[2024] FWCA 616 [Note: An appeal pursuant to s.604 (2024/3262) was lodged against this decision - refer to Full Bench decision dated 2 August 2024 [[2024] FWCFB 331] for result of appeal.]

DECISION

Fair Work Act 2009
s.217 - Application to vary an agreement to remove an ambiguity or uncertainty

Qube Logistics (Rail) Pty Ltd T/A Qube Logistics
v
Australian Rail, Tram and Bus Industry Union
(AG2023/2561)

DEPUTY PRESIDENT CROSS SYDNEY, 1 MAY 2024

Application for variation of the QUBE Logistics (Rail) Train Crew and RTBU NSW Enterprise Agreement 2019 and the QUBE Logistics (Rail) Train Crew and RTBU NSW Enterprise Agreement 2015

The Application

[1] On 28 July 2023, Qube Logistics (Rail) Pty Ltd T/A Qube Logistics (Qube) filed an application pursuant to s.217 of the *Fair Work Act* 2009 (Cth)(the Act) to vary two agreements being the *QUBE Logistics (Rail) Train Crew and RTBU NSW Enterprise Agreement 2015* (the 2015 EA), and the *QUBE Logistics (Rail) Train Crew NSW Enterprise Agreement 2019* (the 2019 EA), to remove ambiguity or uncertainty (the Application).

[2] The Australian Rail, Tram and Bus Industry Union (the RTBU) is the Respondent to the Application, and is a party covered by the 2015 EA and the 2019 EA.

[3] Prior to the Application, and on 23 June 2023, the RTBU filed a claim in the Federal Court alleging historical and ongoing underpayment pursuant to the 2015 EA and the 2019 EA (the Underpayment Claim). The Underpayment Claim alleges Qube failed to pay allowances and penalties that were incorporated into the 2015 EA and the 2019 EA by the terms of those agreements and s.257 of the Act.

[4] In the Application, Qube seeks to retrospectively vary the 2015 EA and 2019 EA such that accrued entitlements to the allowances and penalties claimed by the RTBU in the Underpayment Claim above are removed. Qube seeks the following relief in the Application.

> *1. Pursuant to section 217 of the FW Act, Qube Logistics (Qube) seeks the Fair Work Commission (Commission) to:*
>
> > *a. find that ambiguity or uncertainty arises in the 2015 EA and in particular, the interaction between clauses 4.2, 5.2 and the definition of "Hourly Rate" in clause 6.1;*

b. upon finding that ambiguity or uncertainty arises in the 2015 EA, exercise its discretion to remove that ambiguity or uncertainty by varying the 2015 EA in the manner proposed by Qube at Annexure A;

c. find that ambiguity or uncertainty arises in the 2019 EA and in particular, the interaction between clauses 4.2, 5.2 and the definition of "Hourly Rate" in clause 6.1; and

d. upon finding that ambiguity or uncertainty arises in the 2019 EA, exercise its discretion to remove that ambiguity or uncertainty by varying the 2019 EA in the manner proposed by Qube at Annexure B.

2. Any order varying the 2015 EA comes into force on and from 5 April 2016.

3. Any order varying the 2019 EA comes into force on and from 18 September 2020.

4. Such other orders as the Commission sees fit.

[5] Annexure A to the Application provides:

Annexure A – proposed variations to the 2015 EA

Clause 4.2 now read as follows:

Upon incorporating Award terms into the Agreement, the incorporated Award terms are to be read as altered with the appropriate changes to make them provisions of the Agreement rather than provisions of the Award, save that the loaded Hourly or Normal Rates in this Agreement continue to include and offset any shift/weekend penalties or loadings and any allowances, otherwise payable under the Award (including as incorporated), unless the terms of this Agreement expressly provide otherwise.

Clause 5.2 now read as follows:

No entitlements as contained in this Agreement, or over-Award payments and conditions of employment, shall be used for the purpose of setting off any other term of this Agreement.

The definition of "Hourly Rate" in clause 6.1 now read as follows:

Hourly or Normal Rate	*means the hour rate specified in the table at clause 29, which rate is payable for all Ordinary Hours worked and is inclusive of annual leave loading, any shift/weekend penalties or loadings and any allowances, otherwise payable under the Award (including as incorporated).*

[6] Annexure B to the Application provides:

Annexure B – proposed variations to the 2019 EA

Clause 4.2 now read as follows:

> *Upon incorporating Award terms into the Agreement, the incorporated Award terms are to be read as altered with the appropriate changes to make them provisions of the Agreement rather than provisions of the Award, save that the loaded Hourly or Normal Rates in this Agreement continue to include and offset any shift/weekend penalties or loadings and any allowances, otherwise payable under the Award (including as incorporated), unless the terms of this Agreement expressly provide otherwise.*

Clause 5.2 now read as follows:

> *No entitlements as contained in this Agreement, or over-Award payments and conditions of employment, shall be used for the purpose of setting off any other term of this Agreement.*

The definition of "Hourly Rate" in clause 6.1, now read as follows:

Hourly or Normal Rate	*means the hour rate specified in the table at clause 29, which rate is payable for all Ordinary Hours worked and is inclusive of annual leave loading, any shift/weekend penalties or loadings and any allowances, otherwise payable under the Award (including as incorporated).*

[7] On 8 August 2023, the RTBU filed an application that sought to dismiss both limbs of the Application pursuant to s.587 of the Act. The RTBU submitted that the Application was without reasonable prospects of success and should be dismissed. I did not consider that at that stage of the Application there existed a clear case for a definite and certain conclusion for either limb of the application pursuant to s.587, and I dismissed that application.[1]

Relevant Provisions of the 2015 and 2019 Enterprise Agreements

[8] Sub-clauses 4.1 to 4.3 of Clause 4 of the 2015 EA and the 2109 EA are identical, and provide:

