[2023] FWC 508 [Note: An appeal pursuant to s.604 (C2023/1515) was lodged against this decision - refer to Full Bench decision dated 5 July 2023 [[2023] FWCFB 102] for result of appeal.]

DECISION

Fair Work Act 2009
s.217—Enterprise agreement

Qube Ports Pty Ltd
(AG2022/4849)

Stevedoring industry

DEPUTY PRESIDENT COLMAN MELBOURNE, 1 MARCH 2023

Application under s 217 to remove ambiguity or uncertainty – jurisdictional objection – employer not covered by agreements when application made – no standing to make application – application dismissed

[1] This decision concerns a jurisdictional objection raised by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) to an application made by Qube Ports Pty Ltd (Qube) to vary a number of enterprise agreements under s 217 of the *Fair Work Act 2009* (FW Act). The CFMMEU contends that the application is incompetent because Qube was not an employer covered by the relevant agreements when its application was made, and therefore had no standing to make the application. Qube acknowledges that it was not covered by the agreements at that time because they had been superseded and had ceased to operate. It contends however that s 217 allows an application to be made by an employer that is or was covered by the relevant agreement. At a mention on 8 December 2022, I determined that the CFMMEU's objection would be heard as a threshold matter. The parties subsequently filed written submissions in accordance with my directions.

[2] It is convenient briefly to summarise the background to this matter. In 2012 and 2013, the Commission approved under s 185 of the FW Act sixteen enterprise agreements that covered Qube and employees engaged as waterside workers at ports around Australia. These agreements are listed in annexure A to Qube's application and are referred to as the '2012 agreements'.

[3] From 2016 to 2018, the Commission approved seventeen enterprise agreements that replaced the 2012 agreements ('replacement agreements'). These instruments covered all of the employees who had been covered by the 2012 agreements. As a consequence, the 2012 agreements ceased to *apply* to those employees (see s 58(2)(e)). Further, from the day on which there were no employees to whom the 2012 agreements applied, they ceased to *operate* (see s 54(2)). In addition to the replacement agreements that were made from 2016 to 2018, new enterprise agreements were made at the ports of Esperance and Ashburton ('new port agreements'). The replacement agreements and the new port agreements are set out in annexure B to Qube's application and are referred to in the application as the '2016 agreements'.

[4] In 2021, the Commission approved enterprise agreements which replaced each of the 2016 agreements and covered all of the relevant employees ('2021 agreements'). The 2016 agreements ceased to apply to the employees, and ceased operate, in the same manner as the 2012 agreements. It is common ground between the parties that all of the 2012 agreements and 2016 agreements have ceased to operate because of the effect of s 54(2).

[5] Qube's application seeks to vary each of the 2012 and 2016 agreements to remove ambiguity or uncertainty from a number of clauses. The 2012 and 2016 agreements had a similar structure. They comprised a Part A, which contained conditions applicable to all ports, and a Part B, which set out port-specific conditions. The Part A conditions of the 2012 and 2016 agreements made provision for several categories of employees whose hours of work would vary from fortnight to fortnight, depending on the volume of work required by the company. These employees are known as guaranteed wage employees (GWEs), variable salary employees (VSEs), and provisional variable salary employees (PVSEs). Such employees were entitled to receive either a minimum fortnightly salary or their actual earnings for the fortnight, whichever was greater. The minimum salary was payable even if the employees did not work sufficient hours to 'earn' that salary in a particular fortnight. The minimum salary would cover the gap ('gap payment'), and ensure that employees working variable hours received a consistent base level of remuneration. However, the agreements contained provisions that allowed Qube to recover gap payments from employees' earnings *'in the next pay period'*, if they earned more than the minimum salary. There were four such provisions, two in each of the 2012 agreements, which related to VSEs and GWEs, and two in each of the 2016 agreements, which concerned VSEs, PVSEs and GWEs ('the disputed clauses'). They were in very similar terms. It suffices to cite one of them. Clause 9.2.4(b) of the 2012 agreements stated:

> "In the event that a VSE's actual earnings do not meet the guarantee minimum in any fortnight, that amount will be deducted from actual earnings in the next pay period subject to earnings being in excess of the minimum salary."

[6] Qube contends that there has been a long-established and notorious practice at all ports to apply what it describes as an ambulatory and ongoing approach to these provisions, whereby the company has made deductions in respect of gap payments from earnings above the minimum salary in any *subsequent* fortnightly pay periods, rather than only in the *next* pay period (the Practice). Qube submits that the Practice has existed since around 2007, when it acquired certain stevedoring operations from P&O Ports Pty Ltd, which was covered by collective agreements with provisions analogous to those above.

[7] In mid-2020, a dispute arose between Qube and the CFMMEU about the Practice. The union contended that Qube could not lawfully make deductions under the relevant provisions other than in the pay period that immediately followed the pay period in which the 'gap payment' was made. Qube maintained that the clauses permitted its ambulatory approach, such that deductions could be made in any subsequent pay period. In July 2022, the CFMMEU commenced proceedings against Qube in the Federal Court, seeking declarations of contraventions of s 50 of the FW Act (breaches of each of the 2012 and 2016 agreements), together with penalties and orders for statutory compensation to rectify underpayments in respect of some thousand employees over the six-year period from July 2016 to July 2022.

