DECISION

Fair Work Act 2009
s.604—Appeal of decision

Qube Ports Pty Ltd T/A Qube Ports
v
Construction, Forestry, Maritime, Mining and Energy Union - The Maritime Union of Australia Division
(C2023/1515)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT GOSTENCNIK
DPEUTY PRESIDENT CLANCY

SYDNEY, 5 JULY 2023

Appeal against decision [[2023] FWC 508] of Deputy President Colman at Melbourne on 1 March 2023 in matter number AG2022/4849 – permission to appeal granted – appeal dismissed.

[1] On 21 November 2022 Qube Ports Pty Ltd (Qube) applied to vary several enterprise agreements under s 217 of the *Fair Work Act 2009* (Act) to remove an ambiguity or uncertainty. Some of the agreements the subject of the application had been approved by the Commission in 2012 and 2013 and covered Qube and employees engaged as waterside workers at ports around Australia (2012/13 Agreements). Between 2016 and 2018 the Commission approved a number of enterprise agreements (Replacement Agreements) which replaced the 2012/13 Agreements. Consequently, the 2012/13 Agreements ceased to apply to those employees (s 58(2)(e)). And, from the day on which there were no employees to whom the 2012/13 Agreements applied, the agreements ceased to operate (s 54(2)) and no longer covered Qube (s 53(5)).

[2] Additionally, enterprise agreements were made at the ports of Esperance and Ashburton and approved by the Commission. These agreements together with the Replacement Agreements (together the 2016 Agreements) and the 2012/13 Agreements – 35 in total – were the agreements the subject of the variation application (listed in Annexures A and B to the application). The application was opposed by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU). In 2021, the Commission approved enterprise agreements replacing each of the 2016 Agreements covering all the relevant employees. It was common ground that all of the 2012/13 Agreements and 2016 Agreements have ceased to operate because of the effect of s 54(2) of the Act and that Qube was not covered by any of these agreements because of the operation of s 53(5).

[3] Qube's application sought to vary each of the 2012/13 Agreements and 2016 Agreements to remove an ambiguity or uncertainty from a number of clauses. The agreements the subject of the application were similarly structured, comprising a Part A – containing

conditions applicable to all ports, and a Part B – containing port-specific conditions. Part A conditions of the 2012/13 and 2016 Agreements provided for categories of employees whose fortnightly hours of work would vary from one fortnight to the next, depending on the volume of work required by Qube, and known variously as guaranteed wage employees (GWE), variable salary employees (VSE), and provisional variable salary employees (PVSE). These employees were entitled to be paid 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.

[4] The 2012/13 and 2016 Agreements contained provisions permitting Qube to recover gap payments from an employee's earnings in the next pay period if the employee earned more than the minimum fortnightly salary. There were two such provisions in each of the 2012/13 Agreements, relating to VSEs and GWEs, and two concerning VSEs, PVSEs and GWEs, in each of the 2016 Agreements. The provisions were in very similar terms. Clauses 9.2.4(b) and 9.3.4(b) of the 2012/13 Agreements relevantly provided:

> "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."

And

> "In the event that a GWE'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."

[5] Clauses 9.6.4(b) and 9.7.4(c) of the 2016 Agreements relevantly provided: that:

> "If their 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."

And

> "If a GWEs 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."

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

[7] A dispute about the practice arose in about mid 2020 with the CFMMEU contending that Qube could not make deductions under the relevant provisions of the various agreements except in the pay period that immediately followed the pay period in which the gap payment had been made. In July 2022, the CFMMEU commenced proceedings against Qube in the Federal Court of Australia, seeking declarations of contraventions of s 50 of the Act - breaches of each of the 2012/13 and 2016 Agreements - and penalties and compensation to rectify underpayments in respect of some one thousand employees over the six-year period from July 2016 to July 2022.

[8] In connection with its variation application, Qube maintained that the provisions described above are ambiguous or uncertain, because the parties advance competing constructions of the provisions, each of which is arguable. Qube also contended that it, the CFMMEU, and the various employees who voted to approve the 2012/13 and 2016 Agreements had a mutual intention that the provisions would reflect Qube's practice, and that the Commission should vary the provisions so that the text clearly reflects that intention. In sum, the variations proposed by Qube, which would have retrospective effect, replace reference in each provision to 'the next pay period' with 'any subsequent pay periods.' Qube contended that, if the application were granted, the proceedings in the Court would not be maintainable, because the variations would remove the constructional premise on which the contravention allegations rested.