> ***4. Relationship to Parent Award and NES***
>
> *4.1 This Agreement wholly incorporates the Rail Industry Award 2010 or as varied from time to time (the Award), except for the Award Flexibility and Facilitative Provisions clauses.*
>
> *4.2 Upon incorporating Award terms into the Agreement, the incorporated Award terms are to be read as altered with the appropriate changes to make them provisions of the Agreement rather than provisions of the Award. So, for example, the loadings, penalties and allowances in the Award apply to the rates of pay due under the Agreement, rather than the Award rates.*
>
> *4.3 Where there is any inconsistency between the Award and this Agreement, the terms of this Agreement shall prevail.*

[9] Clause 5 of the 2015 EA and the 2019 EA are also identical, and provide:

> ***5. No Extra Claims***
>
> *5.1 All Parties agree to not pursue any extra claims in relation to the terms of this agreement until its expiry.*
>
> *5.2 No entitlements as contained in this agreement, or over-award payments and conditions of employment, shall be used for the purpose of setting off any other term of this Agreement or Award.*

[10] *"Hourly rate"* and *"ordinary hours"* are defined in Clause 6.1 definitions. The *"hourly rate"* definitions of the 2015 EA and the 2109 EA are identical and provide:

> *"Hourly Rate"* *means the hourly rate applicable to the "Ordinary Hours" component of the Remuneration and includes leave loading.*

[11] The definition of *"ordinary hours"*, however, differs. In the 2015 EA it is:

> *"Ordinary Hours"* *means the number of Ordinary hours worked over a roster cycle necessary to average 76 Ordinary Hours per fortnight over the roster cycle.* (Emphasis added)

[12] In the 2019 EA, *"ordinary hours"* the definition is:

> *"Ordinary Hours"* *means the number of Ordinary hours worked over a roster cycle necessary to average 76 Ordinary Hours per fortnight over the Duty Cycle.* (Emphasis added)

[13] Despite the variation to, and capitalisation of, the term *"Duty Cycle"* in the 2019 EA, that term remains undefined notwithstanding that it is used 22 other times in the 2019 EA, though those references to *"Duty Cycle"* largely repeat identical references in the 2015 EA.

[14] Clause 29 of the 2015 EA and the 2019 EA provided tables that recorded pay rises on the various dated provided in each agreement. There were differences in how the various rates were expressed. In the 2015 EA, for example, rates for Classification Level 1 were expressed as:

29. Pay Levels

Classification	**From Certification**	**1st Anniversary 3%**	**2nd Anniversary 3%**
Level 1			
Hour Rate	$27.83	$28.66	$29.52
Overtime Rate	$44.53	$45.86	$47.23
Casual Rate	$34.79	$35.83	$36.90

Level 2			
Hour Rate	$31.07	$32.00	$32.96
Overtime Rate	$49.71	$51.20	$52.74
Casual Rate	$38.84	$40.00	$41.20
Level 3			
Hour Rate	$33.85	$34.66	$35.70
Overtime Rate	$53.84	$55.46	$57.12
Casual Rate	$42.06	$43.33	$44.63
Level 4			
Hour Rate	$42.71	$43.99	$45.31
Overtime Rate	$67.47	$70.38	$72.45
Casual Rate	$53.39	$54.98	$56.64
Level 5			
Hour Rate	$44.37	$45.70	$47.07
Overtime Rate	$70.99	$73.12	$75.31
Casual Rate	$55.46	$57.13	$58.84
Level 6			
Hour Rate	$50.15	$51.65	$53.20
Overtime Rate	$80.24	$52.64	$85.12
Casual Rate	$62.69	$64.56	$66.50

[15] In the 2019 EA, Clause 29 regarding Classification Level 1 provided:

29. Wage Increase

29.1 Wage rate for all classifications

(a) 6% from the 1st May 2020
(b) 3.5% from the 1st April 2021
(c) 3.5% from the 1st April 2022

29.2 Rate of Pay

Classification	Current Rates	1st May 2020	1st April 2021	1st April 2022
Level 1		6% increase	3.5% increase	3.5% increase
Normal Rate	$29.52	$31.2912	$32.3863	$33.5198
Overtime Rate	$47.23	$50.0638	$51.8160	$53.6235
Casual Rate	$36.90	$39.114	$40.4829	$41.8998
Overtime Casual Rate	$59.04	$62.5824	$64.7727	$67.0397
Level 2				
Normal Rate	$32.96	$34.9376	$36.1604	$37.4260
Overtime Rate	$52.74	$55.9044	$57.8610	$59.8861
Casual Rate	$41.20	$43.672	$45.2005	$46.7825

Overtime Casual Rate	$65.92	$69.8752	$72.3200	$74.8312
Level 3				
Normal Rate	$35.70	$37.8420	$39.1664	$40.5372
Overtime Rate	$57.12	$60.5472	$62.6663	$64.8596
Casual Rate	$44.63	$47.3078	$48.9635	$50.6772
Overtime Casual Rate	$71.41	$75.6946	$78.3439	$81.0859
Level 4				
Normal Rate	$45.31	$48.0286	$49.7096	$51.4494
Overtime Rate	$72.50	$76.8500	$79.5397	$82.3235
Casual Rate	$56.64	$60.0384	$62.1397	$64.3145
Overtime Casual Rate	$90.62	$96.0572	$99.4192	$102.8988
Level 5				
Normal Rate	$47.07	$49.8942	$51.6404	$53.4478
Overtime Rate	$75.31	$79.8346	$82.6288	$85.5208
Casual Rate	$58.84	$62.3704	$64.5533	$66.8126
Overtime Casual Rate	$94.14	$99.7884	$103.2805	$106.8953
Level 6				
Normal Rate	$53.20	$56.3920	$58.3657	$60.4085
Overtime Rate	$85.12	$90.2272	$93.3851	$96.6535
Casual Rate	$66.50	$70.4900	$72.9571	$75.5106
Overtime Casual Rate	$106.40	$112.7840	$116.7314	$120.8170

[16] Clause 42.1 of the 2015 EA and the 2019 EA provide for payment of wages, as follows:

> **42. Payment of Wages**
>
> 42.1 Wages shall be paid in accordance with the Act fortnightly
>
> (a) Guarantee payment of 76hrs,
>
> (b) Any excess hours for the cycle
>
> (c) Any RDO worked.
>
> (d) Any allowances applicable.
>
> 42.2 Wages shall be paid by electronic funds transfer into an employee nominated bank (or other recognised financial institution).
>
> 42.3 On termination of employment, wages due to an employee shall be paid within a week of termination and only after all Company issue assets have been returned.