[8] On 21 November 2022, Qube lodged its application under s 217(1) in the Commission. It submits that the disputed clauses are ambiguous or uncertain, because the parties advance competing interpretations of those clauses, each of which is arguable. Qube contends that the company, the CFMMEU, and the employees who voted to approve the 2012 and 2016 agreements had a mutual intention that the clauses would reflect the Practice, and that the Commission should exercise its discretion to vary the disputed clauses to have the text of the agreements clearly reflect that intention. The proposed variations would replace references in the disputed clauses to *'the next pay period'* with the words *'any subsequent pay periods.'* They would do so with retrospective effect. Qube contended that, if its application were granted, the proceedings before the Court would not be maintainable, because the variations would remove the constructional premise on which the allegations of contravention rested.

[9] The CFMMEU contends that the relevant provisions of the agreements are not ambiguous or uncertain. First, however, it asks the Commission to dismiss the application because it was not made by an *'employer covered by the agreement'*.

Relevant provisions of the FW Act

[10] Section 217 of the FW Act allows the Commission to vary an enterprise agreement to remove ambiguity or uncertainty. It states:

> **"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." (Emphasis added)

[11] Section 53 defines when an enterprise agreement *covers* an employer, an employee or an employee organisation (union). It reads as follows:

> **"53 When an enterprise agreement *covers* an employer, employee or employee organisation**
>
> *Employees and employers*
>
> (1) An enterprise agreement ***covers*** an employee or employer if the agreement is expressed to cover (however described) the employee or the employer.
>
> *Employee organisations*
>
> (2) An enterprise agreement ***covers*** an employee organisation:

(a) for an enterprise agreement that is not a greenfields agreement - if the FWC has noted in its decision to approve the agreement that the agreement covers the organisation (see subsection 201(2)); or
(b) for a greenfields agreement - if the agreement is made by the organisation.

Effect of provisions of this Act, FWC orders and court orders on coverage

(3) An enterprise agreement also ***covers*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement covers the employee, employer or organisation:

(a) a provision of this Act or of the Registered Organisations Act;
(b) an FWC order made under a provision of this Act;
(c) an order of a court.

(4) Despite subsections (1), (2) and (3), an enterprise agreement does not ***cover*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement does not cover the employee, employer or organisation:

(a) another provision of this Act;
(b) an FWC order made under another provision of this Act;
(c) an order of a court.

Enterprise agreements that have ceased to operate

(5) Despite subsections (1), (2) and (3), an enterprise agreement that has ceased to operate does not ***cover*** an employee, employer or employee organisation.

Enterprise agreements cover employees in relation to particular employment

(6) A reference in this Act to an enterprise agreement covering an employee is a reference to the agreement covering the employee in relation to particular employment."

[12] The contentions of the parties referred to ss 52 and 54, which define when an enterprise agreement applies to a person and when it operates. Section 52 provides:

"52 When an enterprise agreement *applies* to an employer, employee or employee organisation

When an enterprise agreement applies to an employee, employer or organisation

(1) An enterprise agreement ***applies*** to an employee, employer or employee organisation if:

(a) the agreement in operation; and

(b) the agreement covers the employee, employer or organisation; and
(c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation.

Enterprise agreements apply to employees in relation to particular employment

(2) A reference in this Act to an enterprise agreement applying to an employee is a reference to the agreement applying to the employee in relation to particular employment."

[13] Section 54 provides as follows:

"54 When an enterprise agreement is in operation

(1) An enterprise agreement approved by the FWC operates from:

(a) 7 days after the agreement is approved; or
(b) if a later day is specified in the agreement - that later day.

(2) An enterprise agreement ceases to operate on the earlier of the following days:

(a) the day on which a termination of the agreement comes into operation under section 224 or 227;
(b) the day on which section 58 first has the effect that there is no employee to whom the agreement applies.

Note: Section 58 deals with when an enterprise agreement ceases to apply to an employee.

(3) An enterprise agreement that has ceased to operate can never operate again."

[14] Section 58 addresses the interaction between enterprise agreements that cover the same employee. In the course of doing so, it identifies when an agreement will cease to apply to an employee. The section reads as follows:

"58 Only one enterprise agreement can apply to an employee

Only one enterprise agreement can apply to an employee

(1) Only one enterprise agreement can apply to an employee at a particular time.

General rule—later agreement does not apply until earlier agreement passes its nominal expiry date

(2) If:
(a) an enterprise agreement (the ***earlier agreement***) applies to an employee in relation to particular employment; and

(b) another enterprise agreement (the ***later agreement***) that covers the employee in relation to the same employment comes into operation; and
(c) subsection (3) (which deals with a single-enterprise agreement replacing a multi-enterprise agreement) does not apply;
then:
(d) if the earlier agreement has not passed its nominal expiry date:
(i) the later agreement cannot apply to the employee in relation to that employment until the earlier agreement passes its nominal expiry date; and
(ii) the earlier agreement ceases to apply to the employee in relation to that employment when the earlier agreement passes its nominal expiry date, and can never so apply again; or
(e) if the earlier agreement has passed its nominal expiry date—the earlier agreement ceases to apply to the employee when the later agreement comes into operation, and can never so apply again.

