DECISION

Fair Work Act 2009
s.604—Appeal of decision

Monash University
v
National Tertiary Education Industry Union
(C2023/3720)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER BISSETT

BRISBANE, 4 OCTOBER 2023

Appeal against decision [2023] FWC 1148 of Deputy President Bell at Melbourne on 7 June 2023 in matter number AG2022/4262.

[1] Monash University (the University) was established on 30 May 1958 under the since repealed *Monash University Act 1958* (Vic). Pursuant to s 4 of the *Monash University Act 2009* (Vic) the University continues in existence and is a body politic and corporate. In September of 2022, the National Tertiary Education Industry Union (NTEU) commenced proceedings in the Federal Court of Australia in which it alleged that the University had contravened s 50 of the *Fair Work Act 2009* (Cth) (Act), relevantly, by not paying casual Teaching Associates for certain student consultation at the rate prescribed by clause 7 of Schedule 3 to the *Monash University Enterprise Agreement (Academic and Professional Staff) 2019 Agreement* (Agreement). In October of 2022 the University applied under s 217 of the Act to vary Schedule 3 to the Agreement to remove an ambiguity or uncertainty. The application was opposed by the NTEU. On 17 November 2022, the Court (Snaden J) determined an interlocutory application brought by the University by ordering that the NTEU initiated proceeding in the Court be stayed until the Commission determines the University's s 217 application.[1] By a decision published on 7 June 2023[2] Deputy President Bell dismissed the University's s 217 application. The University has applied for permission to appeal, and if granted appeals that decision.

[2] Schedule 3 of the Agreement deals with Teaching Associate sessional rates descriptors and provides, for the purposes of payment of a tutorial or repeat tutorial rate (clause 1) and a lecture or repeat lecture rate (clause 2), that "associated work" may encompass various activities, including relevantly, "contemporaneous consultation with students involving face-to-face and email consultation prior to and following a" tutorial (clause 1) or lecture (clause 2). The University maintained that these provisions - specifically the phrase 'contemporaneous consultation' - were ambiguous or uncertain and proposed variations which would have inserted a sentence in the fourth dot point of clause 1 as follows:

> "For the avoidance of doubt, "contemporaneous consultation" means consultation associated with a tutorial that occurs proximate in time to the

> tutorial, for example, within a week before or after the relevant tutorial but prior to the next tutorial, and may be scheduled by either the Teaching Associate or the University".

[3] A sentence substantially to the same effect was to be added to the fourth dot point in clause 2, save that the word "lecture" appears wherever "tutorial" is found in the sentence above.

[4] Although the Deputy President found the provisions were ambiguous and uncertain (at [87], [95], [104], [105]), he concluded that it was not appropriate to make the variation sought by the University (at [166]).

[5] By its notice of appeal, the University sets forth four appeal grounds in which it contends:

- *First*, in declining to exercise his discretion to remove ambiguity and uncertainty in the Agreement, the Deputy President erred in finding that it was a mandatory requirement that a "common intention" supportive of the proposed variation be established before a variation could be made under s 217 of the Act;

- *Second*, the Deputy President impermissibly fettered his discretion by finding that "common intention" was to be treated as a "significant" consideration in the exercise of any discretion under s 217 of the Act;

- *Third*, the Deputy President misconceived how "common intention" is to be ascertained, which resulted in his exercise of discretion miscarrying, including by:

    - adopting the reasoning from jurisprudence concerning contract rectification, holding that what is required to be established is "actual" or subjective mutual intention (at [143]), as opposed to the objectively ascertained mutual intention;

    - despite noting at [151] that the only material before him to discern mutual intention was the Agreement, the prior industrial instruments, and some limited material circulated during bargaining – the Deputy President failed to engage in any considered reasoning of those materials in the Decision and the Agreement itself;

- *Fourth*, the Deputy President took into account irrelevant or speculative considerations in the exercise of his discretion, namely:

    - potential for persons to be exposed to pecuniary penalties if a retrospective amendment was made;

    - what persons may have understood the provisions in question to mean after the making of the Agreement;

    - that substantial resolution of the disputed terms may be achieved through either court determination or the bargaining process;

- the variation sought was to have retrospective effect, meaning that it involved "heightened considerations".

[6] As we have already noted, the Deputy President determined that the Agreement was both ambiguous and uncertain. The ambiguity and uncertainty identified by the Deputy President arose in respect to whether a request or direction by the University to a Teaching Associate to undertake student consultation precludes such consultation being "associated work" and the temporal boundaries of the term "contemporaneous consultation".[3] These conclusions are not challenged by the University nor by the NTEU, although the NTEU does not concede the correctness of the conclusions.

[7] The issue in contention in this appeal is, in substance, whether the Deputy President's discretion miscarried in determining not to exercise the power under s 217 to vary the Agreement in the terms proposed by the University, to remove the ambiguity and uncertainty he identified. In so deciding, the Deputy President reasoned as follows.