[9] The CFMMEU contended that the relevant provisions of the 2012/13 and 2016 Agreements were not ambiguous or uncertain. It also contended that Qube's variation application was incompetent because Qube was not an employer covered by any of the 2012/13 or 2016 Agreements when its application was made, and therefore had no standing to make it.

[10] Qube contended that it had standing to make the variation application because s 217 of the Act allows an application to be made by an employer that is or was covered by the relevant agreement. Deputy President Colman decided to determine the standing question as a threshold matter.[1] The Deputy President dismissed the variation application, construing s 217(1)(a) of the Act as allowing an employer to apply to vary an enterprise agreement only if it is covered by the agreement at the time when it makes the application. The Deputy President concluded that Qube was not such an employer and so it did not have standing to make the application. Consequently, as Qube did not have standing to make the application, the Deputy President concluded that the Commission had no power to determine it. [2]

[11] By its notice of appeal dated 21 March 2023, Qube applies for permission to appeal and if granted, appeals the Deputy President's decision. Its sole appeal ground is that the Deputy President erred in concluding (at [57] of the decision) that Qube was not an employer covered by any of the 2012/13 or 2016 Agreements, for the purposes of section 217(1)(a) of the Act.

[12] In its written submissions Qube criticises some of the Deputy President's reasoning process. Whether or not these criticisms are well founded is not to the point. The question of standing – whether Qube was an employer covered by any of the 35 agreements and consequently whether the Commission has jurisdiction to deal with the application – determined by the Deputy President turned on a proper construction of statutory provisions and so the only issue in the appeal is whether the Deputy President's conclusion was correct.

[13] As the proper construction of the standing provisions in s 217(1) of the Act has not, as best as we can discern, been the subject of Full Bench consideration we propose to grant Qube permission to appeal. But, for the reasons which follow, we dismiss the appeal. We reject Qube's construction of s 217(1)(a) – that an employer "covered by the agreement" – means an employer that "is or was covered" or "covered at any relevant time when the agreement was in operation".[3] The Deputy President's construction of s 217(1)(a) as being confined to an employer that "is covered" by the agreement the subject of the application was plainly correct as was the conclusion that Qube did not have standing to make the application which flowed from the construction.

[14] The central issue requiring determination by the Deputy President was whether the Commission had jurisdiction to vary the 2012/13 and 2016 Agreements, which turned on whether there was an "application by one or more employers covered by the" 2012/13 and 2016 Agreements or any of them. That such an application had been made is a jurisdictional fact. And as it is uncontroversial that Qube was not at the time it made the application, covered by any of the 2012/13 or 2016 Agreements, whether such an application was made turned on the meaning of "covered by" in s 217(1)(a) of the Act. It is uncontroversial that the correctness standard applies to the issue raised in this appeal and that we are to determine the question for ourselves.

[15] The contemporary approach to the construction of statutory provisions is not in dispute. Ascertaining the legal meaning of a statutory provision begins with the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose. Context includes the language of the Act as a whole, the existing state of the law, the mischief the provision was intended to remedy and any relevant legislative history.

[16] Although the text of the statute is the starting point, at the same time, regard is had to its context and purpose. Context is to be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word or words – that is how the word is, or words are, ordinarily understood – to the process of construction. Context and purpose considerations recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[4]

[17] Section 15AA of the *Acts Interpretation Act 1901* (AI Act)[5] requires that a construction that would promote the purpose or object of the enactment is to be preferred to one that would not promote that purpose or object. This is so whether the purpose or object is expressly stated in the enactment or not. The purpose or object of the Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the Act, and another does, the latter interpretation is to be preferred. Of course, s 15 of the AI Act requires us to construe the Act, not to rewrite it, in the light of its purpose or object.[6]

[18] Section 217 of the Act is part of an array of provisions found in Division 7 of Part 2-4 which enable enterprise agreements to be varied or terminated. Division 7 is in turn part of the scheme established by the Act for the bargaining, making, approval, variation and termination

of enterprise agreements. Section 217(1) empowers the Commission to vary an enterprise agreement to remove an ambiguity or uncertainty only on application by employers, employees and registered organisations "covered by the agreement". In this sense it is apt to describe s 217(1) as a "standing provision", because each of subparagraphs (a) to (c) describe the class of persons who can apply for a variation by reference to a relevant connection (covered by the agreement) to the subject matter of the application (varying the agreement), although s 217(1) is also much more. The provision is a conferral of discretionary power upon a valid application and sets out the limits of the power – variation to remove an ambiguity or uncertainty – with the corollary that the Commission cannot act unless first satisfied that an ambiguity or uncertainty exists.