Special rule—single-enterprise agreement replaces multi-enterprise agreement

(3) Despite subsection (2), if:
(a) a multi-enterprise agreement applies to an employee in relation to particular employment; and
(b) a single-enterprise agreement that covers the employee in relation to the same employment comes into operation;
the multi-enterprise agreement ceases to apply to the employee in relation to that employment when the single-enterprise agreement comes into operation, and can never so apply again."

[15] The parties made submissions concerning the interpretative significance for s 217 of standing provisions found in Part 4-1 of the FW Act, which concerns enforcement proceedings in a court. Section 539 relevantly provides:

"539 Applications for orders in relation to contraventions of civil remedy provisions

(1) A provision referred to in column 1 of an item in the table in subsection (2) is a ***civil remedy provision***.

(2) For each civil remedy provision, the persons referred to in column 2 of the item may, subject to sections 540 and 544 and Subdivision B, apply to the courts referred to in column 3 of the item for orders in relation to a contravention or proposed contravention of the provision, including the maximum penalty referred to in column 4 of the item." (Notes omitted)

[16] The table that is then set out in s 539(2) contains 38 items. Items (4) and (14) state:

4	50 (other than in relation to a contravention or proposed contravention of a term that would be an outworker term if it were included in a modern award)	(a) an employee; (b) an employer; (c) an employee organisation to which the enterprise agreement concerned applies; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention —600 penalty units; or otherwise—60 penalty units

14	417(1)	(a) an employee; (b) an employer; (c) an employee organisation covered by the enterprise agreement or workplace determination concerned; (d) a person affected by the industrial action; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

[17] Section 540 imposes a limitation on who may apply for relevant orders. Subsections 540(1) to (3) state:

> **"540 Limitations on who may apply for orders etc.**
>
> *Employees, employers, outworkers and outworker entities*
>
> (1) The following persons may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the

person is affected by the contravention, or will be affected by the proposed contravention:

(a) an employee;
(aa) a prospective employee;
(b) an employer;
(c) an outworker;
(d) an outworker entity.

Employee organisations and registered employee associations

(2) An employee organisation or a registered employee association may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision in relation to an employee, only if:

(a) the employee is affected by the contravention, or will be affected by the proposed contravention; and
(b) the organisation or association is entitled to represent the industrial interests of the employee.

(3) However, subsection (2) does not apply in relation to:

(a) items 4, 7 and 14 in the table in subsection 539(2); or
(b) a contravention or proposed contravention of:
(i) an outworker term in a modern award; or
(ii) a term in an enterprise agreement that would be an outworker term if it were included in a modern award.

…"

[18] Section 544 places a time limit on certain applications that may be brought under Part 4-1 of the FW Act:

"544 Time limit of applications

A person may apply for an order under this Division in relation to a contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:

(a) a civil remedy provision;
(b) a safety net contractual entitlement;
(c) an entitlement arising under subsection 542(1)." (Notes omitted)

Contentions of the CFMMEU

[19] The CFMMEU contended that, in order for an employer, employee or union to make an application to vary an enterprise agreement under s 217(1), it is necessary that the applicant be covered by the relevant agreement at the time the application is made. This was the ordinary

meaning of *'employers covered by the agreement'*, read in the context of the section. Qube was not an employer covered by the 2012 or 2016 agreements at the time that it made its application because the agreements had ceased to operate. Pursuant to s 53(5), such agreements do not cover an employee, employer or union. Therefore, the application was not made by *'one or more of the employers covered by the agreement'*, as required by s 217(1)(a).

[20] The CFMMEU submitted that the words of s 217 were entirely clear, and that there was nothing in the text, context or evident purpose of the provision to support Qube's contention that s 217(1) should be understood as allowing an application to be made by an employer who was previously covered by the agreement. The union said that this was confirmed by paragraph 203 of the Explanatory Memorandum to the *Fair Work Bill* (EM), which, in connection with its explanation of the concept of an award or enterprise agreement covering a person, stated the following:

> "… coverage means that, from the time the award or agreement is approved by FWA until the time the award or agreement ceases to operate:
>
> - persons covered by the award or agreement can apply to vary the instrument".

[21] The CFMMEU contended that the framework was clear: once an agreement has ceased to operate, its coverage also ceases, and it is no longer possible for a person to apply to vary it.

[22] The union contended that there was good reason why the FW Act would confine standing under s 217(1) to persons presently covered by the relevant agreement, as these are the persons with a continuing relationship to the instrument and to one another. Allowing a person who was previously covered by the agreement to ask the Commission to vary it would permit a stranger to alter the current conditions of employment of others. The CFMMEU further contended that if one accepted the company's construction of the words *'covered by the agreement'* in s 217(1), a similar meaning would need to be given to the same words in other provisions in Part 2-4 of the FW Act, including s 225 (applications to terminate agreements after their nominal expiry dates), which would lead to anomalous consequences, such as former employees being able to apply to terminate agreements that continued to apply to others. The union further contended that Qube's construction of s 217 was incompatible with the statutory scheme because it would purport to alter the effect of the machinery provisions that govern enterprise agreements by permitting an order of the Commission under s 217 to re-enliven the application of agreements that had ceased to operate.