[8] *First*, the Deputy President discussed the challenges in identifying any common intention in respect of an enterprise agreement[4] but concluded that in the instant case these need not be resolved[5] because the evidence did not establish a common intention concerning Schedule 3 of the Agreement.[6] The Deputy President noted that the University acknowledged the evidence did not point to any meeting of the minds from the extrinsic material.[7]

[9] *Second*, the Deputy President accepted the University's contention that the discretion under s 217 of the Act is not confined by a requirement to give effect to a variation reflecting the common intention of the persons who made the relevant enterprise agreement,[8] thereby rejecting the NTEU's contention to the contrary.

[10] *Third*, the Deputy President found that evidence of common intention is relevant to the question of whether the power in s 217 should be exercised which he noted the University also accepted.[9]

[11] *Fourth*, the Deputy President concluded that the circumstances in which a variation under s 217 would be made absent an established common intention are limited.[10] This suggests that the absence of an identified common intention in the instant case was given significant weight.[11]

[12] *Fifth*, the Deputy President identified various considerations which, depending on the circumstances of a particular matter, might bear on the question whether the variation power in s 217 should be exercised.[12] The non-exhaustive list of matters identified is set out below:

- The absence of an antecedent "common intention" or "substantive agreement". The Deputy President observed that the presence of this factor would ordinarily be a matter of significant weight in favour of variation and, equally, its absence a significant factor for refusal.

- The variation would not "give effect to a new and substantive change to the agreement".[13] The Deputy President opined that this is a significant factor for refusal, if not satisfied.

- The exercise of the power of variation granted by s 217 is only for the purpose of removing "an ambiguity or uncertainty".[14] A variation extending beyond that required to remove an ambiguity or uncertainty would be beyond the jurisdiction conferred by s 217.

- The views of the employer and employees (and, for the latter, including the views expressed on their behalf by an applicable union).[15]

- The utility of the amendments.[16]

- The stage of bargaining between the parties, where relevant.[17] The Deputy President considered that where an enterprise agreement has expired, it would be generally preferrable for the parties to endeavour to reach an agreed position rather than having the Commission determine a variation for the expired agreement.

- The timing of an application for variation, including delay.

- The specified date on which the variation is sought to be effective.

- The power under s 217 does not give rise to a general discretion to determine a matter based on industrial fairness.[18]

[13] *Sixth*, the Deputy President determined that it was not appropriate, in all the circumstances, to exercise discretion to vary the Agreement in the manner sought by the University[19] having earlier explained that:

- An enterprise agreement is not made by the Commission, and it represents an overall bargain so that caution needs to be exercised against imposing changes to the bargain expressed in that agreement;[20]

- The absence of any demonstrable common intention as to the operation of Schedule 3, risks any variation imposed by the Commission having the effect of improving (or harming) the legal position of either the employees or employer unanchored by any principled assessment of how those legal rights would or should be affected;[21]

- For the purposes of s 217, a variation needs to be anchored against a principled assessment of the potential rights of those affected. By way of illustration, a reduction in industrial disputation or greater certainty as to the operation of Schedule 3 could also have been achieved by different variations that would confine any contemporaneous consultation to a period of 1 hour from a tutorial (not 1 week as proposed), and to further specify that the University was not permitted to schedule a consultation time (which reflects the NTEU's position). And, although the University proposed variations are based on a genuine attempt to adopt a reasonable compromise, that is not sufficient to support a variation under s 217;[22]

- There was no unreasonable barrier or difficulty in obtaining substantial resolution of the disputed terms, either by court determination or through a bargaining process;[23]

- The conclusions expressed conform with the requirement that the Commission's powers and functions must be exercised in a manner that is fair and just, promoting harmonious and cooperative workplace relations; they take into account the object of the Act and the objects of Part 2-4, and equity, good conscience and the merits of the matter;[24]

[14] The Deputy President said that as the variations proposed would, on the University's application, operate retrospectively, this raises "heightened considerations".[25] One was that the prospect of a retrospective variation resulting in a person being exposed to a pecuniary penalty could not be ruled out.[26] Another was the effect of the passage of time on new employees following the commencement of the Agreement.[27]

[15] Before returning to the grounds of appeal it is necessary to say something about the Full Federal Court judgment in *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union*,[28] considering some of the contentions advanced by the University. Both on appeal and below,[29] the University contends that *Bianco Walling* sets out a comprehensive statement of principles concerning the proper construction and application of s 217 of the Act. In so doing, the University argues that the Full Court described evidence of "common intention and to the history" of the relevant clauses as permissible, but it did not say in its comprehensive statement that the establishment of common intention was mandatory. The University says that there is no support in *Bianco Walling* for the proposition that the exercise of discretion under s 217 is "strictly confined" to circumstances where common intention is established.