[19] It is common ground that the words 'covered by the agreement' embrace present coverage but there is a dispute about whether it includes an employer once covered, but no longer covered by the agreement. In this respect we accept that there are at least two available constructions of the phrase "covered by the agreement" used in s 217(1). The first is that the words "covered by" are used only in the present tense so as to delimit the 'persons' who can apply for a variation by reference to coverage when the application is made. That is, the employer, employee or registered organisation applying must be covered by the agreement the subject of the application when the application to the Commission is made. The second is that s 217(1) is agnostic as to the temporal aspect of coverage. In contrast to some other provisions of the Act where tense is explicitly deployed, s 217(1) does not provide for applications by a person who "is covered", or by persons who "are covered", nor does it convey standing of a person to apply by reference to whether the person "is or was" covered by the agreement. Such use leaves open a construction that an employer/employee/organisation has standing to bring an application under s 217(1) if the enterprise agreement the subject of the application "covered" the relevant person at the time the application is made or during a time when the agreement, which is no longer in operation, was in operation.

[20] As the Deputy President correctly pointed out (at [31] of the decision), the word 'covered' is a past participle, a common grammatical function of which is to form the present perfect tense, connoting an action that began in the past and that has some significance for the present. However, another functional use of a past participle is to form participial phrases. And the phrase 'covered by the agreement' may evidence such use in that it is adjectival in nature, describing 'one or more of the employers' – only the employer or employers presently covered. Again, as the Deputy President correctly observed any dimension of time discernible from the use of the phrase is to be ascertained by reference to text, context (at [31] and [32] of the decision), and, we add, purpose. But as to the ordinary grammatical meaning of the phrase 'covered by the agreement', we agree with the Deputy President's observation that the participial phrase is being used in s 217(1)(a) of the Act to describe the employer that may make an application and the relevant temporal context of the sentence is the time of the application – thus an employer covered by the agreement when making application. And like the Deputy President, we are unable to identify any textual elements – semantic or grammatical – suggesting a concern with past coverage of an employer by an agreement the subject of an application under s 217(1).

[21] As we have noted above, the Act establishes a scheme for the bargaining, making, approval, variation and termination of enterprise agreements. An enterprise agreement is a single-enterprise agreement or a multi-enterprise agreement (s 12). A single-enterprise

agreement may be made by an employer, or 2 or more employers that are single interest employers, with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or with one or more relevant employee organisations if:

- the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and
- the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement (s 172(2)).

The latter is known as a greenfields agreement (s 172(4)).

[22] Relevantly, a non-greenfields single-enterprise agreement (as is the case with the 2012/13 and 2016 Agreements) is made when a majority of employees of the employer(s), that will be covered by a proposed agreement, having been asked to approve the agreement, cast a valid vote to approve the agreement (s 182(1)).

[23] From this point the proposed agreement has become an enterprise agreement (albeit not one that is approved by the Commission or in operation). But the enterprise agreement made under s 182(1) is an agreement which covers at least one employer and the employees the agreement expresses to cover (s 53(1)).

[24] A bargaining representative for an agreement made under s 182(1) of the Act must apply to the Commission for the approval of the agreement within 14 days after it is made or within such further period as the Commission may allow (ss 185(1) and (3)). Subject to meeting the approval requirements (ss 186 and 187), the Commission must approve an enterprise agreement the subject of a valid application (s186(1)) and the agreement commences operation on the later of 7 days after approval or the date specified in the agreement (s 54(1)).

[25] An enterprise agreement must have a nominal expiry date which is no more than 4 years after the day on which the Commission approves the agreement (s 186(5)). The nominal expiry date of an enterprise agreement may be varied using the mechanism available under s 207 of the Act, but the period of extension must not result in the nominal expiry date of the agreement as varied being more than 4 years after the day on which the Commission approved the agreement (s 211(1)(b)). More generally, enterprise agreements may be varied by a variation agreement approved by the Commission following an application by "a person covered by the agreement" (ss 207-216), to remove ambiguity or uncertainty (s 217), to remove discriminatory terms following a review conducted after a referral of an agreement by the Australian Human Rights Commission (s 218), and now also (but not at the time Qube's application was made) – to correct or amend an obvious error, defect or irregularity (s 218A).

[26] An enterprise agreement continues to operate unless it has been terminated by agreement which is approved by the Commission (ss 219-224) or on application by the same classes of persons which can apply under s 217 for a variation, made after the nominal expiry date of the agreement and approved by the Commission (ss 225-226).