[23] The CFMMEU submitted that the text and the intended meaning of s 217(1) was plain: only persons currently covered by an enterprise agreement could make an application under s 217. This meaning was consonant with the relevant context and statutory purpose, and was confirmed by the EM. As Qube was not an employer covered by the 2012 and 2016 agreements at the time when it made its application, it had no standing to make that application, and the Commission had no power to determine the application.

Contentions of Qube

[24] Qube contended that s 217(1) allows an application to be made by an employer *'covered by'* an agreement, irrespective of whether the employer is so covered at the time when the

application is made. It submitted that the union's construction of s 217 was based on a flawed premise that the words *'covered by'* imported the present tense, when in fact the provision did not state that the employer must be one that *'is covered'* by the agreement, nor was there any sound basis to read the provision in this more limited way. Qube contended that, contrary to the union's submissions, its construction did not require words to be read into s 217, because the section was simply agnostic as to time in respect of coverage. Rather, it was the union that sought to imply a temporal limitation as to when an applicant must be covered by the relevant agreement by reading the word *'is'* into the provision before the words *'covered by'*.

[25] Qube further contended that one must have regard to the fact that s 217(1) is a standing provision and that the nature of such provisions is generally to define *who* can make an application by reference to a relevant connection to the subject matter and the interests that might be protected by the available relief, rather than to prescribe *when* an application may be made. Section 217(1) identified three classes of persons who can bring applications, all persons *'covered by the enterprise agreement'*. These are the persons upon whom an enterprise agreement may impose rights and obligations. This was the rationale for conferring standing on those persons to bring an application under the section. The question of when the person was so covered was not regulated by the provision. The preferable construction of s 217 was that an applicant has standing to bring an application if *'covered by'* the agreement at the time the application is made or during the period of operation of the proposed variation. In effect, an employer could make an application under s 217(1) if it is covered or was covered by the enterprise agreement.

[26] Qube submitted that the union was wrong to assert that the company's construction of s 217 was inconsistent with the statutory scheme. A retrospective variation in the present case would not mean that an agreement that had ceased to operate would be re-enlivened and purport to apply to persons contrary to s 58(2)(e). Rather, it would retrospectively vary the text of the agreement as at the time in the past when the agreement applied to the relevant persons. Qube further submitted that the union's construction of the tense-free expression *'covered by'* would have curious implications. For one matter, it would call into question the standing of the CFMMEU in its proceeding against Qube in the Court for breach of the 2012 and 2016 agreements. Item 4 in the table in s 539 provides that a union may sue for breach of an enterprise agreement only if it *'applies'* to the union; the agreements did not apply to the CFMMEU at the time that its proceeding was filed. If s 217 required a person to be covered by an agreement at the time of the application, s 539 should similarly be read as requiring an agreement to apply to the union at the time it brings a claim for breach of agreement. The correct interpretation, said Qube, was that item 4 in the table in s 539 required either that an agreement apply to a union, or that it have so applied at the time of the relevant contravention. It submitted that the same approach should be taken to the construction of s 217.

[27] Qube contended that the union's construction would lead to other unreasonable outcomes. A person's right to apply under s 217 would turn on the happenstance of whether an agreement had been replaced by another agreement. Further, employees who ceased employment would lose the right to seek variations to the agreement that had previously applied to them because they would no longer be covered by it. An employer that was in dispute with former employees about past entitlements would however be able to apply to vary the agreement under s 217. This would be unfair and was unlikely to have been intended.

[28] The company contended that analogues of s 217(1) had been present in industrial legislation since certified agreements were introduced into the *Conciliation and Arbitration Act 1904*. The legislative history showed little if any indication that Parliament had given attention to the concept of a temporal requirement for standing to vary collective agreements for ambiguity or uncertainty. It was unlikely that in 2009 Parliament had experienced an epiphany and decided to introduce such a requirement into s 217(1) of the FW Act. As to the EM, Qube submitted that the passage relied on by the union was simply a shorthand legal conclusion drawn from the combined operation of various provisions and did no more than set out examples of various ways in which the coverage of an award or agreement *can* be significant; it was not a comprehensive statement of legislative intention about standing under s 217(1).

[29] I note that the CFMMEU did not dispute that retrospective orders were available under s 217, and for reasons that I outlined briefly on transcript, I have proceeded on this basis.

Consideration

[30] I will begin with a brief grammatical and functional review of s 217(1). The provision commences with a clause that confers a power on the Commission: *'The FWC may vary an enterprise agreement'*. There follows a phrase containing two objects, limiting the purpose for which the FWC may exercise this power: *'to remove an ambiguity or uncertainty'*. Next, there is a prepositional construction that qualifies when the FWC may vary an agreement: *'on application by any of the following'*. Finally, each of subsections (a) to (c) contains a phrase specifying who may make an application under s 217. Subsection (a) states: *'one or more of the employers covered by the agreement.'* This phrase requires closer scrutiny.