[16] These contentions by reference to *Bianco Walling* must be rejected. *Bianco Walling* was not concerned with the principles applicable to the exercise of discretion under s 217 of the Act. The judgment was in terms only concerned with the question of the proper approach to determining whether there was ambiguity or uncertainty in an enterprise agreement. It is to be remembered that the exercise of power under s 217 involves determining two discrete issues or questions. *First*, whether there is ambiguity or uncertainty in the enterprise agreement under consideration which by variation to the agreement could be removed. If so, then *secondly*, whether to exercise the power to remove the ambiguity or uncertainty by varying the enterprise agreement.[30] The existence of ambiguity or uncertainty is a necessary precondition or jurisdictional fact, the existence of which must be found before the power to vary is exercisable.[31]

[17] The Full Court held in *Bianco Walling* that the Deputy President at first instance, erred because identifying whether there is ambiguity or uncertainty for the purposes of s 217 of the Act did not require the enterprise agreement to be construed and there was no need for the Commission to feel constrained in the matters to which it may have regard by the principles developed for the interpretation of enterprise agreements.[32] The Full Court also held that the decision of the Full Bench was affected by jurisdictional error because it too had misconceived the task required under s 217, noting that the Commission was not required to "properly construe" an enterprise agreement before determining whether there was ambiguity or uncertainty,[33] and the function under s 217 attracted the application of s 578 and did not require the application of the rules of evidence.[34] Accordingly the Full Bench did not address the question required for its determination of the appeal which affected the discharge of the appellate function.[35]

[18] *Bianco Walling* did not deal with and so says nothing about the principles to be applied by the Commission when deciding whether to vary an agreement that has been found to be ambiguous or uncertain. The Full Court's observation that the function under s 217 Act attracted the application of s 578, although a timely reminder is not new, nor specific to s 217. Section 578 mandates that the Commission take account of the enumerated matters in performing its functions and exercising its powers under the Act. *Bianco Walling* cannot therefore be regarded as setting out a comprehensive statement of principles concerning the proper construction and application of s 217 of the Act, concerned as it was with the first but not the second issue we noted earlier.

[19] To the extent that the Full Court in *Bianco Walling* ventured into the second issue it did so only to note that s 578 has application, and that the constraint to which the Deputy President erroneously felt he was subject had the potential to be material in another way, namely:

> In relation to s 170MD(6) of the WR Act, the AIRC held that a "significant factor" for the Commission's consideration in determining whether to exercise its discretion to vary an enterprise agreement is "the objectively ascertained mutual intention of the parties at the time the agreement was made": *Re Australian and International Pilots Association* at [17] (Watson VP).[36]

[20] We return to the appeal grounds. By ground 1, the University contends that the Deputy President erred in finding that it was a mandatory requirement that a "common intention" supportive of the proposed variation be established before a variation could be made under s 217 of the Act. This ground must immediately fail as it is plain the Deputy President did not so find. To the contrary, the Deputy President accepted the University's submission that mutual or common intention could be a factor to consider and, where appropriate, a significant factor, but it was not a mandatory matter as better reflecting the position under s 217 of the Act.[37] He posited some circumstances, by way of example, when it might be appropriate to vary the enterprise agreement, absent an established common intention.[38] But the Deputy President formed the view that the discretion to vary an enterprise agreement under s 217 is not largely unfettered and the relevance of an antecedent common intention is significant.[39] The Deputy President opined that although he was "prepared to accept that the discretion in s 217 is not strictly confined by a requirement that any variation be supported by an established prior common understanding, the circumstances are limited."[40] For our part, this is consistent with the view expressed in *Re Australian and International Pilots Association*[41] in relation to a predecessor provision to s 217, that a "significant factor" in determining whether to exercise the discretion to vary an enterprise agreement to remove ambiguity or uncertainty is "the objectively ascertained mutual intention of the parties at the time the agreement was made",[42] a view we endorse.

[21] To the extent that the University suggested that despite the Deputy President's express acceptance of its submission that common intention was not a mandatory factor in s 217 applications the Deputy President nevertheless so held at [153] of the decision, we reject the suggestion for the reasons we express below in dealing with ground 2.

[22] Ground 1 of the notice of appeal therefore fails.

[23] By ground 2, the University contends that the Deputy President erred by impermissibly fettering his discretion by concluding that evidence of common intention was a 'significant' consideration in the exercise of discretion under s 217 of the Act. The University argues that the Deputy President erroneously elevates common intention to a mandatory weighting of "significant" and so it was determinative in his reason to refuse to exercise his discretion. The University says:

- That the imposition of a "strictly confined" requirement is not supported by the text of the Act, or authority, and is in error;

- *Bianco Walling*, described evidence of "common intention and to the history" of the relevant clauses as permissible, but the Full Court did not say "in its comprehensive statement" that the establishment of common intention was mandatory;

- There is no support in *Bianco Walling* for the proposition that the exercise of discretion under s 217 is "strictly confined" to circumstances where common intention is established;

- The Deputy President was led into error in not acting on the guidance provided by the President of the Commission as to the status and effect of *Bianco Walling* by accepting the NTEU's submission that the President's observations as to *Bianco Walling* were not correct.

