduct of performance and visual art studio sessions;
- musical coaching, repetiteurship, and musical accompanying other than with special educational service;
- development of teaching and subject materials such as the preparation of subject guides and reading lists and basic activities associated with subject co-ordination;
- consultation with students (other than as contemporaneous consultation for a tutorial or lecture);
- attendance at departmental and faculty meetings as required; and
- attendance at any of the activities set out in 1-4 above of this Schedule as directed.

The above list is not intended to be exhaustive, but is provided by way of examples and guidance."

Overview of the disputes regarding Schedule 3

[20] The dispute(s) regarding Schedule 3 are centred on certain work performed by Teaching Associates regarding "consultation" activities with students. By way of example, for "tutorials", the 2019 Agreement states that payment for each hour of delivered tutorial assumes two hours of paid "associated work". The definition of "associated work" includes "contemporaneous consultation" with students. A similar formulation applies for payments for "lectures".

[21] For Teaching Associates, there is a separate entitlement for work described as "Other required academic activity". The description of that entitlement includes work in the nature of "consultation with students (other than as contemporaneous consultation for a tutorial or lecture)".

[22] A key area of disputation between the parties, and for which the variation application is targeted, is whether certain "consultation" activities by Teaching Associates – particularly when the student consultation time was fixed in advance by a scheduled requirement or direction from the University – is:

- "contemporaneous consultation" within the meaning of clauses 1 and 2 of Schedule 3 (and, presumably on the University's case, therefore *prima facie* compensable as part of any "associated work" payable per tutorial); or

- on the NTEU's case, is "Other required academic activity" (or **ORAA**) within the meaning of clause 7 of Schedule 3 and is therefore separately (and additionally) compensable to the paid "associated work" assumed in clauses 1 and 2.

[23] The NTEU asserts that Teaching Associates, or at least some of them, have been undertaking consultation with students that has been classified (and paid) by the University as "contemporaneous consultation" under clause 1 of Schedule 3 in circumstances where (on the NTEU's case) that consultation ought correctly be classified under clause 7 of Schedule 3 as "Other required academic activity". On the NTEU's case, those Teaching Associates have been underpaid.

[24] The underlying dispute appears to have come to the fore in either late 2021 or early 2022. The University's submissions state that the first time the NTEU raised this particular pay dispute was in March 2022. Putting aside disputations or queries at a local level, that submission reflects the evidence before me. The evidence also discloses a series of meetings and correspondence between the parties that followed, and then more formal steps. A brief summary of the key steps after March 2022 follows.

[25] On 18 July 2022, the NTEU delivered a substantive correspondence to the University regarding the issue.

[26] On 1 September 2022, the University formally referred to the disputes process under the 2019 Agreement in correspondence on the matter with that date.

[27] On 15 September 2022, the NTEU commenced proceedings[2] (**Federal Court proceeding**) in the Federal Court of Australia to the effect that the University had breached the relevant clauses of the 2019 Agreement, as well as equivalent clauses under the *Monash University Enterprise Agreement (Academic and Professional Staff) 2014* (**2014 Agreement**).

[28] The NTEU's statement of claim filed in the Federal Court proceeding alleges that "At all times material to this proceeding, the University directed some Teaching Associates to undertake consultation with students during windows of time that were fixed and determined in advance", which was defined as the "Student Consultation Time". The pleading alleges the Student Consultation Time was a "fixed period of time" and advertised to students as a period of time in which a Teaching Associate would be "available for consultation". The statement of claim asserts that the University treated the pleaded Student Consultation Time as "associated work" for the purpose of Schedule 3 of the 2019 Agreement.

[29] The correct position, on the NTEU's case, is that such Student Consultation Time was not "associated work", falling within the definition of clauses 1 or 2 or Schedule 3 of the 2019 Agreement, but was (and still is) "Other required academic activity" falling within clause 7 of Schedule 3.

[30] On 15 and 19 September 2022, further discussions between the parties ensued.

[31] On 26 September 2022, the University lodged a 'dispute' application with the Commission, under s.739 of the Act. That matter[3] was subsequently allocated to me and a conciliation conference was listed for 12 October 2022.

[32] On 6 October 2022, the NTEU made an interlocutory application in the Federal Court proceeding for the University's s.739 application to be stayed.

[33] On 10 October 2022, the University made an application – the current application - to the Commission for the 2019 Agreement to be varied under s.217 of the Act.

[34] On 11 October 2022, the University issued a 'Notice of Representational Rights' to staff, which has the effect of establishing the 'notification time' for bargaining for a new enterprise agreement.[4]

[35] On 12 October 2022, the parties attended the scheduled conciliation conference before me. The matter did not resolve.

[36] On 18 October 2022, the University made an application in the Federal Court proceeding for a stay pending the determination by the Commission of the University's application under s.217.

[37] On 27 October 2022, the University discontinued its application in the Commission made under s.739 of the Act.

[38] On 17 November 2022, the Federal Court made orders staying the proceeding before it until the variation application currently before me is heard and determined, or until further order of the court.[5]

[39] Largely for the accommodation of the parties, the matter was substantially in abeyance before me between November 2022 and mid-February 2023, while the parties conferred (I infer) about this proceeding and bargaining more generally. Ms Gale's evidence records that the parties have undertaken a number of bargaining meetings in relation to a proposed new enterprise agreement.

[40] At the time of the hearing before me, bargaining remained unresolved.

Evidence

The witness evidence

[41] The witness evidence comprised of witnesses called directly by the NTEU, as well as extracts of material from non-parties (all current or former Teaching Associates) relied upon by the NTEU.

[42] In substance, there was relatively little dispute to the evidence led by the parties and much of it was documentary. Rather, as is commonly the case, there was dispute as to the significance of the parties' evidence.

[43] The NTEU's primary evidence is directed at showing that some Teaching Associates undertook consultation work for whom the only payment received was under clause 1 of

Schedule 3 (and not, as the NTEU contends is the correct position), separately paid for under the ORAA rates as "consultation" under clause 7 of Schedule 3.

[44] The NTEU also contends that some Teaching Associates have been (correctly, on the NTEU's case) paid for scheduled student consultation at the ORAA rates for many years and that many others have not been required to deliver scheduled student consultation at all. The purpose of this evidence of mixed practices was to show that there is not, nor has been, any discernible "common intention" that might be relevant to the exercise of any discretion to vary the enterprise agreement. Broadly speaking, the evidence of the Teaching Associates called by the NTEU, supported by the non-party evidence relied upon, makes good the factual proposition of mixed practices. In a number of respects, I observe that the University embraced aspects of the NTEU-led evidence because it further demonstrated (on the University's case), the ambiguity and uncertainty in the 2019 Agreement that the University was seeking to remedy.

[45] The NTEU also contends that, when properly construed, clauses 1 and 2 of Schedule 3 of the 2019 Agreement do not permit the University to *direct* or *require* Teaching Associates to schedule student consultation. At least at a factual level, I accept that the material before me shows practices by some Faculties or Schools within the University that are to the effect that Teaching Associates were instructed to be available for student consultation (usually in half-hour or one-hour blocks of time). Examples are described below.

[46] Broadly speaking, the Teaching Associate witnesses also described (and I accept) a state of affairs where the time spent with students during any student consultation period was often spent on topics not specifically focussed on the immediate tutorial in question. Rather, a range of topics or issues were often canvassed - usually initiated by students - such as assessments, readings, future study options, or health and wellbeing.

[47] As I do not consider those broad factual matters described above were directly in contest between the parties, other than at the margins or by noting there is other contextual material that would be applicable, I will only briefly summarise the salient aspects of the evidence given by various Teaching Associates.

[48] Mr Duncan Wallace is a Teaching Associate, who has been employed as such by the University since around February 2019. He works in the Faculty of Law where, relevantly, he has delivered tutorials and lectures in three separate subjects over the course of approximately ten Teaching Associate contracts.