[31] The word *'covered'* is a past participle. A common grammatical function of a past participle is to form the present perfect tense, which connotes an action that began in the past and that has some significance for the present (e.g. 'the agreement *has covered* the workers'). Another function of a past participle is to form participial phrases. The words *'covered by the agreement'* constitute such a phrase. It is adjectival in nature, because it describes *'one or more of the employers'*. In such a context, a past participle does not connote the past. It is simply a grammatical device that is used for an adjectival purpose. Any dimension of time that exists in connection with the use of the participial phase is to be ascertained by reference to the context in which it is used, including any tense or time that is expressed or implied in the surrounding text.

[32] The parties agree that the words *'covered by the agreement'* embrace present coverage. The controversy is whether they also embrace past coverage. The question then is whether there is any indication in the text or context of s 217 that an employer *'covered by the agreement'* includes one who was, but is no longer covered by the agreement. In my view, there is no such indication. Section 217(1) relevantly provides that an employer *covered by* an agreement may make an application to the Commission to vary it. The participial phrase is being used to describe the employer that may make an application. The relevant temporal context of the sentence is the time of the application. I cannot identify any textual or contextual elements, semantic or grammatical, that suggest a concern with the agreement's past coverage. In my view, an employer that was previously covered by an agreement, but is no longer covered by it when it makes an application, is not an employer *'covered by the agreement'*.

[33] The phrase *'employer or employers covered by the agreement'* could have been constructed as a relative clause by using a relative pronoun and the verb *'to be'*. Participial phrases and relative clauses are common means by which further information can be provided about a subject. Had a relative clause been used, the provision might then have read: *'one or more of the employers <u>that are</u> covered by the agreement'* or, on Qube's reading of the clause, *'one or more of the employers <u>that are or were</u> covered by the agreement'*. The verb or verbs in the clause would have expressed tense. Use of a relative clause would have been an obvious way to convey a concern with both the present and past coverage of an enterprise agreement. Instead, the legislature cast the provision in text that does not convey such a concern.

[34] It is necessary to consider whether any other provisions of the FW Act, the scheme of the FW Act, or any discernible statutory purpose points to a different conclusion as to the meaning of these words.

[35] It is relevant to consider the machinery provisions that regulate when a person is covered by an enterprise agreement, when an agreement applies to a person, and when an agreement is in operation. Section 53(1) provides that an agreement covers an employee or employer if the agreement is expressed to cover them. Section 53(5) then states that an enterprise agreement that has ceased to operate does not cover an employee, employer or employee association. Had it not been for s 53(5), an employer could have remained *covered* by a superseded agreement indefinitely, even after a new agreement covering the same employees had been made, because the old agreement, though no longer *applying* to those employees, would still be *expressed* to cover them. But s 53(5) draws a line under coverage once an agreement has ceased to operate.

[36] The CFMMEU contended that s 53(5) was fatal to Qube's application. But if Qube's construction were to be correct, then the provision would confer standing on an employer who is *or was* covered by an agreement; it would not matter that Qube had ceased to be covered by the agreements, and s 53(5) would therefore not be an obstacle to the company's standing to make the application. However, s 53(3) is of schematic significance for the interpretation of s 217(1). To my mind, it seems unlikely that, having gone to the trouble to cease coverage of agreements that have stopped operating, the legislature would then have allowed persons previously covered by such agreements to bring applications under s 217. It seems to me that one purpose of s 53(5) is to prevent an application to vary an agreement from a person who, but for s 53(5), would remain covered by an agreement that has ceased to operate. This is consistent with the extract from the EM referred to by the CFMMEU, which notes that a consequence of *coverage* is that from the time an agreement is approved by the Commission until the time it ceases to operate, persons covered by the agreement may apply to vary it. Qube submitted that this passage merely illustrated that during this time a person *can* make such an application, and that it did not imply that outside this period no such applications were possible. I do not accept this. The ordinary meaning of the passage is that a person can *only* apply to vary an agreement from the time that it is approved until it ceases to operate. Contrary to the company's contention, I consider that the interpretative relevance of the extract is not diminished by the fact that it might be described as a *'shorthand legal conclusion'*. Such conclusory statements are not uncommon in explanatory memoranda. In my view, the machinery provisions governing enterprise agreements, and s 53(5) in particular, support the CFMMEU's construction of s 217(1). Once an agreement's operation ends, coverage ends with it, and so does a person's standing to make an application to vary the agreement under s 217.