[24] These contentions are rejected. *First*, it seems clear that the Deputy President's reference to "common intention" is used to capture "mutual intention", "common understanding" and "substantive agreement", which are used synonymously in various authorities to discuss the same notion.[43] The Commission has discretion under s 217 to "remove ambiguity or uncertainty", but the exercise of power is not to give effect to a new and substantive change to an enterprise agreement the subject of an application. And a decision to remove uncertainty or ambiguity should give effect to the "substantive agreement" that was ambiguously or uncertainly reduced to writing in the terms of the enterprise agreement.[44] Enterprise agreements are "made" under the Act in several ways. A greenfields agreement is made by industrial parties (employer(s) and union(s)) when each industrial party expressed to be covered by the agreement has signed it (s 182(3)), or if notice of a notification period has been given and other preconditions are met, an agreement is taken to be made between the industrial parties when the application to approve the agreement is made to the Commission (s 182(4)). A single enterprise agreement is made when a majority of employees that will be covered by the proposed agreement cast a valid vote to approve the agreement (s 182(1)). A multi-enterprise agreement is made when a majority of employees to be covered by the agreement of at least one of the employers who will be covered by the agreement cast a valid vote to approve the agreement (s 182(2)). The variable ways in which enterprise agreements are made and the absence of "parties" to such agreements, explains the Deputy President's discussion of the particular difficulties that the concept of mutual or common intention brings to an enterprise agreement made under Part 2-4 of the Act. The way in which enterprise agreements are "made" and the absence of traditional parties, all of which is a product of the statute, informs the significance ascribed to mutual intention, or put another way, to identifying what is the "substantive agreement" that was "made", and provides a statutory context for the exercise of the discretion under s 217.

[25] *Second*, the Deputy President's observation that common intention was a 'significant' consideration in the exercise of discretion under s 217 of the Act, was entirely consistent with the authorities. It is to be recalled that the Deputy President did not accept the NTEU's primary submission that discretion under s 217 can only be exercised to give effect to a variation that reflects the common intention of the persons who made the relevant enterprise agreement. The rejection of that contention is consistent with previous decisions of the Commission identifying common intention as one of the matters to which the Commission should have regard.[45] Indeed that mutual or common intention could be a factor to consider and, where appropriate, a significant factor in the exercise of the discretion, was a matter the University accepted as the Deputy President noted at [119] of his decision.

[26] Expressing that common intention was a 'significant' consideration is saying no more than that the Deputy President gave the absence of common intention significant weight in the circumstances. That common intention may be given significant weight is, as we have already noted, consistent with what is said at [17] of *Re Australian and International Pilots Association,*[46]which bears repeating:

> The discretion of the Commission in the case of an ambiguity or uncertainty involves two questions. First, is it appropriate to vary the agreement? If so then secondly, what variations are appropriate? Similar considerations will often be relevant to both questions and hence the two questions frequently overlap. <u>It is well established that a significant factor is the objectively ascertained mutual intention of the parties</u> at the time the agreement was made [citing *Re Tenix Defence Systems Pty Ltd Certified Agreement 2001-2004* [2002] AIRC 531]. It is not appropriate to rewrite an agreement or install something that was not inherent to the agreement when it was made [citing *Construction, Forestry, Mining and Energy Union v Linfox Transport (Australia) Pty Ltd*]. These principles reflect the notion that an agreement is made by the parties usually without any arbitrated content or independently determined standards of industrial fairness. The exercise of the discretion conferred on the Commission in relation to an ambiguity or uncertainty does not give rise to a general discretion to determine a matter based on industrial fairness [citing *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Qantas Airways Ltd* (2001) 106 IR 307]. The task is to place the parties in the position they intended by their agreement - insofar as the wording of the agreement does not reflect that intention. Although a significant factor, the objectively ascertained mutual intention of the parties is not the only consideration. However it would be unusual for other considerations to weigh in favour of a variation that was inconsistent with the intention of the parties [citing *Community and Public Sector Union v Telstra Corporation Ltd* (2005) 139 IR 141]. [Underlining added].

[27] These observations also accord with the much more recent decision of a Full Bench of the Commission in *Construction, Forestry, Maritime, Mining and Energy Union & Ors v Specialist People Pty Ltd*[47] which said:

> [42] Once ambiguity or uncertainty has been identified, the Commission must then consider whether to exercise its discretion to vary the agreement. The Commission has discretion to "remove ambiguity or uncertainty", not to give effect to a new and substantive change to the agreement. Applications that seek the latter must be made under s 210 of the FW Act. A decision of the Commission under s 217 to remove uncertainty or ambiguity should give effect to the substantive agreement that was ambiguously or uncertainly reduced to writing in the terms of the enterprise agreement.[48] [Underlining added]

[28] Therefore, the Deputy President's conclusion that common intention was a significant consideration in the exercise of his discretion to vary the Agreement to remove the identified ambiguity and uncertainty, and his observation that the circumstances in which the Commission would exercise discretion without evidence of mutual intention are "limited", finds support in the authorities and is entirely orthodox.