[27] An enterprise agreement applies to a person if the agreement covers the person, it is in operation, and no other provision of the Act provides, or has the effect, that the agreement does

not apply to the person (s 52(1)). And in relation to an employee, it covers and applies to an employee only in relation to particular employment (ss 53(6) and 52(2)). An agreement commences operation as earlier specified and continues in operation until the earlier of the day on which a termination of the agreement comes into operation under ss 224 or 227 (s 54(2)(a)) or the day on which s 58 first has the effect that there is no employee to whom the agreement applies (s 54(2)(b)).

[28] Only one enterprise agreement can apply to an employee in relation to particular employment at a particular time (s 58(1)). A later agreement that covers an employee in relation to particular employment which comes into operation does not apply to an employee's employment if an earlier agreement which has not passed its nominal expiry date applies to an employee in relation to that employment (s 58(2)(d)(i)). But once the earlier agreement passes its nominal expiry date, that agreement ceases to apply and can never again apply, and the later agreement applies to that employee (s 58(2)(d)(i) and (ii)). If an earlier agreement which has passed its nominal expiry date applies to an employee in relation to particular employment, then when a later agreement covering the employee in relation to the employment comes into operation, the earlier agreement stops applying to the employee and can never so apply again (s 58(2)(e)). When an enterprise agreement ceases to operate it does not cover an employee, employer or employee organisation.

[29] A person must not contravene a term of an enterprise agreement (s 50), but a person cannot contravene an enterprise agreement unless it applies to the person (s 51(1)). And so, a person may only contravene an enterprise agreement while the agreement covers the person and is in operation (so that it applies to the person) (s 52).

[30] Thus, under the enterprise agreements scheme, the Act appears to regulate the life cycle of enterprise agreements. An agreement is born when it is made and from that point covers persons expressed to be covered. It gains strength when it begins to operate – no earlier than 7 days after it is approved by the Commission – at which point the agreement applies to the persons expressed to be covered in the sense of giving a person the agreement covers entitlements and imposing obligations on a person the agreement covers (s 51). As an agreement grows older it continues its operative life beyond its nominal expiry date unless it is terminated pursuant to the scheme in ss 219-224. Otherwise, an agreement dies when it stops operating at a point after its nominal expiry date when terminated or wholly replace by another agreement. When an agreement ceases to operate (s 54(1)), it cannot apply to a person expressed to be covered (s 52(1)(a)), it no longer confers entitlements nor imposes obligations on any person (s 51) and does not cover anyone (s 53(5)).

[31] Put another way, the Act establishes a scheme under which enterprise agreements are approved by the Commission, commence and then cease to operate. This context suggests that the various variation and termination provisions (subject to the express limitations in each) are applicable in relation to agreements approved, and agreements that are in operation, but not in relation to agreements that have ceased to operate. This context also suggests that the phrase "covered by the agreement" in s 217(1) of the Act means presently covered by an agreement that has been approved by the Commission and will be in operation, or presently covered by an agreement that is in operation. And the phrase does not contemplate a person who was but is no longer covered by an agreement which is in operation (such as a former employee) nor a person that was covered by an agreement but is no longer covered because of the operation of

s 53(5) (such as Qube in relation to the agreements the subject of its application). Part 2-4 of the Act regulates the birth, life and death of an enterprise agreement, but not its afterlife (save for ensuring that once dead it can never live again).[7] Application by persons not covered by an agreement, which is not in operation and can never operate again, is very much about an agreement's afterlife and in that afterlife, seeking to rewrite its history by contending that while alive one or more of its terms was ambiguous or uncertain.

[32] Enterprise agreements are part of the main terms and conditions of employment of national system employees for which the Act provides (s 43) and while in operation and applying to an employee in relation to particular employment, a modern award (which would otherwise apply) does not apply to the employee in relation to that employment nor to the employer in relation to that employee (s 57).

[33] The making, approval, variation and termination of agreements is found in Part 2-4 of Chapter 2 of the Act. As s 5 makes clear, Chapter 2 provides for terms and conditions of employment of national system employees (s 5(1)), and Part 2-4 is about enterprise agreements, which are made at the enterprise level, providing terms and conditions for those national system employees to whom it applies (s 5(4)).

[34] An enterprise agreement contains permitted matters which are matters pertaining to the relationship between an employer covered by the agreement and that employer's employees covered by the agreement; matters pertaining to the relationship between the employer(s), and the employee organisation(s), covered by the agreement; deductions from wages for a purpose authorised by an employee covered by the agreement; and how the agreement operates (s 172 (1)). Relevantly, an agreement's principal purpose is to fix employment terms and conditions applicable to the employee(s) and their employer(s) covered by it while the agreement is in operation. In short, an operative enterprise agreement regulates an existing employment relationship and where relevant an existing industrial relationship between employer(s) and a union, while each party to the relationship is covered by the agreement.