[37] In my opinion, several other contextual considerations support the interpretation of the CFMMEU. First, s 160, which concerns applications to vary awards to remove ambiguity or uncertainty, clearly states, using a relative clause and the present tense, that the Commission may make a determination *'on application by an employer, employee, organisation or outworker entity that is covered by the modern award'* (s 160(2)(b)). There is no basis to read the words *'is covered'* to mean *'is or was covered'*. And there is no apparent reason why Parliament would confine standing under s 160 to those presently covered by awards but extend standing under s 217 to those previously covered by agreements. Secondly, I agree with the CFMMEU that if the meaning of the phrase *'covered by the agreement'* in s 217(1) extended to previous coverage, it would presumably possess that broader meaning in other sections, including s 225. It seems improbable to me that the legislature would have intended to allow a person no longer covered by an agreement to apply to *terminate* it. Thirdly, on Qube's construction of s 217, it is not clear what work is to be done by s 53(5).

[38] In support of its construction, Qube pointed to s 185(1A), which states that applications to the Commission for approval of multi-enterprise agreements that are greenfields agreements must be made either by *'(a) an employer covered by the agreement'* or *'(b) a relevant employee organisation that is covered by the agreement'*. Qube submitted that the contemporaneous use in s 185(1A) of a tenseless construction in (a) and the present tense in (b) was a further example of the legislature distinguishing between a standing requirement that was agnostic as to the time when a person is covered by an agreement, as in (a), and a requirement that a person be presently covered by an agreement, as in (b). In my view however what s 185(1A) in fact illustrates is that as a matter of ordinary English usage it is possible to use either a participial phrase (as in (a)) or a relative clause (as in (b)) to express the same thing. In simple terms, one can either include or omit the words *'that is.'* I do not consider that the coverage requirements of s 185(1A)(a) and (b) are relevantly different. Like s 217(1), the temporal context of s 185(1A)(a) is the time when an application is made. In my view, ss 185(1A)(a) and (b) both require the identified person to be covered by the agreement at the time of the application.

[39] Qube contended that a relevant contextual consideration supporting its interpretation of s 217(1) was the section's function as a standing provision, and that such provisions were not ordinarily concerned with questions of time. But there is no general principle in this regard. Whether a standing provision imports dimensions of time will depend on the relevant text and context. It is true, as Qube says, that the purpose of a standing provision is to define classes of persons who may make an application, and that such persons can be expected to have a connection to the subject matter of the application and have an interest in the available relief. But in the present case, both constructions have such a connection. The fact that Qube's construction draws the boundaries of this connection more widely than that of the union is not a reason to prefer it. The interest that the classes of persons have is the fact that they are persons *'covered by the agreement'*. Standing is not framed by reference to broader interests that may be affected by the agreement. In this regard, s 217 differs from other standing provisions in the FW Act that refer to a person being *'affected'* by something (see for example s 426(6) and s 540). Section 217(1) does not state that a person whose interests are affected by an agreement can make an application to vary it. If it did so, there would be little doubt that Qube had standing to make its application.

[40] What of the contextual consideration, relied on by Qube, that s 217 confers a broad discretion on a specialist tribunal? In my opinion, there is no reason of principle or indication

from context that suggests that the scope of the power conferred on the Commission by s 217 has a bearing on the interpretation of its standing requirements. The fact that the provision might give the Commission a broad discretion, once ambiguity or uncertainty is found to exist, does not mean that the words *'covered by the agreement'* should be given a meaning that is broader than would otherwise be warranted.

[41] Qube contended that if the CFMMEU's construction of s 217(1) were correct, there would be no sound reason why a similar approach would not be taken to the construction of certain standing provisions relating to enforcement proceedings under in Part 4-1, which Qube said would have unreasonable consequences and could not have been intended. Qube's contention focused on the standing provisions in items 4 and 14 in the table in s 539(2). Item 4 relates to applications under s 50 in respect of contraventions of enterprise agreements. Item 14 deals with applications in relation to contraventions of s 417(1), which prohibits industrial action during the nominal life of an enterprise agreement. Both items 4 and 14 identify as persons who may bring an application *'an employee'* (subitem (a)) and *'an employer'* (subitem (b)). No words of limitation are used. In respect of unions, however, both items impose a limitation.

[42] Item 4(c) confers standing on a union *'to which the enterprise agreement concerned applies'*. Qube submitted that, consistent with its construction of s 217(1), the proper interpretation of item 4(c) was that a union could make an application if the agreement applies to the union *or applied to it at the time of the contravention*. Qube said that if this was not the case, the implication would be that unions could not sue for breach of superseded agreements, which was a very common practice. Indeed, the CFMMEU's proceeding against Qube in the Federal Court relied on such an interpretation. In the case of a contravention of s 417(1), standing is conferred on a union *'covered by the enterprise agreement'*. Qube submitted that if the union's construction of s 217(1) were correct, as soon as an enterprise agreement was replaced and ceased operating, a union would be unable to bring a claim for a past contravention of s 417(1), yet an employer would be free to do so. Qube contended, in effect, that a strict interpretation of agreement 'machinery' concepts in standing provisions, such as the union presently advanced before the Commission in respect of the concept of *'coverage'* in s 217(1), was not compatible with the scheme of the FW Act, as it created unreasonable and unintended outcomes in the enforcement framework.