[29] *Third*, for the reasons we have already stated, save for its reminder as to the effect of s 578 of the Act and the observation at [69] of *Bianco Walling*, which appears to endorse [17] of *Re Australian and International Pilots Association,* the Full Court did not venture into the realm of setting out the principles that may be applicable to the exercise of the Commission's discretion to vary an enterprise agreement once ambiguity or uncertainty had been established.

[30] *Fourth*, it is wrong to suggest, as the University does, that the President of the Commission provided guidance as to the status and effect of *Bianco Walling* in *Monash University v National Tertiary Education Industry Union*.[49] The proceeding before the President was in the nature of an interlocutory proceeding in which the President determined an NTEU application for the s 217 application to be referred to a Full Bench of the Commission pursuant to s 615 of the Act. Whether *Bianco Walling* determined how the Commission is to exercise its discretion to vary an agreement under s 217 of the Act was not debated. Moreover, it is important to note that in accepting the University's contention that "the principles concerning the proper construction and application of s 217 were comprehensively stated" in *Bianco Walling*, the President added that this was undertaken "in part by reference to previous decisions of this Commission and its predecessor tribunal".[50] And for the reasons we have already stated the judgment in *Bianco Walling* is to be understood by reference to its terms, which on our reading do not descend into a dissertation of the principles applicable to the exercise of the Commission's discretion to vary an enterprise agreement under s 217 once ambiguity or uncertainty has been established.

[31] Ground 2 of the notice of appeal therefore fails.

[32] By ground 3 of the notice of appeal, the University contends, in substance, that the Deputy President's discretion miscarried because he misconceived how "common intention" is to be ascertained. The University contends that the Deputy President adopted reasoning from jurisprudence concerning contract rectification and determined that that which must be established is "actual" or subjective mutual intention (at [143]), as opposed to the objectively ascertained mutual intention. The University also contends that the Deputy President failed to engage in any considered reasoning of the extrinsic materials and the Agreement to ascertain whether objectively a mutual intention could be found. We reject these contentions.

[33] *First*, the Deputy President concluded at [141]-[143] that a search for an 'objectively determined' common intention is a search for 'actual mutual intention' assessed by reference to objective evidence "in the sense that [a court] does not merely accept what a party says was in his or her mind, but instead considers and weighs admissible evidence probative of intention".[51] In describing this as a way to ascertain common intention in relation to an enterprise agreement, the Deputy President was correct. Contrary to the University's contention, on our reading of the decision, the Deputy President did not find that that which must be established is actual or subjective mutual intention, rather than objectively ascertained mutual intention. The Deputy President's reference to 'actual intention' is not to a subjective intention but rather to objectively identified actual mutual intention. So much is clear from [143] of the decision where the Deputy President says that he "would approach that task 'in the sense' described by Kiefel J above, namely as a search for actual mutual intention through a prism of considering and weighing the admissible evidence probative of actual intention".

[34] At [144] of the decision the Deputy President acknowledges that a common intention may be objectively identified by engaging with the terms of an enterprise agreement and at [145] he notes that whichever approach is adopted, common intention in the context of an enterprise agreement is not lightly found. At [151] of the decision the Deputy President records that the University acknowledged the evidence did not point to any meeting of minds.[52]

[35] *Second*, it is true that the Deputy President did not engage with the Agreement's terms to ascertain a mutual or common intention, but in the circumstances we identify below, he cannot be criticised for not so doing.

[36] Neither the NTEU nor the University contended below that common intention could be found or identified from the words of the Agreement. Although the University in its submissions below undertook a textual analysis of the Agreement and some extrinsic material,[53] it is palpably clear from those submissions that the University's textual analysis was undertaken for the purposes of establishing the existence of ambiguity or uncertainty.[54] It was not undertaken for the purposes of establishing the existence of a common intention to guide the exercise of the discretion to vary the Agreement. This also is unremarkable since it is to be remembered that the University argued below that once the jurisdictional prerequisite of ambiguity or uncertainty is established the Commission's "unfettered" discretion is enlivened,[55] and the University proposed its variations as striking a "reasonable balance"[56] rather than as reflecting the substantive agreement earlier made.

[37] During oral argument before the Deputy President, the University averted to the fact that common intention may be discerned through a textual analysis of the Agreement[57] but ultimately submitted that the variation for which it contended was advanced on the basis that it was a reasonable balance to be struck rather than reflecting a common intention. So much is clear from the following exchange:

> PN346 MR BOURKE: We say, once you get to that, in terms of equity good conscience, we have struck the appropriate balance in clarifying the construction issues that are in dispute and coming up with, we would say, a common senses industrial outcome to try and make the clause workable and reduce or avoid disputation in the future.

PN347 THE DEPUTY PRESIDENT: It could be workable if not within a week, it could be within an hour. I'm guess one thing that I'm a little bit cautious about is that there's potentially other ways that things could be made to work. They would work by giving clarity and reducing industrial disharmony, but they can do so in a way that's adverse to a party.