Background to the Application

[17] The 2015 EA was approved by the Commission and commenced operation on 5 April 2016. Its nominal expiry date was 4 April 2019. The 2019 EA was approved by the Commission and commenced operation on 18 September 2020. Its nominal expiry date was 31 March 2023.

[18] Prior to the making of the 2015 EA, Qube had acquired a number of companies which operated NSW rail businesses. As a result of the transfer of business provisions in the Act, there came to be four separate enterprise agreements that applied to Qube and various groups of employees in those rail businesses (the Transferring EAs).

[19] Each of the Transferring EAs provided employees with an entitlement to an hourly rate of pay that operated as a loaded rate payable for all ordinary hours of work, incorporating certain penalty rates, shift loadings and, in some cases, allowances. None of the Transferring EAs incorporated the *Rail Industry Award 2010* (the Award), or any other award.

[20] When making the 2015 EA, the parties attempted to consolidate the terms and conditions derived from the Transferring EAs, into one enterprise agreement that applied to Qube's entire NSW rail crew.

[21] The 2015 EA provided *"Hour* (sic.) *Rates"* in the table in clause 29. Those rates were payable for all hours of work, except for overtime hours and casual hours (which each had a separate rate of pay specified in the clause 29 table). *"Hourly Rate"* was defined in clause 6.1 to mean *"the hourly rate applicable to the "Ordinary Hours" component of the Remuneration and includes leave loading."*

[22] At all times during the operation of the 2015 EA, Qube paid the employees covered by it a loaded hourly rate for all ordinary hours worked. The pay arrangements in the 2019 EA were structured in the same way.

[23] While the 2015 EA provided for an *"Hour Rate"* in clause 29, the 2019 EA described this hourly rate of pay in clause 29 as a *"Normal Rate"*. The definition of *"Hourly Rate"* in Clause 6 did not change.

[24] In late June 2023, the RTBU served on Qube the Underpayment Claim. The substance of the Underpayment Claim is, relying on clauses 4.1, 4.2 and 5.2 of the 2015 EA and 2019 EA, that all weekend penalty rates, shift penalty rates and allowances provided for in the Award are, and always have been, incorporated into the 2015 and 2019 EAs, and payable in addition to the loaded hourly rate of pay specified therein.

The Evidence

[25] In the hearing of the Application, Statements were filed by the parties from the following deponents, and with the exception of Mr Matthews, each deponent was cross-examined:

(a) Qube filed statements in chief all dated 20 October 2023, from:

(i) Mr Dan Coulton, General Manager – Industrial Relations for Qube;

(ii) Mr Rodney Rich, a Train Driver with Qube; and

(iii) Mr Shayne Johnson, a Train Driver with Qube.

(b) The RTBU filed statements in response both dated 20 November 2023, from:

(i) Mr Kevin Pryor, an Organiser in the Locomotive Division of the RTBU; and

(ii) Mr Peter Matthews, the Legal Officer in the Locomotive Division of the RTBU.

(c) Qube filed statements in reply all dated 4 December 2023, from:

(i) Mr Coulton;

(ii) Mr Rich; and

(iii) Mr Johnson.

[26] Excluding Mr Matthews, who I have noted above was not cross-examined, none of the other deponents of statements in the matter presented as witnesses in whose evidence I could place any significant weight where uncorroborated. Particular conclusions regarding those witnesses are outlined below.

[27] This decision is better founded and expressed by making factual findings based on evidence of reliability, ordinarily in the form of documentation, but also uncontroverted facts. In that regard, I accept the submission of the RTBU that the principled approach to fact finding described by Justice Lee in *TWU v Qantas Airways Limited*[2] is salient:

> *… what matters most is usually "the proper construction of such contemporaneous notes and documents as may exist, and the probabilities that can be derived from those notes and any other objective facts": Mealey v Power [2015] NSWSC 1678 (at [4] per Pembroke J). As Leggatt J (as his Lordship then was) said in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) (at [22]):*
>
> > *... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.*

(a) Mr Rich and Mr Johnson

[28] The statements of Mr Rich and Mr Johnson dealt extremely generally with the whole period of the negotiation of the 2015 EA. Their evidence principally involved the following broad statements:

(a) Mr Rich:

> *At some point during the course of this year at a time when we were in bargaining negotiations with Qube once again for an enterprise agreement to replace the Qube Logistics (Rail) Train Crew and RTBU NSW Enterprise Agreement 2019 (the 2019 Agreement), I became aware that the RTBU was arguing that Qube had not paid*

employees correctly under the 2015 Agreement and the 2019 Agreement, because Qube had not been paying weekend loadings, shift penalties and allowances under the Rail Industry Award 2010 (the Award).

This was a surprise to me as I was involved in the bargaining for the 2015 Agreement and these additional payments in the Award were never discussed at all.