[43] In my opinion these contentions do not present a reason to prefer Qube's construction of s 217 to that of the union. Item 4(c) does not use the words *'covered by the agreement'*. It is concerned with a different concept of agreement machinery, namely application. It uses a verb in the present tense (*'applies'*). The meaning of *'applies'* in item 4(c) and the meaning of *'covered by the agreement'* in s 217(1) is to be ascertained by reference to the context in which those words sit. As to this context, despite the verb in item 4(c) appearing in the present text, there is reason to think that a broader frame of reference may be contemplated. The table in s 539(2) identifies who may apply to a court for orders in relation to a contravention of particular provisions. A contravention will necessarily have occurred in the past, and s 544 allows a six year period for proceedings to be brought. Further, it appears that when items 4 and 14 refer simply to *'an employee'* and *'an employer'* as persons who have standing to bring applications, they contemplate persons who *were* employees or employers at the time of a contravention; it would not be necessary that the person be an employee or an employer at the time of the application. On one view therefore, the word *'applies'* could be read as meaning *'applied at the*

time of the contravention'. But that is because of the context that surrounds it. It is not because the alternative interpretation – that a union can only bring an application for breach of an enterprise agreement if that agreement presently applies to it – is unreasonable and cannot have been intended. Union applications for breach of agreement are frequently brought on behalf of, or in the interests of, affected employees. The standing of employees to bring their own applications for breach of agreement is not confined by item 4(c), and unions are free to support them. The literal reading of item 4(c) would have little practical impact on employees. To the extent that an alleged contravention affected the rights of a union under an agreement, the literal reading of item 4(c) would mean that, to seek redress, the union would have to make its application while the agreement still applied to it. But this hardly seems unreasonable. Whereas historical claims of underpayment of wages are not uncommon, allegations of contraventions of union rights under an agreement tend to be made at the time when the relevant issue arises, which is usually at a time when the agreement applies to the union.

[44] As to item 14(c), which concerns unions *'covered by the agreement'* applying for court orders in respect of contraventions of s 417, the relevant words are analogous to those in s 217, but as discussed above, the context of Part 4-1 is different. Further, if these words do require a union to be currently covered by the agreement in order to bring an application, I would not consider this to be an unreasonable result. Again, affected employees would be free to bring their own applications irrespective of whether they were currently covered by the agreement.

[45] In my view, there is no basis to distil from the scheme of the FW Act an implication that references to agreement machinery provisions that appear in standing provisions are to be read in an expansive way. Nor do I consider that there are any other contextual or schematic factors that would suggest that the interpretation of s 217(1) should be informed by the construction of items 4(c) and 14(c). In short, I find the link that Qube seeks to draw between the table in s 539(2) and the words *'covered by'* in s 217 to be a tenuous one.

[46] Qube contended that its construction of s 217(1) was to be preferred because *'logic, purpose and policy'* would suggest that present controversies about rights and obligations arising under enterprise agreements in the past should remain capable of being resolved by the Commission in the present. If a dispute about the meaning of a historical clause under a replaced agreement could be resolved in the Court in a proceeding for breach of agreement under s 50, why, asked Qube, should such a dispute not be capable of resolution in the Commission under s 217? As a matter of policy, this general proposition has merit. However, there is a competing policy consideration. Qube understandably focuses on the implications of the CFMMEU's interpretation of s 217(1) in the context of the retrospective variation it seeks, where no one is presently covered by the agreements in question. But what of applications that seek prospective variations of agreements, that continue to cover and apply to employers, employees, and unions? A consequence of Qube's construction is that former employees would have standing under s 217(1)(b) to bring an application to vary an agreement, because they were previously covered by it. Why should a person who is no longer covered by an enterprise agreement be able to seek to alter the text of an agreement that covers and continues to apply to others? No doubt, as a matter of discretion, the Commission would be reluctant to grant such applications with prospective effect, but we are presently concerned with the limits of standing and power under s 217. I find it unlikely that the Parliament would have intended to allow such applications.

[47] In my opinion, the reason why s 217(1) confines standing to persons who are presently covered by the agreement is that identified by the union: those persons have an ongoing interest in the agreement that governs their relationship. They have a continuing interest in the integrity of the text, and in removing any ambiguity or uncertainty that might affect it. Qube suggested that it would be unreasonable if former employees could not make an application under s 217, when the employer currently covered by the agreement could do so. I do not find this outcome to be unreasonable. The employer is covered by the agreement and the former employee is not. The former employee could have made an application under s 217 while still employed and has six years to sue for any breach of agreement in a court.

[48] Qube contended that the union's construction produced anomalous results, because standing to seek variation orders would be available to some but not others, based purely on the happenstance of whether an enterprise agreement has been replaced or terminated. But this simply reflects the fact that the line drawn by a standing rule will see some applicants fall either side of it. None of the examples cited by Qube seem unreasonable to me.

[49] Qube contended that provisions analogous to s 217(1) had existed in industrial legislation for many years without any temporal limitations and that it was unlikely that Parliament had intended to introduce them into the FW Act. I disagree. Given the text and context of s 217, and the extract from the EM referred to above, I consider that Parliament did intend to establish a temporal limitation in s 217.