PN348 MR BOURKE: There's consequences of the creation, no doubt. But, in our submission, there invariably will be, that's why this application is opposed. That's not a reason for the discretion not to be exercised.

PN349 But can we come back to the example of whether it should be an hour either side? As we read the NTEU's submissions, they don't put any temporal hold, it's just before or after. They don't say with any particular time. As we've said, it could be the whole semester. Well, we've chosen what we say is a practical common sense outcome, 'Let's make it a week either side', everybody knows where they stand.

PN350 One hour, in our submission, that is going to effectively be ripe for abuse, because everyone's going to make sure they don't consult with students within an hour of a tutorial. It's contrary to the notion that there might be email exchange, and it makes it difficult where someone has back-to-back tutorials, effectively ruling out any consultation being associated work.

PN351 So, in our submission, the one hour is too strict. Reading the statement of claim and the NTEU's submission, I don't think they're even pushing for that type of strict, immediate approach. As I said, I don't think they're using the word 'immediate' anymore and 'immediate' is not used in the language.

PN352 So, in our submission a week is a reasonable balance where the tutorial, for example, the lecture is fresh in the teaching associate's mind, the student's mind and issues come up and need to be resolved, whether by way of scheduled consultation or not scheduled consultation, that's beside the point.

PN353 THE DEPUTY PRESIDENT: Just on that, the proposition that a week is a reasonable balance reflects - well, the proposition that I should exercise a discretion to make it a week and clarify that it be scheduled by either the university or teaching associates, is put on the basis that it's a reasonable balance, rather than there's a common intention that I can divine and - - -

PN354 MR BOURKE: Correct.

PN355 THE DEPUTY PRESIDENT: I understand.

PN356 MR BOURKE: We can't, straight faced, go, 'On a proper construction it's one week'. It's some reasonable amount and we could have cases where you have to look at all the circumstances, maybe in certain circumstances two weeks, or it could be on all semester. But weighing up your discretion, exercising industrial common sense, equity, good conscience, put

> some boundaries around it because otherwise it's just going to be more disputation and the current disputation won't go away.[58]

[38] The University did not contend below that its proposed variation would give effect to an identified common intention found by reference to a textual analysis of the Agreement, much less did it explain how, on a textual analysis, a common intention consistent with its proposed variation could be found.

[39] Therefore, although we accept that a common intention may be identified by a textual analysis of an enterprise agreement, any failure by the Deputy President to undertake such an analysis in the circumstances described above does not sound in error. Proceedings under s 217 of the Act, unlike corresponding proceedings to remove ambiguity or uncertainty from a modern award, may not be initiated on the Commission's own motion. A s 217 application may only be made by a person or body covered by the enterprise agreement. The University is covered by the Agreement. It made an application under s 217 and advanced a case in support of its contention that the Agreement contained ambiguity or uncertainty, which ought be removed in the manner proposed by the University. It was no part of the University's case that common intention consistent with its proposed variation could be discerned from a textual analysis of the Agreement. Nor did the University suggest that a common intention could be identified at all. The Deputy President decided the case the University advanced. He did not decide a case the University now, with the benefit of hindsight, thinks it ought to have advanced. And he cannot be justifiably criticised for not doing so. Much less is appealable error established in the result.

[40] Consequently, appeal ground 3 of the notice of appeal fails.

[41] By its final ground of appeal, the University contends that the Deputy President took into account irrelevant or speculative considerations in the exercise of his discretion. Specifically, the University argues that the Deputy President erroneously took into account the potential for persons to be exposed to pecuniary penalties; what persons may have understood the provisions in question to mean after the making of the Agreement; that substantial resolution of the disputed terms may be achieved through either court determination or the bargaining process; and that as the variations sought were to have retrospective effect, this involved "heightened considerations". The University says that these considerations are irrelevant for the following reasons:

- As to the first consideration, because the potential for the imposition of a pecuniary penalty is speculative and would arise in all applications for a retrospective variation, the potential is in any event unlikely to eventuate given the nature of the proposed variation and the fact that a contravention occurred in effect because of a retrospective variation is a matter that would support a contention before a court that there be no penalty, or a nominal penalty be imposed;

- As to the second, because it is speculative and does not advance matters;

- As to the third, because it ignores the observations of Snaden J that the Commission is the specialist tribunal to determine the issues in this dispute when staying the Federal Court proceeding between these parties until the s 217 application was heard and determined;

- As to the fourth, because s 217 expressly authorises the Commission to determine when the date any variation is to take place and there is no added impediment imposed by the legislation for a retrospective variation.