[49] Mr Wallace has never been directed by the University to provide scheduled consultation hours as part of his duties. The consultation he provides is largely ad hoc and self-directed, which he accepts was within the "associated work" component of his base tutorial/lecture payments and being a matter he was given near-full autonomy over. He states that he has been allocated a number of hours each week in relation to student consultation, which is allocated and paid at the 'Other required academic activity' rate. His evidence included reference to a Teaching Associates' Induction Guide, issued by the Faculty of Law, which includes references to 'Consultation' as an activity claimable against the 'Other required academic activity' rate.

[50] Ms Elka Sadler was a Teaching Associate, who has been employed as such on contracts beginning in July 2016 and with further contracts in each of 2017, 2020, 2021 and 2022. Her

engagements with the University ceased in about June 2022, upon her commencing doctoral studies at a different institution. At the University, she worked within the School of Philosophical, Historical and International Studies (**SOPHIS**), which sits within the Faculty of Arts.

[51] For all subjects tutored by Ms Sadler as a Teaching Associate, she was directed by the University to deliver weekly scheduled student consultation hours for each teaching week of semester. For each subject she worked in, Ms Sadler was asked to "nominate" the hours she would be available for student consultation. Her (and other tutors') consultation hours were made available to students through an online Learning Management System called 'Moodle'. Ms Sadler's consultation hours were paid as part of the "associated work" component of the rate for delivering a tutorial (and not, by contrast to the practices for Mr Wallace) at the 'Other required academic rate'.

[52] Dr James Tanter was a Teaching Associate with the University during the first semester of 2021. He taught a subject for SOPHIS, within the Faculty of Arts. The circumstances he describes for student consultation time being part of "associated work" and not "Other required academic activity" in Schedule 3 of the 2019 Agreement are largely similar to those described by Ms Sadler, and I will not repeat them. In relation to any requirement or direction to schedule consultation for students, Dr Tanter exhibited an email he received on 21 February 2021 from the then Head of Philosophy, which stated:

> "Part of the hourly rate for tutes includes your consultation hour. (We don't double the number of consultation hours just because tutes have gone to 2 hours). Please make sure you set aside an hour for this, and this can be on zoom."

[53] Mr Michael Ciaravolo commenced as a Teaching Associate with the University commencing in about July 2018. Over that period, he has delivered tutorials in six separate subjects, and had approximately five Teaching Associate contracts. His employment was within the Department of Banking and Finance, which sat within the Monash Business School (Faculty of Business & Economics).

[54] For each subject that Mr Ciaravolo tutored in, he was directed or required by the University to deliver weekly scheduled consultation hours for each week of the teaching semester. At least by late 2018, Mr Ciaravolo was contacted by the Chief Examiner of the unit he was then tutoring, who asked him to nominate regular consultation times. The contact from the Chief Examiner, described above, continued after 2018. Mr Ciaravolo's consultation times were posted on 'Moodle' in essentially the same manner as Ms Sadler describes above. Mr Ciaravolo's description of topics raised or discussed during the consultation time was also essentially the same as that described by Ms Sadler.

[55] Mr Ciaravolo was told that the amount of consultation he was required to be available for was half an hour for each hour of tutorial delivered. He was not separately paid for those hours outside the 'associated work' component of clause 1 of Schedule 3 of the 2019 Agreement. Initially, Mr Ciaravolo believed he would be paid for that consultation work as 'Other required academic activity' but he was contacted by an administrator within his department who informed him that those consultation hours were part of the duties associated with the delivery of the tutorial and could not be claimed as 'Other required academic activity'.

[56] Dr Michael Lazarus is a Teaching Associate, who commenced employment as such in about October 2015. He has performed Teaching Associate work since, all for SOPHIS within the Faculty of Arts. As his circumstances were broadly similar to those described by Ms Sadler regarding the nomination of consultation hours and posting on Moodle, I will not repeat them. In 2016, Dr Lazarus received from the University a Teaching Associate Staff Induction Guide. It stated:

> "**Consultation hours**
> At the beginning of each semester all teaching staff, lecturers and tutors, will be asked to indicate the times when they will be available in their work area (or consultation room) for student consultation.
>
> Teaching Associate staff members are generally expected to be available for limited consultation hours (up to two non-contiguous contact hours) on a day that they are teaching on-campus. Outside these times, students should be directed to the Unit Coordinator: this should be made clear to the students at the beginning of the semester."

[57] Dr Lazarus describes an unsuccessful attempt by him, in about April 2022, to separately claim student consultation hours as 'Other required academic activity'. He was informed by email that (among other matters), "any consultation outside of class hours would already be accounted for in the pay structure for tutoring".

[58] Dr Scott Robinson is a Teaching Associate, who commenced in about July 2017 and has remained as such since. His Teaching Associate work is for SOPHIS, within the Faculty of Arts. As Dr Robinson's experience regarding student consultation (e.g. nomination of scheduled times and Moodle, no payment for 'Other required academic activity', activities associated with a tutorial and preparation), broadly reflect Ms Sadler's experiences, I will not repeat those matters.

[59] Consistently with Dr Lazarus' descriptions, he also referred to a "Sessional Tutors' Handbook" for SOPHIS Teaching Associates in place from at least 2017. Among other matters, that handbook stated "You are expected to provide one office hour for every three paid hours of teaching" and "This is a contractual requirement assumed as part of your paid hours, and not separately remunerated."

[60] Dr Robinson describes his understanding that, beginning around December 2021, other Teaching Associates in SOPHIS unsuccessfully sought to be separately paid for student consultation on the basis of 'Other required academic activity'. Dr Robinson made a similar request in March 2022, which was rejected.

[61] Mr Tony Williams is a Teaching Associate at the University, who was initially employed as such in about February 2014. His work as a Teaching Associate was for SOPHIS, within the Faculty of Arts. As Mr Williams' experience regarding student consultation (e.g. nomination of scheduled times and Moodle, no payment for 'Other required academic activity', activities associated with a tutorial and preparation) are broadly consistent with other SOPHIS Teaching Associates, I will not repeat those matters. Similar to Dr Lazarus' and Dr Robinson's evidence, Mr Williams referred to various Sessional Tutors' Handbooks for SOPHIS, save that

Mr Williams referred to versions from 2014 – 2017, 2019 and 2022. While there were some changes across the years, the versions from 2019 and 2022 each reflected the substance of the extract of the 2017 handbook I cited above.

[62] Finally, each of the witnesses called by the NTEU opposed the variation application and, further, gave estimates of underpayments that (on their calculations and interpretation of the 2019 Agreement) said they would be excluded from pursuing if the variation application was approved.

[63] Ms Gales' evidence and Ms Thomas' evidence included the various engagements by the parties regarding the substantive dispute in 2022 – I have set those matters out above. Their evidence also described various background matters regarding the university sector, as well as some historical material regarding the industrial instruments that applied prior to the 2019 Agreement.

[64] The 'non-party' evidence relied upon by the NTEU contained further examples and variants to the evidence of practices, given by the principal lay witnesses that I have set out above. It is not necessary for me to repeat it.

The documentary evidence

[65] The University's evidence was primarily directed at past enterprise agreements and awards (together with some available explanatory material produced in bargaining for historical agreements), as well as more recent documents concerning the NTEU's claims in the Federal Court.

[66] The genesis of Schedules 2 and 3 of the 2019 Agreement appears to be drawn from, but not identical to, two Full Bench decisions of the Australian Industrial Relations Commission in 1997, where the words "contemporaneous consultation" were inserted by the Full Bench in the *Australian Universities and Academic and Related Staff Salaries Award 1997*.[6]

[67] At least for the definition of "lecturing", the Full Bench accepted a definition proffered at the time by the NTEU, which was (emphasis added):

> "4.1.1. A casual academic employee required to provide a formal lecture (or equivalent delivery through other than face-to-face teaching mode) of one hour's duration with directly associated non contact duties in the nature of preparation, **reasonably contemporaneous marking and student consultation** shall be paid at a rate for each hour of lecture delivered, according to the following table [which then set out rates for the "Type of lecture and associated working time assumed]:"

[68] The *Monash University Enterprise Agreement (Academic and General Staff) 2000* (**2000 Agreement**) commenced on 24 May 2001. It was expressed to exclude the *Australian Universities and Academic and Related Staff Salaries Award 1987* (among others). The 2000 Agreement separately addressed tutoring and lecturing. For tutoring, the 2000 Agreement contained a Schedule 3 entitled "Sessional Rates Descriptors", which relevantly provided (emphasis added):

> "There are four prescribed rates for tutorials, which are payable to sessional academic staff who are required to deliver or present a tutorial (or equivalent delivery through other than face to face teaching mode) of a specified duration and provide directly associated non contact duties in the nature of preparation, **reasonably contemporaneous marking and student consultation**."