(b) Mr Johnson:

At some point this year, whilst negotiations for an enterprise agreement to replace the Qube Logistics (Rail) Train Crew NSW Enterprise Agreement 2019 (the 2019 Agreement) were ongoing, I became aware that the RTBU was preparing court action seeking for Qube to pay weekend penalties, shift penalties and allowances from the Rail Industry Award 2010, on top of the hourly rates in the 2015 Agreement and the 2019 Agreement.

In all the meetings I attended with Qube or with the RTBU, no-one ever said anything to the effect that award entitlements would or should be paid on top of the hourly rates in the 2015 Agreement.

I have been shown clause 4 in the 2015 Agreement which deals with the award. I do not recall this clause ever being discussed in any bargaining meeting.

[29] Both Mr Rich and Mr Johnson presented as ideal witnesses for Qube in these proceedings, having represented as delegates of the RTBU in the negotiation of the 2015 EA. As such, they effectively came from the *"other camp"*. However, neither Mr Rich nor Mr Johnson's evidence withstood the slightest scrutiny.

[30] While Mr Johnson maintained that his memory as to what occurred 8 to 10 years ago had not faded over time, he had no recollection of how many bargaining meetings he attended, when those meetings occurred, what agenda items were discussed at the meetings, whether the meetings were part of the bargaining for part A or part B conditions, or even what common core conditions were and whether they were discussed.

[31] His evidence regarding weekend penalties being discussed in negotiations for the 2015 EA was:[3]

I think you gave some evidence to me a few minutes ago that the RTBU made no claim for weekend penalties? --- I might have been wrong then, but I don't remember it being discussed.

You are wrong, aren't you? --- Probably yes.

[32] The evidence of Mr Rich was even more supportive of the RTBU case. His cross-examination concluded with the following exchange:[4]

It's the case, isn't it, sir, that you understood that the RTBU had a claim for weekend penalties, you agree? Not on that document, sir, just – don't worry about the document. Do you agree that the RTBU did have a claim for weekend penalties? --- Yes.

> *And that claim wasn't pressed by the RTBU, because you understood the Rail Industry Award was to be incorporated into the agreement? --- Yes.*

[33] In re-examination, when pressed on the source of his understanding that the Award was incorporated, Mr Rich's evidence was:[5]

> *Mr Rich, I'm just asking you about the source of your – you gave evidence that you understood that the award was incorporated. I'm just asking you about the source of that understanding, and asking you what discussions, if any, do you recall in relation to that issue, the award being incorporated into the agreement? --- It was only when we went to a meeting and Mr Pryor mentioned it at a – before we went into an EA meeting.*

(b) Mr Coulton

[34] Mr Coulton exhibited a tendency to provide evidence, and answers to questions asked of him, with content that he thought would best advance the case of Qube. The most potent example of that tendency related to the draft document from the RTBU provided on 24 March 2014, being a draft of the 2015 EA. In his first statement, Mr Coulton deposed, extraordinarily, as follows:

> *There were various updated drafts of the Core Conditions Document prepared by Qube and the RTBU during the course of bargaining for the 2015 EA, but clauses 4 and 5 did not change and were ultimately included in the final version of the 2015 EA. The clauses did not change because, as discussed further below, they were never discussed or raised by either party. No-one ever said or stated what the clauses were supposed to do, nor how they were supposed to operate (if at all).*

[35] Mr Coulton was the General Manager of Industrial Relations and experienced in enterprise bargaining. He understood that enterprise agreements could incorporate terms from other instruments, including awards, and was familiar with the provisions of the *Rail Industry Award*.

[36] Notwithstanding his ample experience in enterprise bargaining, Mr Coulton had to be taken in the finest detail to clause 4.2 of the 2015 EA, in order to have him, reluctantly, accept that the clause in the 2015 EA was identical to that put by the RTBU on 24 March 2014. Even if the RTBU document of 24 March 2014 could have been afforded the scant attention asserted at that time, which I do not accept, it is simply incomprehensible that Mr Coulton could be so vague as to its contents and impact where it the apparent source of these proceedings and the Underpayment Claim.

(c) Mr Pryor

[37] Qube directed particular criticism towards the evidence of Mr Pryor, asserting that while he claimed to have negotiated such a generous deal, he was conspicuously quiet in outlining that deal to members of the RTBU. He was also criticised for not taking any steps to ensure that the penalties and allowances said to have been agreed were in fact paid.

[38] There was some substance to the first criticism, and Mr Pryor, by way of example, claimed it had "*slipped his mind"*[6] to tell employees he had secured a massive windfall gain in take home pay, and didn't tell those employees that it was agreed to pay weekend and shift

penalties because he *" had other things to worry about*". [7] Those failures, however, had limited impact on the question of common intention of the parties.

[39] The second criticism, however, lacked substance. It would not be expected that a union official such as Mr Pryor should take it upon himself to assess whether recently agreed agreement provisions are being paid, absent any complaint by member(s). Were such complaint and enquiry to have been made, having viewed five payslips that were in evidence, I would have expected Mr Pryor to have suffered the same difficulties in calculation suffered by Mr Matthews who stated in his unchallenged evidence that it took him a significant time to model two fortnightly pay periods for two employees.

Findings of Fact

[40] Qube Holdings was formed in August 2011. Prior to the formation of Qube Holdings, the business operated as two separate businesses, P&O Automotive & General Stevedoring Pty Limited and POTA Holdings Pty Ltd.

[41] Mr Coulton commenced employment with POTA Holdings Pty Ltd on 27 January 2007 in the role of New South Wales State Manager for the Logistics Division. Following Qube's acquisition of majority ownership of POTA Holdings in 2011, he commenced as General Manager – Industrial Relations for Qube Logistics in 2012.