[42] Apart from the requirement that there be identified an ambiguity or uncertainty in an enterprise agreement, the discretion thereafter exercisable is not conditioned by any mandatory considerations. But that does not mean it is unfettered. Account must be taken of the object or statutory purpose of s 217, the objects of the Act and of Part 2-4, and the manner in which the Commission's functions and powers are to be exercised. Moreover, a matter taken into account must be relevant to the exercise of discretion. A matter will be relevant if it is rationally capable of bearing on the Commission's determination about whether to vary an enterprise agreement. Subject to the caveat that the Deputy President is not free to ascribe undue or excessive weight to a matter of no great moment or to ascribe no or minimal weight to a highly relevant matter, the Deputy President is free to decide how much weight to give those matters he has assessed as relevant.

[43] We do not accept that the matters raised by the University under this ground disclose error. Firstly it is clear that the Deputy President refused to exercise his discretion to vary the Agreement because of the absence of any demonstrable common intention as to the operation of Schedule 3, and so any variation would risk having the effect of improving or diminishing the legal position of either the employees covered by the Agreement or the University, and that this would occur without any principal assessment of how those legal rights would or should be affected (at [159]). Moreover, although the Deputy President accepted that the University had proffered variations based on a genuine attempt to adopt a reasonable compromise, he did not consider that this was sufficient to support the variations ([160]). Finally, the Deputy President did not consider that there was any unreasonable barrier or difficulty in obtaining substantial resolution of the disputed terms either by court determination or through the bargaining process ([161]). At [162] the Deputy President opined that these conclusions were consistent with the requirement that the Commission exercise its power in a manner that is fair and just, promoting harmonious and cooperative workplace relations (s 577(1)(a) and (d)), take into account the objects of the Act, Part 2-4, and equity, good conscience and the merits of the matter (s 578(a) and (b)). Each consideration summarised above was relevant as each was rationally capable of bearing on the Deputy President's determination whether to vary the Agreement.

[44] The matters about which the University complains in the first, second and fourth impugned considerations, were taken into account only for the purposes of assessing whether a variation if made, should operate retrospectively. The "heightened considerations" are said by the Deputy President to arise when (as in the instant case) a retrospective variation is sought. So much is clear from [163] of the decision and that which follows at [164]–[165]. We agree with the NTEU that these matters can only give rise to error if the University first establishes that the decision not to vary the Agreement at all was affected by error. This it has not done.

[45] In any event we do not consider the first, second and fourth impugned considerations to be irrelevant. The Deputy President explained that, where a variation was to be retrospective, there were "heightened considerations" - the fourth consideration about which the University complains. In our view, the Deputy President intended to convey no more than that in

applications seeking a retrospective variation, additional considerations may arise. The use of the word "heightened" merely conveys that in a variation operating prospectively, the considerations do not arise. Here, the Deputy President's observation is plainly correct and no appealable error is disclosed. The heightened or additional considerations the Deputy President identified were the statutory effect of a breach of an enterprise agreement (at [164]) – the first consideration about which the University complains - and the effect of a variation on new employees who were not among the cohort of people who "made" the Agreement (at [165]) - the second consideration about which the University complains.

[46] The Deputy President's observations that a retrospective variation to an enterprise agreement may expose those who are covered by it to civil penalties for failure to comply with it and that he could not rule out that a person might be so exposed if he made the variations proposed by the University are frankly unremarkable. Both are accurate in the circumstances of this case, and both were relevant. We do not accept, as the University contends, that the risk to civil penalty exposure would arise in every case involving a retrospective variation. A retrospective variation of a term of an enterprise agreement which accorded with an existing practice in the workplace in relation to that term would have the opposite effect and the consideration would likely not be relevant. But here the risk could not be ruled out, and so was relevant. Moreover, the consideration involves no more speculation than the University's contention that the Court may take into account that a contravention occurred in effect because of a retrospective variation in assessing penalty. But in any event that a court may do so does not render irrelevant the legal effect of a retrospective variation identified.

[47] Further, the Deputy President, in our view, correctly identified that a retrospective variation would affect both those who made the Agreement, and those who became covered by it after it was made. Taking into account the position of the latter group, and the impact on that group of the passage of time, was rationally capable of bearing on the Commission's determination about whether to vary the Agreement retrospectively. Moreover, as the NTEU correctly points out, this last consideration is prefaced in the Deputy President's decision by the qualifying words that "even if a common intention could be established",[59] and since it could not, the consideration does not properly form part of the Deputy President's reasons for not exercising his discretion to vary the Agreement.

[48] For these reasons, appeal ground 4 also fails.

[49] We are persuaded that the notice of appeal raises important questions about the exercise of the discretion to vary an enterprise agreement under s 217 of the Act once an ambiguity or uncertainty has been established. For this reason, we consider that it is appropriate to grant permission to appeal. However, as is evident from our discussion above, the decision is not attended by any appealable error for which the University contends and so the appeal will be dismissed.

Order

[50] We order as follows:

1. Permission to appeal is granted.

2. The appeal in C2023/3720 is dismissed.

VICE PRESIDENT

Appearances:

J Bourke KC with *A Denton* of counsel for Monash University.
S Kelly of counsel for the NTEU.