[69] The summary of information provided prior to the 2000 Agreement being voted upon provided no explanation of what was meant by "reasonably contemporaneous marking and student consultation".[7]

[70] The *Monash University Enterprise Agreement (Academic and General Staff) 2005* (**2005 Agreement**) also contained a Schedule 3 entitled "Sessional Rates Descriptors", which relevantly provided (emphasis added):

> "Except for repeat tutorials, the rates prescribed are paid per hour of tutorial delivered (or equivalent delivery through other than face to face teaching mode) and assume two hours' **associated working time** such as preparation **reasonably contemporaneous marking and student consultation**".

[71] The phrase "associated working time", which appeared for the first time in the 2005 Agreement (in substitute for "associated non contact duties"), was not defined. There was no further definition or explanation of the phrase "reasonably contemplated marking and student consultation" for the highlighted part extracted above.

[72] The definition of "Other required academic activity" in the 2005 Agreement encompassed work in the "nature" of various (non-exhaustive) listed activities, which included "consultation with students". There was no qualification or elaboration on the phrase "consultation with students" as it then appeared.

[73] The presentation information sessions for staff provided prior to the 2005 Agreement being voted upon provided no explanation of what was meant by "associated working time" or "reasonably contemporaneous marking and student consultation".

[74] The *Monash University Enterprise Agreement (Academic and Professional Staff) 2009* (**2009 Agreement**), and the 2014 Agreement, each contain a Schedule 3 entitled "Teaching Associate Sessional Rates Descriptors" with identical wording to that found in the 2019 Agreement. Marking and consultation were also now listed separately.

[75] The only evidence before me of material touching upon the changes to, or explanation about, Schedule 3 of the 2009 Agreement was a summary document provided to staff prior to being asked to vote upon that agreement. Relevantly, it stated:[8]

> "**Schedule 3 – Teaching Associate Sessional Rates Descriptors:**
> - Insertion of a definition of the "associated work" encompassed within the sessional tutorial and lecture rates, including marking if performed (or could reasonably be performed) within the relevant classroom, tutorial/lecture, or equivalent teaching environment.

- Provision for separate payment at sessional marking rates where marking is not performed (or could not reasonably be performed) within the relevant classroom, tutorial/lecture, or equivalent teaching environment.
- Faculty guidelines to be developed to assist in the determination of the number of hours to be allowed for marking attracting separate payment.
- Elaboration of the definitions of complex and standard marking.
- More beneficial marking payment arrangements applying by way of local custom and practice may be maintained at the university's discretion."

[76] The explanatory material in evidence before me concerning the 2014 Agreement[9] and 2019 Agreement[10] did not otherwise touch upon or explain Schedule 3.

[77] The University also tendered some material containing statements by the NTEU regarding the phrase "contemporaneous consultation". One example was an email sent by the NTEU's Monash Branch President on 31 March 2022, which relevantly stated that "contemporaneous consultation" is "consultation which is incidental to the delivery of the tutorial and *takes place immediately before or after the tutorial*" (original emphasis).[11]

Applicable principles

The parties' submissions

[78] It was not in dispute that there is a two-step approach to dealing with an application under s.217. The first step requires satisfaction that there is "an ambiguity or uncertainty" in an enterprise agreement. Only if there is satisfaction on that question does the question of discretion to vary the enterprise agreement to remove the ambiguity or uncertainty become enlivened.

[79] As to the principles governing the first stage of inquiry to determine whether there is a relevant ambiguity or uncertainty, I consider that the parties were largely in agreement. Rather, the parties were divergent on the application of those principles.

[80] *First*, the parties were divergent on whether there is any ambiguity or uncertainty in Schedule 3. The NTEU's position was that there is no ambiguity or uncertainty. There were some subcategories to this broad difference between the parties on components of Schedule 3 but the main differences were:

- Whether a *request* or *direction* by Monash to a Teaching Associate to undertake student consultation precludes any such consultation being "associated work" for the purpose of clauses 1 or 2 of Schedule 3. The NTEU's position (disputed by the University) was Teaching Associates, and *only* Teaching Associates, could decide where or how the additional hours of "associated work" could be allocated (e.g., preparation, student consultation).
- The temporal boundaries of the term "contemporaneous consultation" as it appears in clauses 1 and 2 of Schedule 3.

[81] There were other facets to the dispute, either on a question of construction or to the application of the clauses in particular circumstances. For example, the NTEU contended that

where student consultation was not specifically confined to exclude particular topics – e.g., a student's health and wellbeing - beyond the tutorial in question, that consultation could not be "associated work" attached to a tutorial. As to the various permutations, it is unnecessary to canvass the complete array of possible differences because, for the purpose of s.217, it is only necessary that I find ambiguity or uncertainty sufficient to support the proposed variation.

[82] *Second*, the parties were divergent on the applicable principles that apply to the Commission in exercising the discretion under s.217, in the event that a relevant ambiguity or uncertainty was established. Most importantly, the parties diverged on whether there was a requirement for there to be a "common understanding" established before any variation could (or should) be made.

Consideration - whether ambiguity or uncertainty

[83] Broadly, s.217 requires consideration of three steps prior to the exercise of the power to vary an enterprise agreement to remove an ambiguity or uncertainty.

- The first step, which is a jurisdictional prerequisite, is the finding of an ambiguity or uncertainty in an enterprise agreement.
- The second step, which is also a jurisdictional prerequisite is that there is an application by one of the persons listed in s.217(1)(a) – (c).
- The third step addresses a question of discretion, signified by the fact that the Commission "may" exercise the power to vary an enterprise agreement.

[84] Section 217 was recently considered by the Full Court of the Federal Court in *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCAFC 50; 275 FCR 385 (***Bianco Walling***).

[85] As to the 'first step', the following principles are discernible from the authorities:

1) The process of ascertaining ambiguity or uncertainty in an enterprise agreement is "distinct" from the process of construction, the latter of which involves determining the "true meaning" of a provision: *Bianco Walling*, [66] – [67].

2) Ambiguity exists when a provision in an enterprise agreement is capable of more than one meaning: *Bianco Walling*, [67].

3) Ambiguity may be apparent on the face of the document or may only become apparent when extrinsic evidence is adduced: *Bianco Walling*, [67].

4) A provision may be ambiguous even though capable of interpretation: *Bianco Walling*, [67].

5) Evidence of the parties "common intention" and the history of the impugned provisions are matters the Commission is permitted to have regard to in ascertaining whether ambiguity or uncertainty exists: *Bianco Walling*, [68].

6) The mere existence of rival contentions as to the meaning or application of a provision or provisions in an enterprise agreement is unlikely to be sufficient to indicate ambiguity or uncertainty for the purposes of s 217: *Bianco Walling*, [70].

7) And while the mere existence of rival contentions is insufficient to permit a finding of ambiguity or uncertainty, the Commission "will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced *and* an arguable case is made out for more than one contention" (original emphasis): *Bianco Walling*, [70].[12]

8) The words "ambiguity" and "uncertainty" are not synonymous: *Bianco Walling*, [75].

> "There may, for example, be uncertainty in an enterprise agreement even when its terms are not ambiguous. The uncertainty may arise from the application of the unambiguous terms to a given set of circumstances. The distinction between patent ambiguity (linguistic ambiguity) and latent ambiguity (ambiguity in application) provides an illustration by analogy" (citations omitted).

9) A form of "uncertainty" can extend to the common law analogy of uncertainty, where a provision might be found to be void, because no definite meaning can be put on that provision. However, "uncertainty" in s.217 is not so limited: *Bianco Walling*, [77].

[86] *Bianco Walling* makes clear, if clarity was required[13], that the task of identifying an ambiguity or uncertainty is not an especially onerous step.