[35] Together with the contextual matters discussed, the nature of an enterprise agreement discloses the purpose of the variation and termination provisions of the Act and their limited engagement by persons "covered by the agreement". The purpose or object is to enable persons that have an ongoing interest in an agreement that governs their relationship with others covered by the agreement, to apply to vary or terminate the agreement as the case requires or the circumstances permit. Persons presently covered by an enterprise agreement have a continuing interest in the integrity of the text of an agreement, and in removing any ambiguity or uncertainty that might affect it. Such persons have a continuing interest in the ongoing operation of an agreement. Persons who are no longer covered have no such interest. That this is the purpose or object is reinforced by the fact that all of the variation and termination of agreement provisions appear in a single division (Division 7) of Part 2-4.

[36] The construction adopted by the Deputy President, and with which we concur, is consistent with the purpose or object of the statutory provision and the legislative scheme.

[37] There are other textual and contextual indicators which also support the Deputy President's construction.

[38] *First*, as the Deputy President noted, s 160 of the Act which deals with applications to vary modern awards to remove ambiguity or uncertainty, uses a relative clause and the present tense, providing 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)). Plainly there is no basis to read the words "is covered" to mean "is or was covered". There is also no evident reason why Parliament would confine standing under s 160 to those presently covered by a modern award but extend standing under s 217 to those previously covered by agreements. The statutory coverage architecture is the same. Like an enterprise agreement, a modern award covers the persons it is expressed to cover (s 48(1)) and does not cover any person when it has ceased to operate (s 48(4)). Like an enterprise agreement, a modern award applies to a person if the award covers the person, it is in operation and no other provision of the Act provides, or has the effect, that the award does not apply to the person. Like an enterprise agreement, in relation to an employee, a modern award covers and applies to an employee only in relation to particular employment (ss 48(5) and 47(3)). And like an enterprise agreement, a modern award does not impose obligations on a person, nor can a person contravene an award term nor does an award give a person an entitlement unless the award applies to the person (s 46). Of course, an enterprise agreement is a superior instrument in the sense that a modern award does not apply to an employee in relation to particular employment (and the employee's employer) while an enterprise agreement applies to the employee in relation to that employment (s 57).

[39] Qube seeks at [29] of its submissions[8] to explain why Parliament would confine standing under s 160 of the Act to those presently covered by a modern award but extend standing under s 217 to those previously covered by an enterprise agreement. We do not find the explanation proffered persuasive. That a modern award "almost always covers an employee working within its coverage" does not explain why such an employee would not be permitted to apply to vary the award to remove ambiguity or uncertainty from the award after the employee has ceased employment in relation to which that employee was covered. Nor does it explain why an employer no longer covered, because the employer has stopped operating a business or undertaking covered by the award, also cannot apply. The answer of course is that neither has an ongoing interest in the operation of the award, even though there is undoubtedly power to retrospectively vary the award under s 160, albeit limited to exceptional circumstances (s 165(2)). That the "cessation of [the] operation of a modern award is a rarity compared to the same for an enterprise agreement" also does not explain the different treatment. The consequences of both instruments ceasing to operate on coverage is the same. Once each instrument ceases to operate it does not cover anyone (s 48(4) for modern awards, s 53(5) for enterprise agreements).

[40] While the capacity under s 217 to vary an agreement with retrospective operation is in dispute, and for the reasons we later discuss, it is a dispute we need not determine, on the assumption there is power, that the express retrospective variation power *vis-à-vis* an award is more limited (requiring "exceptional circumstances"), that difference does not explain why different standing rules would be adopted. The capacity to retrospectively vary either supports extending the meaning of "covered by" to persons previously covered by an instrument or it does not. For the reasons explained further below, it does not.

[41] *Second*, the use of the phrase "covered by the agreement" in the standing provision of s 217(1) of the Act is not unique. It appears to be used consistently in the various provisions of

Division 7 of Part 2-4. Section 210(1) requires "a person covered by the agreement" to apply to the Commission for approval of a variation when a variation to an enterprise agreement is made under s 209. Plainly a variation to an agreement may not be made under s 209 unless the agreement is in operation, and it covers the employer and some employees employed at the time (s 207 (1)). The reference to "are covered" in ss 207(1)(a)(i) and (b)(i) makes this clear but is also used to delineate between that group of employees and those not yet covered but who will be covered if the agreement variation is approved. The reference to "covered by the agreement" in s 210(1) (which may also be described as a standing provision) can only be a reference to a person presently covered.