[42] As noted above, prior to the making of the 2015 EA, and by the end of 2012, Qube had acquired a number of companies and, as a result of the transfer of business provisions in the Act, came to be bound by the Transferring EAs, being:

(a) *P&O Trans Australia Train Crew Enterprise Agreement 2009*; (the POTA EA)

(b) *South Spur Rail Services Pty Ltd Employee Collective Agreement 2009*; (the South Spur EA)

(c) *Southern and Silverton Railway Pty Ltd Enterprise Agreement 2009*; (the Silverton EA) and

(d) *Independent Railways of Australia Agreement 2011*. (the Independent Rail EA)

[43] In around July 2014, the approximate NSW rail crew for Qube Logistics Rail was comprised of the following groups of employees:

(a) 45 full-time and 2 casual employees who were covered by the POTA EA;

(b) 67 full-time and 6 casual employees who were covered by the South Spur EA;

(c) No employees were covered by the Silverton EA; and

(d) 49 full-time and 2 casual employees who were covered by the Independent Rail EA.

[44] The acquisition of the businesses covered by the Transferring EAs gave Qube a footprint in the rail transport industry in New South Wales for the first time.

[45] The South Spur EA, POTA EA and Independent Rail EA had been negotiated between different employers and different employees. While they each contained different terms and conditions, they all provided for loaded rates in the form of a flat rate of pay for all ordinary hours, regardless of what day or time of the day that the work was performed. If employees worked overtime or excess hours (for instance, by exceeding the maximum shift length or exceeding the total number of working hours in a particular period), they would receive an overtime penalty that was applied to those loaded hourly rates. Loaded rates were used to compensate employees for weekend and shift penalties and any allowances that were not otherwise included within each agreement.

[46] In late 2012 or early 2013 there were informal communications between Mr Coulton and Mr Mark Owens of Qube, and Mr Pryor of the RTBU, about consolidating the terms and conditions of the Transferring EAs into a single enterprise agreement. While the RTBU sought a federal agreement, Qube preferred a state based agreement.

[47] On 30 August 2013, the draft New South Wales log of claims was completed for the purpose of delegate endorsement. That log of claims included a claim for weekend shift penalties expressed as follows:

> *Weekend shift penalties Sat 1.5 and Sun 2.0*

[48] On 11 October 2013, Qube then took steps to initiate bargaining for State-based enterprise agreements in Victoria, South Australia and NSW, and the Notice of Employee Representational Rights (NERR) was issued to all employees who would be covered by the proposed agreements.

[49] On 29 October 2023, the RTBU enquired as to how Mr Coulton sought to standardise and consolidate conditions on a state-based basis. Mr Coulton responded on that date as follows:

> *Representation from existing EA's: I would think that it is reasonable that a delegate from each of the existing agreements (where applicable, not every EA is operating in all states) form part of the employee reps for the negotiation process in each state to ensure each pool of employees is equally and fairly represented.*
>
> *In respect to a standardised conditions, by this statement I mean that the body of all agreements would be of a standard format in respect to the basic conditions of employment including but not limited to; hours of work, penalty rates, superannuation for example, I would intend that the "variable" if required is in the rate of pay or in the instance of a specific operational parameter that is unique to a certain state that may result in a different allowance or operational requirement.*
>
> *The different wage and condition outcomes referred to may come as a result of the individual states negotiating different outcomes. However the documents will all have the same Skeletal framework from which to work, unlike our current situation where the agreements are all vastly different.*
>
> *Should agreement be reached and the employees vote for an early termination of existing agreements I am agreeable to this position.*

[50] Thereafter the parties agreed that bargaining would progress in two parts. Initially, bargaining would be with the National Office coordinating on a set of Common (or Core) Conditions that would be replicated in each state agreement. This would then be followed by bargaining in each State for conditions including pay levels, hours of work, rostering and rostering rules and shifts, that would be applicable in particular States only. The Common Conditions became known as "Part A" and the State specific conditions were referred to as "Part B".

[51] Mr Coulton attended most of the bargaining meetings for Qube and was the key point of contact with the RTBU throughout bargaining. He was initially assisted by Mr Mark Owens, General Manager-Compliance, Safety and Infrastructure at Qube Logistics Rail, until Mr Owens' departure from Qube on 31 October 2014.

[52] Mr Pryor led the negotiations on behalf of the RTBU. The RTBU's bargaining team also included RTBU delegates, including Mr Rich and Mr Johnson, who were called as witnesses for Qube in these proceedings.

[53] On 22 January 2014, a high level meeting occurred at the RTBU National Office at Trades Hall in Sydney. Qube were represented by Mark Owens, and the RTBU was represented by Mr Pryor and Mr Barden. Other bargaining representatives did not attend. I accept that Mr Pryor had taken a printed copy of the Shift Penalties Allowance Multiplier clause from the *Pacific National NSW Bulk Rail Enterprise Agreement* to facilitate discussions on the topic of shift penalties. Mr Pryor wrote his notes directly onto the Pacific National clause. Those notes, that were signed and dated, described where and when the meeting occurred, who attended, and included the notation:

> *"MO. No Rosters in Place*
> *Agree to leave clause 4 (Part A) to cover shift penalties & weekends*
> *Make sure above Award"*

[54] I accept Mr Pryor's explanation that the above notation records Mr Owens rejecting the idea of including a clause similar to the *Pacific National NSW Bulk Rail Enterprise Agreement* as that clause required forecast master rosters to work out applicable penalties in advance, a style of rostering Qube could not accommodate. Instead, there was agreement to allow clause 4 of Part A, which incorporates the Award, to provide for shift penalties and penalties for weekends. Further, by the notation *"Make sure above award"*, Mr Pryor was referring to the way shift penalties were calculated under the *Rail Industry Award*, which relied on a nominal classification and a formula to create an applicable hourly loading.

[55] Between 22 January and 24 April 2014, various bargaining meetings occurred. Various documents recording bargaining in that period were produced. Those documents included various references to the RTBU agreeing to remove a claim for weekend and shift penalties, though Mr Prior explained that was a reference to removing those claims from Part B regarding the New South Wales Agreement.