[87] Applying those principles, I am satisfied that there is an ambiguity or uncertainty in each of the first two bases, described at paragraph [80] above. I do not accept that the clauses are so clear that the jurisdictional threshold under s.217 fails. The reasons for my conclusion on those matters follows.

[88] The first basis concerned the capacity (or not) for the University to *require* or *direct* a Teaching Associate to undertake consultation.

[89] The NTEU's submissions state:[14]

> "All that is required is to ask whether the consultation is "required" by Monash. If the answer is "yes", clause 7 applies. If the answer is "no", the next question is whether the consultation is of a kind that meets the descriptors in cll 1 and 2. There is nothing uncertain or ambiguous about this."

[90] That contention presupposes a construction such that the University cannot *require* a Teaching Associate to undertake consultation within the confines of clauses 1 or 2. The NTEU advances various contextual arguments in support of its contention. For example, the NTEU points out (correctly) that there is no express power in clauses 1 or 2 of Schedule 3 to require or direct (however described) a Teaching Associate to undertake any particular "associated work".

[91] The NTEU accepts that Teaching Associates are required to perform (and are paid for) "associated work", however it contends that:

> "Ultimately, the Teaching Associate decides what, and how much, associated work is performed. This is inherently different to "other required academic activity", which covers work that Monash requires a Teaching Associate to perform, and which the Teaching Associate in fact performs."

[92] While the NTEU is correct in stating that clauses 1 and 2 of Schedule 3 do not expressly describe a power of direction or requirement for contemporaneous consultation, on one view such a statement is unnecessary. In addition to some of the matters raised by the University, the power (if it exists) of direction or requirement is arguably an orthodox incident of the power to issue lawful and reasonable directions, if it is not already present on a proper construction of the section. Such a power would necessarily impinge on the capacity for a Teaching Associate to decide "what, and how much" associated work is performed. The ability to issue such directions may not be without limit, but (for example), it does not appear inherently repugnant (for the purpose of s.217) if the University required Teaching Associates to prioritise some associated work over other types of associated work.

[93] Similarly, the fact that clause 7 expressly describes "required" work does not, of itself, necessarily dictate a conclusion that an absence of such language in clauses 1 or 2 means that Teaching Associates are at large to unilaterally decide how the "associated work" duties are to be discharged. As the University observes, clause 7 describes "*Other*" required academic activity (being suggestive of the proposition that the activities in clauses 1 to 6 of Schedule 3 are also capable of being "required").

[94] Similarly, the consultation work in clause 7 describes "consultation with students (other than as contemporaneous consultation for a tutorial or lecture)". Assuming that the reference to "contemporaneous consultation" here is to that concept used in clauses 1 and 2, then the parenthesised part of the proceeding provision from clause 7 would appear otiose if clauses 1 or 2 did not permit such work to be required. The NTEU submits that the parenthesised section is a "for avoidance of doubt" clause and so much might be accepted but, for the purpose of my inquiry, I am satisfied that this aspect of Schedule 3 is both ambiguous as to its meaning and uncertain as to its application.

[95] I would stress, however, that what I have indicated above is not intended to reflect any settled or final view on the "true meaning" of how the clauses in Schedule 3 operate. That was *not* my task and I was not otherwise asked to construe the 2019 Agreement. Rather, what I have indicated is intended to go no further than establishing that "rival contentions were advanced *and* an arguable case was made out for more than one contention".[15] I am satisfied this threshold is met for that aspect of the enterprise agreement.

[96] The second basis, described at paragraph [80] above, contends that there was ambiguity or uncertainty regarding the term "contemporaneous consultation".

[97] The University proffered four potential meanings, which were (original emphasis):[16]

> "(a) *first*, a literal meaning that envisages Teaching Associates consulting with students **during** a tutorial or lecture;
> (b) *second*, the meaning proffered by Monash through this application that envisages Teaching Associates consulting with students within a week before or after the relevant tutorial or lecture but prior to the next tutorial or lecture, regardless of whether the consultation is scheduled;
> (c) *third*, the first NTEU meaning that envisages Teaching Associates having a quick chat with students immediately before or after a tutorial or lecture;
> (d) *fourth*, the second NTEU meaning that envisages Teaching Associates having consulting with students, so long as it is not fixed in advance by Monash."

[98] As to item (a) on the above list, I consider that imputing a literal meaning to "contemporaneous" is an unreasonable search for ambiguity, given that the balance of the clause states that contemporaneous consultation "involves" consultation "prior to and after" a tutorial. Necessarily, that qualification affects the literal meaning of the word "contemporaneous" at least to that effect. That said, the clause could be more clearly drafted, as the requirement for consultation prior to "and" (not "or") after a tutorial is itself a drafting infelicity.

[99] Item (b) from paragraph [97] reflects the meaning proffered by the University. I will return to this below.

[100] Item (c) from paragraph [97] was explained by the University with reference to correspondence or statements from the NTEU between March and September 2022. While the communications that I was referred to fairly reflect the University's summary, I consider it potentially unfair to elevate the NTEU's statements to such a level of precision given that the statements were, I consider, drafted in part with an eye to grabbing the reader's attention rather than conveying legal niceties.

[101] The NTEU's formal position regarding the meaning of "contemporaneous consultation" is less clear,[17] at least now that it commenced proceedings in the Federal Court. As I understand the NTEU's Federal Court claim, the NTEU does not contend that the University breached the 2019 Agreement because of any temporal limitation regarding the term "contemporaneous consultation". In that sense, the issue is arguably not relevant to the NTEU's Federal Court claims.

[102] Notwithstanding, I do accept that the NTEU's original position, as asserted prior to its commencement of its Federal Court claim, was that contemporaneous consultation needed to take place "immediately" before or after a tutorial.[18]

[103] Despite the fact that the NTEU's Federal Court claim does not appear to assert any particular temporal quality for the term "contemporaneous consultation", I am satisfied that there is a live issue about that matter.

[104] I am also satisfied that the term "contemporaneous consultation" is clothed with sufficient ambiguity and uncertainty to enliven the jurisdiction of s.217 of the Act. I would respectfully adopt the observations of Justice Snaden in *NTEU v Monash University* [2022] FCA 1368 (***NTEU v Monash***). While his Honour's observations were made in the context of

an interlocutory application, they are apposite in illustrating an ambiguity or uncertainty concerning the term "contemporaneous consultation". His Honour observed:[19]

> "The scope for legitimate debate about what is or not contemporaneous consultation is immediately apparent on the face of the instrument. Perhaps it is limited, as the NTEU contends, to consultation that occurs immediately prior to or after a tutorial or lecture; perhaps it extends by some measure to consultation that occurs within some period either side of a tutorial or lecture. Contemporaneity is, conceptually, a question of degree. Ill-defined (or undefined), it is a concept that, naturally and for want of clear boundaries, lends itself to disputation."

[105] Item (d) on the list at paragraph [97] is a genuine matter of contention. As noted above, the NTEU disputes whether the University can *direct* or *require* Teaching Associates to undertake contemporaneous consultation as "associated work" in clauses 1 or 2 of Schedule 3. I consider that the question of whether the University can fix or schedule consultation in advance is a variant of (if not the same as) the dispute concerning whether the University has power to direct or require Teaching Associates in relation to contemporaneous consultation. I have considered that matter, above, and refer to what I indicated there. I am satisfied there is sufficient ambiguity and uncertainty in relation to that facet of clauses 1 and 2 or Schedule 3.

Consideration - whether variation should be made

[106] Having found that clauses 1 and 2 of Schedule 3 are ambiguous and uncertain, I am required to consider whether I ought to vary those clauses to remove the ambiguity or uncertainty.

Applicable principles

[107] There was significant disputation between the parties as to the principles governing the exercise of the discretion that ought apply at this step in an application under s.217. Primarily, the divergence concerned the role that a finding of (or, more accurately, the *absence* of a finding of) a "common understanding" or common intention serves to control the exercise of the discretion to vary an enterprise agreement to remove ambiguity or uncertainty.

[108] In summary, the NTEU's position is that any variation to remove an ambiguity or uncertainty can *only* be exercised to conform to a prior common understanding that was not otherwise reflected in the relevant terms of the enterprise agreement.