Hearing details:

2023.
Melbourne:
August 22.

Final written submissions:

Monash University: 20 July 2023
NTEU: 10 August 2023

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[1] *National Tertiary Education Union v Monash University* [2022] FCA 1368

[2] *Re Monash University* [2023] FWC 1148

[3] *Re Monash University* [2023] FWC 1148 at [80], [87], [95], [104], [105], and [166]

[4] *Re Monash University* [2023] FWC 1148 at [121]-[149]

[5] *Re Monash University* [2023] FWC 1148 at [150]

[6] *Re Monash University* [2023] FWC 1148 at [150]

[7] *Re Monash University* [2023] FWC 1148 at [151]

[8] *Re Monash University* [2023] FWC 1148 at [119], [153]

[9] *Re Monash University* [2023] FWC 1148 at [119]

[10] *Re Monash University* [2023] FWC 1148 at [153]

[11] See also *Re Monash University* [2023] FWC 1148 at [155] where the Deputy President observes that the presence of an antecedent "common intention" or "substantive agreement" would ordinarily be a matter of significant weight in favour of variation and, equally, its absence a significant factor for refusal

[12] *Re Monash University* [2023] FWC 1148 at [155]

[13] Citing *Construction, Forestry, Maritime, Mining and Energy Union & Ors v Specialist People Pty Ltd* [2019] FWCFB 6307 at [42]

[14] Citing *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCAFC 50; 275 FCR 385 at [3]; *Construction, Forestry, Maritime, Mining and Energy Union & Ors v Specialist People Pty Ltd* at [42] and [50]

[15] Citing *The Hon. Christian Porter MP, Attorney General and Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board; United Firefighters' Union of Australia* [2019] FWCFB 6255 at [58](3); *Re Australian and International Pilots Association* (2007) 162 IR 121 at [17]; *Re Energy Safe Victoria* [2020] FWCA 6718 at [9]

[16] Citing *Construction, Forestry, Maritime, Mining and Energy Union & Ors v Specialist People Pty Ltd* [2019] FWCFB 6307 at [50]

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

[18] Citing *Re Australian and International Pilots Association* (2007) 162 IR 121 at [17]

[19] *Re Monash University* [2023] FWC 1148 at [166]

[20] *Re Monash University* [2023] FWC 1148 at [156]

[21] *Re Monash University* [2023] FWC 1148 at [159]

[22] *Re Monash University* [2023] FWC 1148 at [160]

[23] *Re Monash University* [2023] FWC 1148 at [161]

[24] *Re Monash University* [2023] FWC 1148 at [162]

[25] *Re Monash University* [2023] FWC 1148 at [163]

[26] *Re Monash University* [2023] FWC 1148 at [164]

[27] *Re Monash University* [2023] FWC 1148 at [165]

[28] [2020] FCAFC 50; 275 FCR 385

[29] Appellant's outline of submissions, 20 July 2023 at [9]-[10]; Appeal Book (AB)332-333

[30] For example, see *Re Australian and International Pilots Association* [2007] AIRC 303; (2007) 162 IR 121 at [16]-[17]

[31] See *CoInvest Ltd v Visionstream Pty Ltd* (2004) 134 IR 43 at [46]

[32] *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCAFC 50; 275 FCR 385 at [67]-[68]

[33] Ibid at [96]-[97]

[34] Ibid at [115]

[35] Ibid at [116]

[36] Ibid at [69]

[37] *Re Monash University* [2023] FWC 1148 at [119]

[38] *Re Monash University* [2023] FWC 1148 at [125]-[126]

[39] *Re Monash University* [2023] FWC 1148 at [127]

[40] *Re Monash University* [2023] FWC 1148 at [153]

[41] [2007] AIRC 303; (2007) 162 IR 121

[42] Ibid at [17]

[43] *Re Monash University* [2023] FWC 1148 at [119]

[44] *Construction, Forestry, Maritime, Mining and Energy Union v Specialist People Pty Ltd* [2019] FWCFB 6307 at [41]

[45] See *Re Australian and International Pilots Association* [2007] AIRC 303; (2007) 162 IR 121 at [17]; *Application by Bradnam's Windows and Doors Pty Ltd* [2019] FWCA 979 at [11]; *Construction, Forestry, Maritime, Mining and Energy Union & Ors v Specialist People Pty Ltd* [2019] FWCFB 6307 at [42]

[46] [2007] AIRC 303; (2007) 162 IR 121

[47] [2019] FWCFB 6307

[48] Ibid at [42]

[49] [2023] FWC 611

[50] Ibid at [11]

[51] *Simic v New South Wales Land and Housing Corporation & ors* (2016) 260 CLR 85 at [42]

[52] See also AB63-64, PN245

[53] AB334-AB341

[54] AB341-AB345

[55] AB345 at [58]

[56] AB74-AB76

[57] AB63-AB64 at PN241, PN245; AB74 at PN345

[58] AB74-AB76

[59] *Re Monash University* [2023] FWC 1148 at [165]