[56] From 24 March 2014, the parties each prepared and exchanged versions of the Part A Core Conditions document. Each version contained versions of the clauses sought to be varied in the form finally made in the 2015 EA. As noted above, in his first statement, Mr Coulton stated:

> *There were various updated drafts of the Core Conditions Document prepared by Qube and the RTBU during the course of bargaining for the 2015 EA, but clauses 4 and 5 did not change and were ultimately included in the final version of the 2015 EA. The clauses did not change because, as discussed further below, they were never discussed or raised by either party. No-one ever said or stated what the clauses were supposed to do, nor how they were supposed to operate (if at all).*

[57] The draft enterprise agreement provided by the RTBU was a significant departure from the Transferring EA's. Importantly, clause 4.2 was in identical terms in that draft enterprise agreement to that which ultimately appeared in the 2015 EA and the 2019 EA.

[58] In or around early 2015, Mr Coulton decided that it would be more efficient for bargaining to proceed with wages being 'parked' until the Core Conditions Document, and other less contentious items, had been progressed and were close to being finalised.

[59] In around July 2015, Part A was merged with Part B New South Wales, and thereafter no changes to Part A were made.

[60] On 22 July 2015, Mr Pryor emailed Mr Coulton with the RTBU's final feedback on a proposed agreement that Qube intended to put out to an employee vote. Mr Pryor's email stated that the draft agreement was complete but that the RTBU did not fully support the proposed wage increases.

[61] The proposed agreement was subsequently provided to all rail crew for a vote. Mr Coulton attended all NSW depots to meet with employees and discuss the terms in the proposed agreement. Mr Coulton deposed that some of the meetings were quite volatile as some individual employees wanted the best parts of each of their previous enterprise agreements to be included in the 2015 EA, in an approach Mr Coulton described as *"a sort of highest common denominator"* approach. Mr Coulton deposed that he was never asked about shift penalties, weekend penalties or allowances or any entitlements in the Award in any of the discussions with employees. The table that Mr Coulton used to demonstrate the increase in rates that would apply to the employees under the proposed 2015 EA provided:

Level	SSR	QUBE	Level		
1	27.28	27.28	1		0.00%
2	30.46	30.46	2		0.00%
3	32.99	32.99	3		0.00%
4	41.87	41.87	4		0.00%
5	43.15	43.50	5		0.81%
Level	SSR	QUBE	Level		
1	19.12	27.28	1	1	42.68%
2	29\.50	30.46	2	2	3.25%
3	32.88	32.99	3	3	0.33%
4	35.51	41.87	4	4	17.91%
5	40.43	41.87	5	4	3.56%
6	42.62	43.50	6	5	2.06%
7					

Level	SSR	QUBE	Level		
1	20.99	27.28	1		29.97%
2	27.66	30.46	2		10.12%
3	31.83	32.99	3		3.64%
4	40.31	41.87	4		3.87%
5	43.50	43.50	5		0.00%
6	47.74	47.74			

[62] On or around 12 August 2015, the vote on the proposed 2015 EA was unsuccessful with a majority of employees voting "No". Following the unsuccessful vote, bargaining resumed with wage rates and increases being one of the most significant outstanding issues.

[63] In around September 2015, Qube revised its wage offer. Qube's new wage offer Was to:

(a) apply South Spur EA rates to all employees with a 2% increase upon commencement; and

(b) provide annual 3% increases for years 2 and 3 of the agreement (regardless of CPI).

[64] A second employee vote was conducted in November 2015. That vote was unsuccessful, falling one vote short of 50% support. Bargaining continued following this unsuccessful vote. There was some further discussion in bargaining regarding certain discrete items, but Qube made no further adjustments to its proposal for hourly rates of pay and wage increases.

[65] On 19 February 2016, the updated proposed agreement was provided to all NSW rail Crew for a further vote. That vote was successful, with a majority of employees voting in support of the proposed agreement.

[66] On 10 March 2016, the approval documents for the 2015 EA were lodged with the Commission, including the Forms F16 and F17. There was no indication in those documents that loaded rates were applicable, no modelling of rates on the basis that the rates were loaded rates, and no disclosure that weekend rates were lower than the Award rates.

[67] Bargaining for the 2019 EA began on 22 June 2018, when a Notice of Employee Representational Rights was issued. The 2019 EA was in large part a rollover of the 2015 EA. Neither the RTBU nor Qube had any claim for any change to Clause 4 or the 'Hourly Rate' definition. The 2019 EA was eventually approved by a ballot of employees on 17 July 2020.

[68] The only time that Clause 4 was changed was in an undertaking during the approval process in the Commission. Clause 4 at that time had the *Rail Industry Modern Award 2010* and the Commission noted that the correct Award was the *Rail Industry Modern Award 2020*. An undertaking from Qube rectified that issue.

[69] Mr Coulton took steps to file an application in the Commission for the approval of the 2019 EA. The approval documents for the 2019 EA were lodged with the Commission, including the Forms F16 and F17. There was no indication in those documents that loaded rates were applicable, no modelling of rates on the basis that the rates were loaded rates, and no disclosure that weekend rates were lower than the award rates.

[70] In October 2020, a few weeks after the 2019 EA was approved, Mr Matthews first formed a belief as to the applicable rates of payment under the 2019 EA. The rates had to be interpreted and extracted for inclusion in a *"Comparative Analysis of Enterprise Agreements"* document the RTBU was preparing at the time. He formed the view that the rates of pay expressed in the 2019 EA were base rates of pay, and they were recorded in the spreadsheet as such, and all the rates included in that spreadsheet were base rates of pay and subject to penalties and allowances.