[109] If that position was not accepted, the NTEU contended the absence of a common understanding should be given significant weight as a factor against variation.

[110] Further factors relied upon by the NTEU against the exercise of a discretion to vary the 2019 Agreement included:

- The proposed variation is inconsistent with how Schedule 3 of the 2019 Agreement has been interpreted and applied, in the sense that there were different practices of paying some Teaching Associates for consultation under clause 7 (i.e. 'other required

academic activity') but for other Teaching Associates, consultation was compensated as 'associated work' under clause 1.

- The proposed variation itself was ambiguous and uncertain. Various criticisms of the form of the proposed variations were made, including by way of example, the introduction of "proximate" as a new term.
- A complaint that the variation would permit the University to schedule consultation times, which the NTEU says would materially impinge on payment for other 'associated activities' that would need to be performed.
- The parties are presently engaged in enterprise bargaining and any amendments to Schedule 3 is best left to be resolved by the parties.
- Schedule 3 is capable of being construed and, in circumstances where the Federal Court has been asked to determine issues of construction, the 2019 Agreement should not be varied.
- The variation, if granted, would create "differential rights" between Teaching Associates based on claims made under the 2014 Agreement (which would be unaffected by any variation) and those under the 2019 Agreement.
- The variation is opposed by the Teaching Associates who would be affected by it.

[111] The University disputes that the power under s.217 *cannot* be exercised without evidence of a common intention. It says that the question of common intention is but a factor for a power that is otherwise "unfettered". [20] The University states that the requirement is for the Commission to perform its functions and exercise its powers in a manner that is fair and just, promoting harmonious and cooperative workplace relations: s.577(1)(a) & (d). In exercising its powers, the Commission must take into account the objects of the Act, any objects of a Part of the Act, and equity, good conscience and the merits of the matter: s.578(a) & (b).[21]

[112] Further submissions advanced by the University as favouring a variation included:

- The extant ambiguity and uncertainty of clauses 1 and 2 of Schedule 3, which is currently affecting thousands of employees.
- The employer and employees are currently in a "no mans land", in circumstances where there is a clear dispute as to how the provisions should be interpreted and applied.[22]
- Section 217 is directed at allowing everyone to know where they stand. One of the very purposes of 217 is to reduce or eliminate or minimise the scope for disputation by the parties, during the life of an enterprise agreement.[23]
- Failing to make a variation and allowing the matter to simply proceed to the Federal Court is contrary to the notions of equity and good conscience.[24]
- Leaving the matter for the parties to bargain is undesirable, as bargaining may not be concluded for a significant period of time.[25]
- The variation would help bargaining, by resolving any potential bargaining disputes.
- The textual amendments proposed by the University provide a reasonable parameter for what would constitute "contemporaneous" consultation.

[113] As to any requirement for "common intention" in exercising the power in s.217, the University observes that there is nothing in the text of the provision that confines its operation in that manner.

[114] For avoidance of doubt, the term "common intention", "mutual intention", common understanding" and "substantive agreement" appear to be used in the authorities as essentially synonymous. In these reasons, I primarily use "common intention" as the applicable descriptor.

[115] In support of its contention that the breadth of the discretion under s.217 is largely unfettered, the University relies[26] upon *Bianco Walling* where, at [68], the Full Court stated:

> "There are practical consequences for the FWC's ascertainment of ambiguity or uncertainty for the purpose of s 217 being different in character from the interpretation of an enterprise agreement. One is that there was no need for the FWC to feel constrained in the matters to which it may have regard by the principles developed for the interpretation of enterprise agreements. Moreover, the FWC is obliged, in performing its functions or in exercising its powers in relation to a matter under the FW Act, to take into account, amongst other things, "equity, good conscience and the merits of the matter" – see s 578 of the FW Act. Furthermore, the FWC is not bound by the rules of evidence and procedure in relation to a matter – see s 591 of the FW Act. Each of those provisions applies to the discharge by the FWC of its functions under s 217(1). The consequence is that, far from being precluded from having regard to evidence of the parties' common intention and to the history of cl 1.2, the Deputy President was permitted to have regard to them as part of the "equity, good conscience and the merits" of the matter."

[116] The University also submits that decisions of the Full Bench of the Commission (and, I infer, its predecessors) delivered prior to *Bianco Walling* should be dealt with an "immense amount of caution",[27] at least so far as those prior decisions emphasised the requirement for an element of common intention in connection with the exercise of discretion under s.217. The NTEU, whose submissions in this respect I accept, disputed either proposition was supported by *Bianco Walling*.

[117] I do not consider the University's submission reflects a fair reading of *Bianco Walling* on the question of how the *discretion* under s.217 is to be exercised, nor that previous decisions of the Full Bench of the Commission are to be treated with caution, let alone that the discretion under s.217 is largely "unfettered" save for the general considerations imposed by ss.577 and 578.

[118] The Court in *Bianco Walling* was not asked to consider the factors relevant to the exercise of discretion under s.217. The case concerned a review of a decision where an application under s.217 was rejected because there was no ambiguity or uncertainty initially found. At first instance and upon appeal to the Full Bench, the exercise of discretion did not arise[28] and therefore did not form part of the subsequent judicial review by the Court. So far as discretion was touched upon by the Court in *Bianco Walling*, I note that in addition to the paragraph relied upon by the University above, the Court referred to Commission decisions where mutual intention was a "significant factor":

> "69 The constraint to which the Deputy President erroneously felt he was subject had the potential to be material in another way. In relation to s 170MD(6) of the WR Act, the AIRC held that a "significant factor" for the Commission's consideration in determining whether to exercise its discretion to vary an enterprise agreement is "the objectively

> ascertained mutual intention of the parties at the time the agreement was made": *Re Australian and International Pilots Association* at [17] (Watson VP)."

[119] The University accepted that mutual or common intention could be a *factor* to consider and, where appropriate, a significant factor, but it was not a *mandatory* matter. I accept this submission better reflects the position under s.217, which I will expand upon below.

[120] In support of the University's general position that "common intention" is not a mandatory factor, I note there are cases of the Commission where common intention does not appear to have been a necessary incident for making a variation order under s.217.

[121] In *United Voice v MSS Security Pty Ltd* [2016] FWCFB 4979, the Full Bench considered an appeal from a decision of Sams DP. At first instance, the Deputy President found a mutual intention existed as to a particular term and exercised his discretion to vary the enterprise agreement. The decision was affirmed on appeal and, while the following statement was therefore strictly *obiter*, the Full Bench stated:

> **"[23]** It is possible in this case that the parties had different intentions as to the use of the words "all purpose". The resolution of the matter requires the application of the following logic. If an ambiguity exists in relation to the payment of an additional amount, as in this case, and the evidence establishes that there is no mutual intention to pay the additional amount, then it would normally follow that the Commission should not vary the agreement to create an entitlement that is consistent with the intention of only one of the parties. Even if there is no clear mutual intention to not pay the additional amount, it would normally be desirable to resolve an ambiguity to make it clear that the amount is not payable when there is an insufficient basis to find that the parties agreed to pay the additional amount. Therefore, if there was no mutual intention to apply penalty calculations to the allowance, then absent any other compelling circumstance, the company's application was likely to succeed."

[122] The above paragraph from *MSS Security* was adopted by Asbury DP (as she then was) in *Cannon Hill v AMIEU* [2016] FWC 7256[29]. In that matter, while it was concluded that there was "no clear mutual intent"[30] a variation order was made. However, and importantly in my mind, the Deputy President had also interpreted the enterprise agreement. The variation was simply made to conform the agreement to how it had been conclusively interpreted.[31]

[123] While there are a number of decisions involving orders made under s.217 where there has been little or no specific discussion of common intention, so much is not surprising, as they involve 'consent' applications. By this, I refer to applications where an employer or a union (the latter usually also being the bargaining representative during the agreement-approval process) seek an order under s.217 with the support of the other party. There is nothing novel about this scenario. In such an application, it is likely to be assumed that the requisite common intention existed as an uncontested fact.