[42] Section 208 provides that an employer "covered by an enterprise agreement" may request the affected employees for a proposed variation of the agreement to approve the proposed variation by voting for it. Again, the reference to "covered by" can only sensibly be a reference to an employer presently covered by the agreement.

[43] Section 212(3) permits the Commission to accept a written undertaking in connection with the approval of a variation from one or more employers "covered by the agreement". Plainly only employers presently covered by an agreement can give an undertaking, which if accepted becomes a term of the agreement as varied and "applies" to the employer(s) that gave the undertaking (s 213). A term of an agreement can only "apply" to an employer if, *inter alia*, the agreement "covers" the employer (s52(1)).

[44] Section 217A applies if a variation to an enterprise agreement is proposed and permits, *inter alia*, an employer or employee organisation "covered by the enterprise agreement" to apply to the Commission to deal with a dispute about the proposed variation. Given the reference in s 217A to "affected employees" (see s 207(2)), the proposed variation with which the section is concerned is one proposed under s 208. And "covered by the enterprise agreement" can only be a reference to present coverage. Section 217A(2) may also be described as a standing provision.

[45] The reference to "covered by the agreement" in ss 219, 220, 221, 222 and 223 which deal with the termination of an enterprise agreement by agreement, also plainly is a reference to persons presently covered. Section 222 (1), which provides that if a termination of an enterprise agreement has been agreed to, a person "covered by the agreement" must apply to the Commission for approval of the termination may also be described as a standing provision.

[46] Section 225 which deals with the termination of an enterprise agreement after it has passed its nominal expiry date is structured in terms that are identical to s 217(1) in that it permits a termination application to be made by:

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.

[47] As the Deputy President observed, it seems improbable that the legislature would have intended to allow a person no longer covered by an agreement to apply to terminate it. Similarly, the requirement in s 226(b) (as in force when Qube's application was made) for the Commission

to take into account the views of employees, employer(s) and employee organisation(s) "covered by the agreement" can only sensibly be understood as referring to present coverage. Having regard to the scheme of the Act, as we have outlined, the notion that the Commission would be required to consider the views of employees previously covered but no longer covered by the agreement is unsustainable. The reference in ss 225 and 226 to "covered by the agreement" is a reference to present coverage not past coverage.

[48] The various provisions in Division 7 of Part 2-4 of the Act use the phrase "covered by the [single-enterprise], [multi-enterprise], [enterprise] agreement" on 21 occasions. As is evident from the analysis above, on 18 occasions, the phrase plainly connotes present not past coverage. Generally, words and phrases which are used consistently in a statute should be given the same meaning consistently. And if a different meaning was intended to be conveyed then different words or a different phrase could have been used. For example, s 217(1) could have been expressed as permitting relevant persons who "are or were" or "is or was" covered by the agreement, or "was covered by the agreement at any time it was in operation". That alternative words or phrases were not deployed suggests that the phrase "covered by the [single-enterprise], [multi-enterprise], [enterprise] agreement" has a consistent singular meaning confined to present coverage. This suggests that the meaning of "covered by" the agreement used 3 times in s 217(1) has the same meaning as its use on the other 18 occasions in Division 7 of Part 2-4 – one that is confined to present coverage.

[49] *Third,* the phrase "covered by the [single-enterprise], [multi-enterprise], [enterprise] agreement" used throughout Division 7 of Part 2-4 of the Act, and specifically in s 217(1) should be read together with s 53(5). As earlier noted, s 53(5) provides that an enterprise agreement that has ceased to operate does not cover an employee, employer, or employee organisation. Section 217(1) which confers standing on the identified persons covered by the agreement, when read with s 53(5) does not extend standing to persons to apply to vary an agreement which is no longer in operation when s 53(5) specifically provides such an agreement 'does not cover' those persons. The Explanatory Memorandum to the *Fair Work Bill 2008* supports this construction and provides:

> "203. Even though coverage of a modern award or enterprise agreement does not necessarily determine who has enforceable entitlements and obligations under those instruments, coverage of the instrument can be significant for a variety of other reasons. For example, coverage means that, from the time the award is made or the 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;
>
> . . ."[9]

[50] We also adopt and endorse without repetition, the Deputy President's analysis of and response to Qube's contentions at [36] commencing at line 13, and [38]-[49] of his decision.

[51] It is necessary also to say something further about Qube's submissions on appeal.