[71] Based on the express incorporation of the Award, the definition of Ordinary Hours, the statements in the F17 that the Award was incorporated, and the lack of disclosure or modelling in the F16 and F17 to suggest the expressed rates were inclusive of shift penalties and loadings, Mr Matthews concluded that loaded rates or annualised salaries weren't intended to apply at Qube.

[72] Qube and the RTBU have been, since on or around 19 May 2022, involved in negotiations for an enterprise agreement to replace the 2019 EA. Mr Pryor and Mr Coulton have once again led negotiations.

[73] In June 2022, Mr Matthews and the RTBU had concluded bargaining with Pacific National Bulk. Pacific National management had complained that Qube were not required to account for penalty rates, and that put Pacific National at a competitive disadvantage. Mr Matthews again undertook a review of the 2019 EA, again forming the view that penalty rates were payable by virtue of the incorporation of the 2020 Award in clause 4. After forming that view, Mr Matthews asked Mr Pryor if weekend penalty rates were paid at Qube. Mr Pryor said he wasn't sure, but thought they were not. Counsel's advice was subsequently sought.

[74] On 22 February 2023, Mr Matthews sent Mr Coulton a letter outlining concerns held by the RTBU that Qube were not meeting their good faith bargaining obligations. The particular concern was that Qube had purported to amend clause 4.2 in bargaining without flagging the change to the RTBU, and that such a change would likely impact the incorporation of penalty rates into any new proposed enterprise agreement.

[75] On 1 March 2023, at 11:36 AM, Mr Coulton responded to an email at Mr Matthews sent the previous day, particularly regarding the amendment to clause 4.2. In that email, Mr Coulton advised (though he claimed not to have read or understood the email[8]):

> *Qube has considered the allegations in your email and maintains its previously communicated position that all material changes (including those under the heading of clause 4) have been discussed at both bargaining meetings and in our various communications with the RTBU during the course of bargaining.*
>
> *As previously explained to the RTBU, the relevant change to clause 4.2 was simply to replace the previous clause with a simplified inconsistency clause and to avoid unnecessary duplication. We do not understand your query "where else in the agreement does it say award loadings and penalties apply to EA rates?" given that loadings and penalties are dealt with in the Award which is wholly incorporated through the operation of clauses 4.1 and 4.2 in the proposed draft (with the agreement terms prevailing to the extent of any inconsistencies). Specifically, the current draft of the proposed agreement already provided to the RTBU provides as follows:*

> *4.1 This Agreement wholly incorporates the Rail Industry Award 2020 as varied from time to time (Award), except for the Award Flexibility and Facilitative Provisions clauses.*
>
> *4.2 Where there is any inconsistency between the Award and this Agreement, the terms of this Agreement shall prevail to the extent of such inconsistency.*
>
> *As you would be aware, the Award provisions with respect to loadings and penalties are incorporated into the proposed agreement (as they are under the current agreement) in circumstances where the enterprise agreement is silent on loadings and penalties. In any event, as this was just to simplify the existing arrangements rather than change the substantive meaning, Qube is more than content to simply reinstate the previous clause 4.2 to address the concern.*

[76] In March 2023, in order to determine if there had in fact actually been any underpayment, Mr Matthews undertook modelling of two Qube roster periods. This task involved reviewing an employee's roster for a given pay period, reviewing their timesheets for that same period, calculating a schedule of flat rates, calculating a schedule of rates incorporating penalty rates and allowances, modelling the actual hours worked against both schedule of rates, and comparing the results to the employee's actual payslip for that period.

[77] By 11 May 2023, Mr Matthews had only modelled two fortnightly pay periods, using the records of two Qube employees who are RTBU delegates. From this task he concluded:

> (a) The complexity of timesheets and payslips caused discrepancies that were unexplained;
>
> (b) Penalty rates, shift allowances, and on-call allowances, were not being paid, but work was being performed that would ordinarily attract such payments;
>
> (c) No Individual Flexibility Agreements were applicable in the examples he had considered;
>
> (d) If penalty rates and shift/on-call allowances had been paid, in the examples he had modelled, employees would have been entitled to an extra $500-700 per week.

[78] Based on a preliminary assessment conducted by Qube, the average estimated labour cost increase, per employee per annum, of the RTBU's construction of the provisions of the 2015 EA and the 2019 EA, is between 20% or 30%.

[79] On 11 June 2023, Qube filed an application under s.240 of the Act seeking the Commission's assistance with an ongoing bargaining dispute. On the same day, the RTBU applied for a protected action ballot order.

[80] On 26 June 2023, the parties attended a conference before Commissioner Crawford, who was dealing with the section 240 application and the mandatory conference held in accordance with s.448A of the Act. At some point during the conference, Mr Matthews handed to Mr Coulton a copy of the Underpayment Claim that was filed on 23 June 2023.

[81] The Underpayment Claim is premised on Qube failing to pay allowances and penalties that were incorporated pursuant to s.257 of the Act into the 2015 EA and the 2019 EA, from the *Rail Industry Award 2010* and the *Rail Industry Award 2020*. In summary, the RTBU's pleaded case is that clauses 4.1-4.2 of the 2015 EA and 2019 EA respectively incorporated the terms of these awards which required Qube to:

(a) pay casual employees weekend penalty rates for times worked on Saturdays and Sundays;

(b) pay employees on-call allowances where they were or may be required to perform duty by returning to duty before the next normal time of commencing duty;

(c) pay employees a meal allowance where they worked more than 2 hours overtime in a minimum of 10 hours on duty;

(d) pay employees shift allowances where the worked shift commences before 6:00PM that concluded after 6:30PM and worked shifts that commenced at or before 4:00AM and 5:30AM; and

(e) pay permanent employees weekend penalty rates for times worked on Saturdays and Sundays.