[124] Realistically, the true position in some consent cases may have been that there was no common intention in the strict sense (even if it was assumed) but, if the parties had turned their minds to the provision in question at the time the agreement was made, there would have been a meeting of the minds reflecting the amendment later being sought.

[125] In consent cases, where the variation would be in the employees' interests, little or no further inquiry might be required to be satisfied that a variation could be made to cure an ambiguity or uncertainty. Where the employees' interests might be affected, then evidence about those employees' views might be required to provide comfort that a decision to vary an enterprise agreement is appropriate, even on an uncontested 'consent' application.[32]

[126] For a further example based on a hypothetical scenario, there might be a case where a provision of an enterprise agreement is so uncertain that it cannot be interpreted or given meaning, such that if it were a common law contract it would be void for uncertainty.[33] If common intention was unable to be established, it might be appropriate to vary the enterprise agreement on the view that it would be more desirable to cure a term rather than to leave it void for uncertainty, although the circumstances of the case would dictate if that was appropriate.

[127] Less hypothetically, if the term of an enterprise agreement were located in an undertaking proffered under s.190 of the Act, common intention may not exist where there is ambiguity or uncertainty concerning the terms of the undertaking or those terms of the enterprise agreement affected by the undertaking. What would be relevant would be the intention of the employer providing the undertaking. Such was the case in *The Hon. Christian Porter MP, Attorney General and Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board; United Firefighters' Union of Australia* [2019] FWCFB 6255 (***Porter v MFESB***), where the Full Bench considered an undertaking given by the employer – MFESB - "and the apparent intention *of the MFESB* to remove any inconsistency with s 55 by those undertakings" (my emphasis).[34]

[128] But hypothetical and less common examples aside, other than 'consent' applications under s.217 or variations to allow an enterprise agreement to conform with a provision that has been formally construed, I am not aware of any decision of the Commission that suggests that the discretion under s.217 is largely unfettered or that the relevance of an antecedent common intention is anything other than significant.

[129] In *CFMMEU & ors v Specialist People Pty Ltd* [2019] FWCFB 6307 (***Specialist People***) the Full Bench stated (my emphasis):

> "**[42]** Once ambiguity or uncertainty has been identified, the Commission must then consider whether to exercise its discretion to vary the agreement. The Commission has discretion to "remove ambiguity or uncertainty", not to give effect to a new and substantive change to the agreement. Applications that seek the latter must be made under s 210 of the FW Act. A decision of the Commission under s 217 to remove uncertainty or ambiguity should give effect to the substantive agreement that was ambiguously or uncertainly reduced to writing in the terms of the enterprise agreement."

[130] The Full Bench in *Porter v MFESB* affirmed the above proposition.[35]

[131] The University also states, on the question of discretion, that it relies heavily[36] on the following statement of Snaden J in *NTEU v Monash* at [14]: "The power to vary an enterprise agreement under s 217 of the FW Act is a specific statutory power of long-standing." His Honour's observation – which I consider to be both uncontroversial and correct – echoes the

observations of the Court in *Bianco Walling*, which traced the lineage of s.217 back to the *Conciliation and Arbitration Act 1904* (Cth).

[132] However, historical cases decided under predecessor legislation to the Fair Work Act do not assist the University's case.

[133] Beginning with the *Conciliation and Arbitration Act 1904 – 1961* (Cth), section 59(2) of that Act was (at least by 1961) in the following form:

> "59.. Setting aside and variation of awards. – …
> (2) The Commission may, if for any reason it considers it desirable for the purpose of removing ambiguity or uncertainty, vary any of the terms of an award."

[134] In *Federal Industrial Laws*,[37] the learned author distinguished variation of award terms made by the Commission[38] and the variation of terms of an award "inserted by agreement". As to the latter, the authors referred to a decision of Chief Justice Piper in *Australian Insurance Staffs Federation and Alliance Assurance Co Ltd & Ors* (1943) 50 CAR 654. At 654, his Honour stated:

> "The Court does not lightly vary agreements or consent awards during their currency and it is the duty of the Court to respect the sanction which attaches to agreements. Many factors operate on the minds of the contracting parties during the negotiations which lead ultimately to the agreement being arrived at, and no one item therein can be considered as a separate and isolated term but each is to be regarded as a part of the whole. The Court is usually not informed of the reasons which actuated the parties in making their agreements on the various details of the final complete agreement, and so, generally speaking, the parties are presumed to have conferred and reached their agreement so as to cover both the circumstances then existing and those which could or should have been reasonably foreseen or anticipated to arise during the term for which the agreement is to operate. If circumstances which could not have been so foreseen or anticipated should arise during such term- and either party thereby suffers an injustice the Court will vary the agreement to the extent necessary to remedy the injustice but in such cases it does not overlook or violate the sanctity of the contract but considers that in fact the parties did not make any agreement with respect to such circumstances."

[135] Moving somewhat further forward in time, the most recent predecessor of s.217 of the Act was found in s.170MD(6) the *Workplace Relations Act 1996* (Cth), which was as follows:

> "(6) The Commission may, on application by any person bound by a certified agreement, by order vary a certified agreement:
> (a) for the purpose of removing ambiguity or uncertainty."

[136] Section 170MD(6) was applied by a Full Bench of the Australian Industrial Relations Commission in *Re Tenix Defence Systems Pty Ltd Certified Agreement 2001-2004* [2002] AIRC 531 (***Tenix***). The Full Bench stated that, on the question of exercising the discretion under s.170MD(6) following a finding of ambiguity or uncertainty, "the Commission is to have regard to the mutual intention of the parties at the time the agreement was made."[39] I note at this point that the NTEU relies on the word "is" in the passage just quoted to demonstrate the mandatory

requirement for a positive finding of mutual intention that goes to jurisdiction. As to what the mutual intention was, the decision of the Full Bench rested on what it described as the "objectively ascertained" mutual intentions of the parties.[40]

[137] In *Re Telstra Corporation Ltd* (2005) 139 IR 141, a Full Bench of the AIRC endorsed the propositions from *Tenix* summarised above when it stated "The objectively ascertained mutual intention of the parties at the time the Agreements were made is clearly relevant to the exercise of the discretion.".

[138] The search for an "objectively" determined mutual intention is not, itself, a concept free from challenge. Specifically, it is not exactly clear to me how it differs from the process of construction, at least as it is described in some of the authorities. For example, in *Re Australian and International Pilots Association* (2007) 162 IR 121, Watson VP described the "objectively ascertained mutual intention" of the parties being determined by reference to the principles of contractual construction stated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 (***Codelfa***).

[139] The decision of Mason J in *Codelfa* is possibly the most well-known decision in Australian contract law concerning the *construction* of an agreement. Justice Mason described the rules of construction, including for resolving ambiguity as part of the process of construction, as a process determined objectively. The rules of construction look for the parties' "presumed intention"[41]. The parties' *actual* (i.e. subjective) intentions and expectations would be relevant where an action for rectification was sought.[42]

[140] By contrast to the constructional task of ascertaining the imputed *objective* intention of the parties to an agreement, the action for rectification searches for the *actual* intention of the parties. In *Simic v New South Wales Land and Housing Corporation & ors* (2016) 260 CLR 85 (***Simic***), a decision relied upon by the NTEU, Gageler, Nettle and Gordon JJ described rectification as (citations omitted):

> "an equitable remedy, the purpose of which is to make a written instrument "conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately". For relief by rectification, it must be demonstrated that, at the time of the execution of the written instrument sought to be rectified, there was an "agreement" between the parties in the sense that the parties had a "common intention", and that the written instrument was to conform to that agreement Critically, it must also be demonstrated that the written instrument does not reflect the "agreement" because of a common mistake. Unless those elements are established, the "hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties" cannot be displaced."

[141] As to the assessment of the evidence led in support of a claim for rectification, Kiefel J in *Simic* stated:[43] (emphasis added)

> "What is necessary to be shown is the actual intention of each of the parties. This has often been referred to by intermediate appellate courts as the subjective intention of the parties. A court, in determining whether the burden of proof is discharged, may be said to view the evidence of intention objectively, in the sense that it does not merely accept

> what a party says was in his or her mind, but instead considers and weighs admissible evidence probative of intention. It is in this sense that statements such as that of Hodgson J in *Bush v National Australia Bank Ltd*, that common continuing intention "must be objectively apparent from the words or actions" of each party, may be understood."