[52] *First*, as we reject Qube's construction of s 217(1)(b) of the Act it is not necessary to deal with its contention that s 217(2) permits the Commission to vary an agreement to remove an ambiguity or uncertainty with retrospective effect. We would however observe that even if s 217(2) permitted a variation to operate retrospectively, it does not follow that a person who was covered but is no longer covered by the agreement can make an application. As we have earlier pointed out, we consider that the purpose or object of the variation and termination provisions of the Act and their limited engagement by persons "covered by the agreement" is to enable persons having an ongoing interest in an agreement that governs or will govern their relationship with others covered by the agreement, to apply to vary or terminate the agreement as the case requires or the circumstances permit. Persons presently covered by an enterprise agreement have a continuing interest in the integrity of the text of an agreement, and in removing any ambiguity or uncertainty that might affect it. That there may be power to vary with retrospective effect does not detract from this purpose, but merely recognises that a person presently covered may wish to clarify the operation of provisions of an agreement from a date earlier than the date on which the Commission determines an application.

Second, Qube criticises the Deputy President's grammatical analysis as flawed and that he adopted a reasoning process whereby he approached the contextual and purposive factors only to see if they dislodged the grammatical meaning at which he had already arrived. We do not accept that the criticisms are valid. The task of ascertaining the legal meaning of a statutory provision begins with the words in the text – examining the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose. The Deputy President appropriately started with the grammatical meaning – the ordinary and natural meaning – of the text. We consider that the Deputy President's grammatical analysis at [30]-[33] of the decision is correct although we accept that the phrase "covered by the agreement" is superficially capable of meaning "is or was covered". That is why the Deputy President considers the phrase in the context of the Act as a whole and the evident statutory purpose of the provision. The Deputy President's remarks at [34] that 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" do not disclose error. It is simply another way of saying:

"Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."[10]

Or:

". . . the statutory text from beginning to end is construed in context, and an understanding of context has utility "if, and in so far as, it assists in fixing the meaning of the statutory text"."[11]

[53] The Deputy President plainly considered the ordinary grammatical meaning of the provision having regard to context and purpose as is evident from his analysis at [35]-[49] of the decision.

[54] *Third*, we have earlier set out that which we consider to be the legislative purpose of s 217. For those reasons Qube's contentions about legislative purpose are rejected.

[55] *Fourth*, Qube's contention that a construction of s 217 which results in asymmetry between that provision and the enforcement regime found elsewhere in the Act should be favoured is rejected. The materiality of the standing provisions in the enforcement regime upon the construction task was addressed by the Deputy President at [41]-[45] of his decision (which we adopt) and answers Qube's contention. Enforcement is concerned with past events in relation to both agreements that remain in operation and those no longer in operation. The variation and termination provisions in Division 7 of Part 2-4 are concerned with agreements that are or will soon be in operation. Necessarily the former will adopt a formulation to allow persons no longer covered by an enterprise agreement to bring enforcement proceedings in relation to events when the agreement applied to the person if the person was affected by the contravention. The different legislative purposes means that the asymmetry for which Qube contends is not required. Qube's reliance on a legislative purpose to create a "balanced framework" (s 3) to bolster its contention for asymmetry is misplaced and takes the proper construction of s 217(1)(a) no further. The balance which is sought to be achieved is as between competing interests. Principally the balanced framework is the balancing of the competing interests of employers and employees and perhaps also of registered organisations. As the CFMMEU correctly points out it is not a balance between those who were formerly covered and those currently covered; or between those enforcing an agreement and those covered by an agreement.

[56] *Fifth*, we reject Qube's contention that the Deputy President's distinguishment of the judgment in *Miller v University of New South Wales*[12] was unsound. We consider the Deputy President was correct, and that *Miller* is distinguishable for the reasons set out at [51]-[55] of the decision. In short compass *Miller* concerned a different enactment, using different words, in a different provision conferring standing, and serving a different purpose. We agree that as in *Miller* there are two possible meanings "as a matter of language" and that the correct meaning should be informed by considerations of context and purpose. Justice Branson's observation that it was "appropriate to give consideration to the purpose or object underlying the Act and to the statutory context in which the subsection is found"[13] and that Her Honour had regard to the legislative objects of the *Workplace Relations Act 1996* (Cth) (WR Act), s 170M of the WR Act, and the inconsistent (and unlikely to have been intended) consequences of the narrow construction of standing, in the context of the case before Her Honour is hardly surprising. These are sound and uncontroversial approaches to statutory construction. But it does not make good the argument that *Miller* is determinative of the proper construction of the standing provisions in s 217(1) of the Act. The text of s 217(1), context and legislative purpose lead irresistibly to the construction favoured by the Deputy President and with which we concur.