[50] I agree with Qube that it would be desirable that the Commission be able to consider whether the agreements are ambiguous or uncertain and if so whether they should be varied. The Commission is a specialist tribunal. It has practical industrial perspective and sectoral experience upon which it draws in exercising its powers. The underlying controversy is before the Commission. The determination of the application could spare the Court's time. However, I am not persuaded that s 217(1) permits the Commission to determine this application, because in my view Qube did not have standing to make it.

The decisions in Miller and Esso

[51] Qube contended that its approach to the construction of s 217(1) found support in the decision of the Federal Court in *Miller v University of New South Wales* [2000] FCA 1563 (*Miller*), which considered a question concerning standing and time that arose under the *Workplace Relations Act 1996* (WR Act). In *Miller*, an employee who had been dismissed alleged that his employer had contravened the certified agreement that had covered his employment. Section 178(5A) of the WR Act provided standing for certain persons to bring contravention proceedings in a court. Section 178(5A)(b) conferred standing on '*an employee whose employment is subject to the agreement*'. The employer sought to have the application dismissed on the basis that when it was made, the applicant was not an employee whose employment was subject to the agreement. This contention, said Qube, aligned with the position taken by the union in its jurisdictional objection in the present case. The Court rejected the employer's motion to dismiss the application, despite the literal meaning of the standing provision in s 178(5A)(b), and the stark contrast with the provision conferring standing on employees to sue for breach of awards (s 178(5)(ca)), which extended to a person '*whose employment is, or at the time of the breach was, subject to the award*'. The Court observed that the words of s 178(5A)(b), whilst capable of being read as requiring an employee to be subject

to an agreement at the time of the application, was also capable of being read as encompassing the past tense. That is, the expression *'whose employment is subject to the agreement'* could be read as extending to an employee whose employment *was* subject to the agreement when the cause of action arose.

[52] Qube contended that the purposive approach of the Court in *Miller* was consistent with its own interpretation of s 217(1) in the present case: a person whose employment *is* subject to the agreement included a person whose employment *was* subject to the agreement at the relevant time. It submitted that in the present matter, its purposive construction should be preferred to what might be considered the literal argument of the union. It emphasised that in *Miller*, the literal construction was stronger than in the present case, because of the contrast between ss 178(5A)(b), which did not refer to the past, and 178(5)(ca), which did so.

[53] I am not persuaded that *Miller* assists Qube's construction. In *Miller*, Branson J noted, at [19], that *'as a matter of language'*, both interpretations were open. At [24], her Honour said:

> *"… s 170M provides support for a conclusion that a person whose employment was, at any relevant time when the agreement was in operation, subject to the agreement, is, unless a contrary intention is disclosed by a particular provision, "an employer whose employment is subject to the agreement" within the meaning of the Act."*

[54] Section 170M, which was set out in the preceding paragraph of her Honour's decision, provided that a certified agreement *'binds'* the employer and *'all persons whose employment is, at any time when the agreement is in operation, subject to the agreement'*. Section 170M cast a person's present status of being bound by an agreement by reference to the period of an agreement's operation and effect, which would include the past. This appears to me to have been the reason why her Honour concluded that *'as a matter of language'* both interpretations were open, and why her Honour considered that s 170M supported her conclusion.

[55] But in any event, *Miller* was concerned with different text from that which is before the Commission. In particular, the peculiar wording of s 170M is not found in the FW Act. The decision in *Miller* does not establish or reflect a point of principle concerning the construction of standing provisions, or dimensions of time that might reside within them or affect them. The decision concluded that a particular standing provision in the WR Act, though facially concerned with the present, was also concerned with the past, in part because of the effect of a definitional provision of broad temporal import. The decision dealt with the legislation before the Court. I do not consider that it informs the approach that should be taken to the interpretation of s 217(1) of the FW Act.

[56] Qube also contended that support for its construction was to be found in the decision of the High Court in *Esso Australia Pty Ltd v Australian Workers' Union* [2017] HCA 54, where the Court was said to have eschewed a narrow focus on the use of the present tense in s 413(5) of the FW Act, reading the words *'any orders that apply to them'* to mean any orders that *apply or applied* to them. But this decision dealt with a provision very different from s 217. Section 413(5) provides that persons organising or engaging in industrial action *'must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement…'* The provision employs a number of tenses: the present perfect, used with a modal verb ('The

following persons *must not have contravened'*); the present tense ('any orders that *apply* to them and that *relate* to …') and the past simple ('… the agreement or a matter that *arose* during bargaining…'). The majority considered that the words following *'that relate to …'* were not confined to the present (at [40]). Again, the Court dealt with the text before it. I do not find in *Esso* any indication of a point of interpretative principle concerning matters of tense or time, nor is there in my view an analogy of construction that assists Qube's interpretation of s 217.

Conclusion

[57] For the reasons given above, I consider that s 217(1)(a) allows an employer to make an application to vary an enterprise agreement only if it is covered by the agreement at the time when it makes the application. Qube was not such an employer. The company did not have standing to make the application, and therefore the Commission has no power to determine it. The application is dismissed.

DEPUTY PRESIDENT

Appearances:

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R. Dalton K.C. and *M. Follett* of counsel for Qube Ports Pty Ltd

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