[142] There is a high bar to establish evidence of the parties' actual common intention, for the purpose of equitable rectification, with it being said there is a need for "clear and convincing proof"[44]. To be clear, however, I do not suggest that s.217 is simply a statutory analogue for the law of rectification.

[143] So far as earlier authorities regarding the statutory predecessors of s.217 are concerned, such as *Tenix,* they identify the requirement for an "objectively" determined common intention. I would approach that task "in the sense" described by Kiefel J above, namely as a search for actual mutual intention through a prism of considering and weighing the admissible evidence probative of actual intention.

[144] If it were otherwise, then it would appear that the task of finding common intention in an enterprise agreement is essentially one of construction, albeit (perhaps) against a slightly expanded set of evidence from which the parties' imputed intention is determined.

[145] "Common intention" - however approached - for the purposes of an enterprise agreement is not lightly found. As Justice Gray stated in *Australian Liquor, Hospitality and Miscellaneous Workers Union v Prestige Property Services Pty Ltd* (2006) 149 FCR 209, "[c]are must be taken, however, to distinguish a common understanding from common inadvertence" and that "[t]here can be no meeting of minds, no consensus, if no-one has thought about the issue."[45]

[146] In *Shop Distributive and Allied Employees' Association v Woolworths Ltd* (2006) 151 FCR 513, another decision by Gray ACJ, his Honour considered a submission that past conduct of the parties might lead to a finding of common understanding. His Honour stated at [31]:

> "… There is authority that, if a provision has appeared in a series of agreements between the same parties, and if they can be shown to have conducted themselves according to a common understanding of the meaning of that provision, then it can be taken that they have agreed that the term should continue to have the commonly understood meaning in the current agreement. ... It is necessary to take great care in the application of this limited principle, to avoid infringing the general principle that the conduct of parties to an agreement cannot be taken into account in construing the agreement. For the limited principle to operate, there must be clear evidence that the parties have acted upon a common understanding as to the meaning of the relevant provision and not for other reasons, such as common inadvertence as to its true meaning."(emphasis added)

[147] His Honour observed that, in addition to "inadvertence" that might otherwise explain a past practice, there might also be instances involving "an act of generosity on the part of the [employer], from which it has now resiled."[46] The observations of Gray J have been endorsed by Full Court decisions.[47] To the list of "inadvertence" and "generosity", I would perhaps add guarded disagreement. Disputes about the operation of provisions of enterprise agreements are often resolved on a situational basis without the parties reaching agreement about the

substantive future operation of the provision. The fact that the (disputed) provision of the enterprise agreement is then restated without amendment in a subsequent enterprise agreement does not indicate a common intention – it may indicate no more than an "agreement to disagree" in the interests of industrial peace at that point in time.

[148] I am also mindful that there are particular difficulties that the concept of mutual or common intention brings to an enterprise agreement made under Part 2-4 of the Act. Other than greenfields agreements (which are made between an employer and at least one union), enterprise agreements are made upon a valid majority of employees voting following a request by the employer for them to approve a proposed enterprise agreement. There are no "parties" as such and the "agreement" has been described as "an agreement in the name only".[48] Further, it is not necessary that all employees vote and it will often be unknown how employees voted, let alone how employees affected by a particular clause might have voted or considered that clause.

[149] The requirement to identify a common understanding among a potentially disparate group of employees brings greater challenges to ascertaining the common intention of an enterprise agreement than might exist for a contract. It is a matter the Full Bench alludes to in *Specialist People* where it was stated at [49] (emphasis added):

> "… Although there are no "parties" per se to enterprise agreements made under Part 2-4 of the FW Act, any concept of mutual objective intention that might inform the proper interpretation of an agreement would need to take into account the intention or understanding of employees, who after all are those who make the agreement when by majority they approve it under s 182."

[150] The potential challenges for identifying any common intention are, however, unnecessary for me to resolve. The evidence before me did not establish a common intention concerning Schedule 3 of the 2019 Agreement, regardless of whether the standard of intention was objectively or subjectively determined.

[151] The University candidly acknowledged that the evidence before me was unable to point to any meeting of the minds from the extrinsic material.[49] I consider that acknowledgment was correctly given. The only material before me from which intention could be discerned were the prior industrial instruments and some limited material circulated during bargaining. Schedule 3 in its current form was rolled over from its introduction in the 2009 Agreement.

[152] Notwithstanding, the University contends that a variation under s.217 is not confined to circumstances where there is a finding of common intention.

[153] While I am prepared to accept that the discretion in s.217 is not strictly confined by a requirement that any variation be supported by an established prior common understanding, the circumstances are limited, such as the examples I have described above.

[154] The (relatively) low bar to establishing an ambiguity or uncertainty serves to sensitise the Commission that the power to vary an enterprise agreement under s.217 is to be approached carefully.

[155] Without limiting what might be appropriate in all the circumstances of a particular matter, the factors guiding the discretion to vary an enterprise agreement to remove and ambiguity or uncertainty might include, as appropriate:

- The absence of an antecedent "common intention" or "substantive agreement". The presence of this factor would ordinarily be a matter of significant weight in favour of variation and, equally, its absence a significant factor for refusal.
- The variation would not "give effect to a new and substantive change to the agreement"[50]. This is a significant factor for refusal, if not satisfied;
- The exercise of the power of variation granted by s.217 is only for the purpose of removing "an ambiguity or uncertainty".[51] A variation extending beyond that required to remove an ambiguity or uncertainty would be beyond the jurisdiction conferred by s.217;
- The views of the employer and employees (and, for the latter, including the views expressed on their behalf by an applicable union);[52]
- The utility of the amendments;[53]
- The stage of bargaining between the parties, where relevant.[54] Where an enterprise agreement has expired, it would be generally preferrable for the parties to endeavour to reach an agreed position rather than having the Commission determine a variation for the expired agreement;
- The timing of an application for variation, including delay;
- The specified date in which the variation is sought to be effective; and
- The power under s.217 "does not give rise to a general discretion to determine a matter based on industrial fairness". [55]

[156] In relation to the final item in the above list, enterprise agreements are not made by the Commission and the authorities make clear that caution needs to be exercised against imposing changes to the bargain expressed in that agreement. Focusing on one or two clauses in isolation can overlook that those clauses were made as part of an overall bargain, the subtleties of which are usually unknown, and possibly unknowable, by the Commission. The outcome of that bargaining process results in a set of legal rights established by an enterprise agreement that, once made and approved, is given statutory force.

[157] As recently explained by Bromberg J in *Target Australia Pty Ltd v Shop, Distributive and Allied Employees' Association* [2023] FCAFC 66 at [55], "[it] is not to be expected that an industrial bargaining process will always produce an agreement where each entitlement provided will be either objectively reasonable or rational and in harmony with other entitlements, or based on some objectively discernible purpose that may have explained the reason for its adoption in a predecessor agreement made under a different bargaining process".

[158] The University's proposed amendments are directed at two issues: giving clarity to the term "contemporaneous" and giving clarity to whom might schedule a consultation. While I accept that the variations proposed by the University are properly targeted at removing ambiguities and uncertainties, I do not consider it is appropriate to make an order for variation.

[159] In the absence of any demonstrable common intention as to the operation of Schedule 3, any variation imposed by the Commission risks having the effect of improving (or harming) the legal position of *either* the employees or employer unanchored by any principled assessment

of how those legal rights would or should be affected. I consider that, if the amendments were made, there is a possibility that Teaching Associates' legal rights would be adversely affected. At least for the purpose on an interlocutory application, I note that Justice Snaden stated that he was satisfied there was "*prima facie* case for the relief that is sought [by the NTEU]".[56] It is also tolerably clear that there are a significant number of employees who wish to preserve their understanding of their legal position, and those employees do not support the proposed variation.