[57] *Sixth*, the various rhetorical and hypothetical questions posed by Qube are of little assistance to the proper construction of s 217(1)(a) of the Act. At [16] of its submissions Qube asks rhetorically why an employee who is no longer covered by an agreement should not be able to apply to vary it? The answer is simply that consistent with the object or purpose of the provisions in Division 7 of Part 2-4, the provisions are concerned with an operative (or soon to be operative) agreement and a person's ongoing interest (expressed through coverage) in the agreement, its variation or termination. At [19] of its submissions Qube asks why can an employer who applies to the Commission for a variation the day before a replacement agreement commences, continue with that application until finality (although by then nobody has any ongoing or continuing interest in the terms of the agreement), but the employer who applies two days later cannot? Without deciding the correctness of the underlying proposition

in the question (because it does not here arise), the answer is that this is the condition the Parliament decided to impose. The question is akin to asking why an employee can make an application for an unfair dismissal remedy on day 21 following dismissal but not day 23? The answer is the same. That is the condition imposed by the Parliament.

[58] The hypothetical posited at [27] does not sit uncomfortably with the legislative purpose identified by the Deputy President. The Act creates three kinds of relationships that a person has with an enterprise agreement. *First*, a person is covered by an agreement, but it does not apply to the person (for example following the period the agreement is made and then approved by the Commission but not yet in operation; or when a later agreement is made but the earlier agreement has not passed its nominal expiry date; or when an earlier agreement passes its nominal expiry date and the later agreement has commenced operation). *Second*, a person is covered by the agreement, and it applies to the person. *Third*, a person was covered by the agreement but is no longer covered by it. The employees identified in Qube's hypothetical remain covered by an agreement which does not apply because a later agreement covering them has come into operation. Qube's complaint inherent in the hypothetical is essentially that only employees to whom an old agreement applies (as opposed to only covers) should vote to vary or terminate the agreement. Though the old agreement can never again apply (s 58(2)(d) and (e)), the legislative choice made to give standing to those in the first and second category but not the third is understandable. But Qube's construction would lead to a fundamentally incongruous result. An employee who was covered but is no longer covered by an agreement (for example because the employee now has a different job with the same employer), would have standing to bring a variation or termination application and that employee's views would be required to be taken into account by the Commission in assessing whether termination of an enterprise agreement is appropriate even though the agreement neither applies nor covers the employee.

[59] The answer to the question posed at [28] of Qube's submissions is twofold. *First*, the term cannot be enforced as it has never had any effect (s 255(b)). *Second*, the employer establishes that the term "discriminates against an employee covered by the agreement" by bringing evidence about the circumstances of one or more employees at the time when the agreement covered and applied to them.

[60] On a proper construction of s 217(1)(a), "covered by the agreement" means presently covered. The Deputy President's construction is correct as is his conclusion that Qube did not have standing to make the application.

Order
We order as follows:

Permission to appeal is granted.
The appeal in C2023/1515 is dismissed.

VICE PRESIDENT

Appearances:
R Dalton KC with *M Follett* of Counsel for Qube Ports Pty Ltd.
M Irving KC with *H Crosthwaite* of Counsel for the Construction, Forestry, Maritime, Mining and Energy Union.

Hearing details:

2023.
Melbourne.
24 May.

Written submissions:

19 April 2023 and 24 May 2023 for Qube Ports Pty Ltd.
15 May 2023 for the Construction, Forestry, Maritime, Mining and Energy Union.

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[1] *Qube Ports Pty Ltd* [2023] FWC 508 at [1].

[2] Ibid at [57].

[3] Transcript (24 May 2023) PN11.

[4] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] per Kiefel CJ, Nettle and Gordon JJ; See also the discussion in *Re Grahame Patrick Kelly* [2021] FWCFB 6002 at [64]-[68] and in *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] *FCAFC* 223 at [76]-[86].

[5] Both currently and as in force on 25 June 2009; see *Fair Work Act 2009*, s 40A.

[6] See generally, *Bowker and Ors v DP World Melbourne Limited; Maritime Union of Australia and Ors* [2014] FWCFB 9227.

[7] To a similar effect, see *BlueScope Steel (AIS) Port Kembla v The Australian Workers' Union, the Australian Manufacturing Workers' Union & the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2018] FWCFB 856 at [73].

[8] Appellant's Outline of Submissions, 19 April 2023.

[9] *Explanatory Memorandum to the Fair Work Bill 2008* [203].

[10] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] per Kiefel CJ, Nettle and Gordon JJ.

[11] Ibid at [37] per Gageler J.

[12] [2000] FCA 1563.

[13] At [19].