[160] While the University's desire to bring the disputing parties out from the "no man's land" of uncertainty is laudable, that objective can be applied to many disputes involving the operation of terms of an enterprise agreement. But again, for the purposes of s.217, that outcome needs to be anchored against a principled assessment of the potential rights of those affected. By way of illustration, a reduction in industrial disputation or greater certainty as to the operation of Schedule 3 could also have been achieved by different variations that would confine any contemporaneous consultation to a period of 1 hour from a tutorial (not 1 week as proposed), and to further specify that the University was *not* permitted to schedule a consultation time (which reflects the NTEU's position). I accept that the University has proffered variations based on a genuine attempt to adopt a reasonable compromise but I do not consider that is sufficient to support a variation under s.217.

[161] I also do not consider, as the University's submissions indicated, that there is any unreasonable barrier or difficulty in obtaining substantial resolution of the disputed terms – either by Court determination or through the bargaining process – although I accept that the bargaining process is proceeding more slowly than might be hoped.

[162] I consider that the conclusions I have expressed above conform with the requirement that the Commission must exercise its powers in a manner that is fair and just, promoting harmonious and cooperative workplace relations: s.577(1)(a) & (d). I also consider that they take into account the objects of the Act and Part 2-4, and equity, good conscience and the merits of the matter: s.578(a) & (b).

[163] The conclusions I have just stated are applicable for the proposed variation being made prospectively or retrospectively. However, for the retrospective variation being sought, I consider there are additional reasons for refusing to exercise the power of variation. While I accept that there is a power to vary an enterprise agreement retrospectively[57], a retrospective variation involves heightened considerations. As a signal to the impact that retrospective variations might have, I note the retrospective variation of a modern award is subject to a further restriction that there be "exceptional circumstances": s.166(3)(b).

[164] The first concerns the statutory effect of an enterprise agreement. A contravention of a term of an enterprise agreement constitutes a civil penalty contravention, whether by employer or employee. I am unable to confidently say whether a retrospective amendment would result in any person being exposed to a pecuniary penalty if the University's proposed variations were made (or any similar such variant) but I cannot rule it out.

[165] The second concerns the effect of the passage of time on new employees following the commencement of the 2019 Agreement. Even if a common intention could be established at the time the 2019 Agreement was made, a Teaching Associate engaged after the 2019 Agreement

commenced operation is unlikely to have any knowledge of those matters. A new employee would only have the terms of the 2019 Agreement itself to assess his or her rights against. I'm mindful that this consideration would also affect the discretion for a prospective variation, but it has greater force for a retrospective variation. In the case of the University, the total cohort of non-parties was about 4500. This is not a suggestion that the University has delayed in bringing its application – to the contrary, it appears to have acted promptly and appropriately.

Disposition

[166] In all the circumstances, while I am satisfied that the University has demonstrated there is ambiguity and uncertainty in respect of Schedule 3 of the 2019 Agreement, and that its proposed amendments are aimed at removing that ambiguity and uncertainty, I am not satisfied it is appropriate to make variations in the nature sought.

[167] The application is therefore dismissed.

DEPUTY PRESIDENT

Appearances:

J Bourke (KC) and *A Denton* of Counsel for Monash University
S Kelly of Counsel for the NTEU

Hearing details:

2023.
Melbourne:
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[1] Section 54 of the Act.

[2] National Tertiary Education Industry Union v Monash University & ors, VID534/2022.

[3] C2022/6536.

[4] Section 173 of the Act.

[5] *NTEU v Monash University* [2022] FCA 1368.

[6] Print P0289 [1997] AIRC 301; (18 April 1997) (Munro J, Watson DP, Frawley C); and Print P2160 [1997] AIRC 587; (23 June 1997) (Munro J, Watson DP, Frawley C).

[7] Exhibit 1 (Application Book), Tab 9 (pages 571 – 573).

[8] Exhibit 1, Tab 13 (pages 605 - 612).

[9] Exhibit 1, Tab 17 (pages 619 - 659).

[10] Exhibit 1, Tab 18 (pages 679 - 684).

[11] Exhibit 1, Tab 22 (page 741).

[12] *Bianco Walling* at [70], citing *Re Tenix Defence Systems Pty Ltd Certified Agreement 2001-2004* [2002] AIRC 531 at [31].

[13] *CFMMEU & Ors v Specialist People Pty Ltd* [2019] FWCFB 6307 at [41] – [42], cited with approval in *The Hon. Christian Porter MP, Attorney General and Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board; United Firefighters' Union of Australia* [2019] FWCFB 6255 (***Porter v MFESB***) at [55].

[14] Exhibit 1, Tab 23 at [19].

[15] *Bianco Walling*, [70].

[16] Exhibit 1, Tab 1 at [54].

[17] Exhibit 1, Tab 23 at [21](e).

[18] Letter from NTEU to Monash University, 18 July 2022, at paras [26] – [28] (Attachment C of Annexure A to the University's Form F1 application dated 10 October 2022).

[19] *NTEU v Monash University* [2022] FCA 1368 at [31].

[20] Exhibit 1, Tab 1 at [58].

[21] Ibid.

[22] Transcript PN312.

[23] Ibid PN222.

[24] Ibid PN313.

[25] Ibid PN318.

[26] Ibid PN266.

[27] Ibid PN240.

[28] *Re Bianco Walling Pty Ltd* [2018] FWC 5823 at [76]. No examination of discretion arose on appeal: *Bianco Walling Pty Ltd v CFMMEU* [2019] FWCFB 161.

[29] *Cannon Hill v AMIEU* [2016] FWC 7256 at [13].

[30] Ibid at [137] - [138].

[31] Ibid.

[32] See, for example, *Re Energy Safe Victoria* [2020] FWCA 6718 (Colman DP) at [9].

[33] See *Bianco Walling* at [77] as a (non-exhaustive) example of "uncertainty".

[34] *Porter v MFESB* at [56] and see also [58](2).

[35] Ibid at [55].

[36] Transcript PN200.

[37] Third Edition of "Nolan and Cohan" (Butterworths), C.P. Mills, 1963.

[38] As to which, see *Australian Federated Union of Locomotive Enginmen v The Victorian Railways Commissioners & ors* (1925) 22 CAR 74 at 77 (Powers J).

[39] *Tenix* at [32] and see also [54].

[40] Ibid at [115].

[41] *Codelfa* at 353.

[42] Ibid.

[43] *Simic* at [42] (citations omitted).

[44] *Fitzwood Pty Ltd (ACN 005 180 163) v Unique Goal Pty Ltd (In Liq) (ACN 064 926 843)* [2002] FCAFC 285 at [172], citing McLelland AJA in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329.

[45] At [44].

[46] *Shop Distributive and Allied Employees' Association v Woolworths Ltd* (2006) 151 FCR 513 at [32].

[47] *Australian Nursing and Midwifery Federation v Eastern Health* [2013] FCAFC 137 (Marshall, Tracey and Bromberg JJ) at [23], and *Target Australia Pty Ltd v Shop, Distributive and Allied Employees' Association* [2023] FCAFC 66 at [69] – [79] per Bromberg J (with whom I consider Jackson J concurred at [118] and [125].)

[48] *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 (Jessup, Tracey and Perram JJ) at [88].

[49] Transcript PN245.

[50] *Specialist People* at [42].

[51] *Bianco Walling* at [3]; *Specialist People* at [42] and [50].

[52] Eg, *Porter v MFESB* at [58](3); *Re Australian and International Pilots Association* (2007) 162 IR 121 at [17]; *Re Energy Safe Victoria* [2020] FWCA 6718 (Colman DP) at [9].

[53] *Specialist People* at [50].

[54] *Re Australian and International Pilots Association* (2007) 162 IR 121 at [35].

[55] Ibid at [17].

[56] *NTEU v Monash* at [8].

[57] Compare ss.160 and 165 of the Act for a modern award. Section 167 establishes "special rules" for retrospective variation. Section 167 does not establish the power to retrospectively vary a modern award but confines it. There is no reason to consider that the power under s.217 cannot be varied retrospectively, as it is in largely the same terms as ss.160 and 165. I also note that for variations made under s.210, s.214 provides that a retrospective variation could not be made at all if the variation "may" result in a person being liable to pay a pecuniary penalty.