Submissions of Qube

[82] Qube distilled its submissions to a document titled *"Qube's 'Road map' of propositions and subsidiary findings necessary to find that Qube agreed to pay the Award penalties and loadings".* Qube submitted that document outlined 15 propositions, each of which would have to be accepted for the RTBU's case to be accepted. Those 15 propositions are:

(1) Qube agreed to pay penalties on top of what were already loaded rates, giving some workers a pay rise in excess of 65%;

(2) Qube agreed to the further 20% plus pay rise associated with adding Award penalties and loadings without doing any modelling as to the financial impact of these benefits, instead modelling on the basis that the rates were loaded and producing costings inconsistent with Award penalties and loadings being added;

(3) Qube agreed to include Award penalties and loadings through an Award incorporation clause in so-called "Part A" of the 2015 Agreement (a) at the very first meeting (at which Qube's main negotiator was not present); (b) without seeing any index of Part A or Part B clauses; (c) without seeing the text of the clause; (d) before Qube was even provided with a log of claims; and (e) when the RTBU was only (subsequently) seeking weekend penalties (and not seeking other Award penalties or loadings);

(4) After supposedly agreeing to clause 4 sight unseen, Qube was provided with the index of Part A headings and responded stating that it will need to see specific wording for the proposed clauses before it could agree to them;

(5) After Qube agreed to pay all Award penalties and loadings through an Award incorporation clause, the RTBU presented to delegates for approval, and then provided to Qube,

a log of claims containing a claim for weekend penalties, but not shift penalties or other Award penalties or loadings;

(6) Having agreed to incorporate all Award penalties and loadings, and then re-confirmed this agreement at a subsequent meeting, Qube responded to the RTBU's log of claims seeking Award weekend penalties by rejecting the claim;

(7) After Qube rejected the claim for weekend penalties, the RTBU did not push back or query this rejection (including on the basis that it had already been supposedly agreed), but rather agreed to remove the claim;

(8) Qube immediately agreed to the additional 20% plus pay rise associated with adding Award penalties and loadings at the very first meeting with the RTBU, before Qube was even presented with the RTBU's log of claims, but then spent years negotiating far less significant terms, including fighting tooth and nail over small percentage increases to the South Spur Agreement rates;

(9) Having agreed to the additional 20% plus pay rise associated with the addition of Award penalties and loadings, Qube never once referred to it in its communications with the RTBU when trying to reach a deal with the union over the next two years of bargaining, nor did Qube ever refer to it in its communications with employees over that period, including communications seeking to persuade employees to vote in support of the 2015 Agreement, at three separate votes;

(10) Having secured the additional 20% plus pay increase associated with the incorporation of Award penalties and loadings, Qube's biggest concession increasing take-home pay for workers that put the 2015 Agreement ahead of the PN Bulk Agreement in terms of take-home pay, the RTBU never bothered to tell employees about it;

(11) Having secured the additional 20% plus pay increase associated with the incorporation of Award penalties and loadings, Qube's biggest concession increasing take-home pay for workers that put the 2015 Agreement ahead of the PN Bulk Agreement (the "benchmark for success") in terms of take-home pay, the RTBU spent years haggling over minor disagreements on small percentage increases to rates and still repeatedly encouraged employees to vote against the 2015 Agreement;

(12) Neither Mr Pryor nor Mr Barden told the Victorian branch of the RTBU that Qube had agreed to pay Award penalties and loadings in NSW, leading the Victorian branch to strike a subsequent Victorian agreement that had essentially the same rates as the 2015 Agreement, but expressly as loaded rates (i.e. without Award penalties or loadings). This is despite Mr Barden attending the 22 January 2014 meeting where Qube supposedly agreed to pay Award penalties and loadings in NSW and him being involved in the negotiation of the Victorian agreement;

(13) Having agreed to pay Award penalties and loadings, Qube then immediately failed to pay them throughout the life of the 2015 Agreement and then under the 2019 Agreement, whilst implementing all other agreed changes in those Agreements;

(14) After the 2015 Agreement was approved, Pryor took no steps to make sure that employees were paid Award penalties and loadings in circumstances where he must have known that Qube was not paying them; and

(15) Mr Pryor at all times believed that the 2015 and 2019 Agreements obliged Qube to pay Award penalties and loadings and knew since at least October 2022 that Qube was not in fact paying them. Yet until mid-2023 he was not *"a hundred percent sure"* there was an issue that needed to be raised with Qube.

[83] Qube's submission was that textual and factual ambiguity or uncertainty arose. As to the textual indicators, Qube highlighted that a number of the provisions in the 2015 EA and the 2019 EA *"don't work"*[9] if the RTBU interpretation is accepted, including ordinary hours, overtime, casual rates and penalties and payment of wages. It submitted the incorporation of award penalties and loadings is either wholly inoperable or, at the very least, *it creates ambiguity and uncertainty that ought be resolved.*[10]

[84] In relation to factual ambiguity, relying on the positions outlined in the "*'Road map' of propositions",* Qube submitted it had comfortably established on the facts, that the common understanding and intention of Qube and the RTBU was to preserve the existing operation of the loaded rates without separate penalties.

Submissions of the RTBU

[85] The RTBU submitted that the objectively ascertained common intention of the parties can be discerned from a textual and contextual analysis of an enterprise agreement.[11] *"Common intention"* is directed to the objective intent of employees who made the agreement and the employer, rather than Mr Coulton and Mr Pryor's recollections of meetings.

[86] That the objectively determined common intent of employees and Qube when making the 2015 EA was that the *Rail Industry Award 2010* be incorporated in full with penalties, loadings and allowances applied on the agreement rates was apparent from:

> (1) The terms of the 2015 Agreement and provision to employees of the Award before voting on the Agreement during access period; and
>
> (2) The Transferring EAs, each of which were standalone agreements that did not incorporate the *Rail Industry Award 2010*. The 'Hourly Rates' the Transferring EAs prescribed were expressed to be inclusive of allowances and penalties .

[87] There is no evidence that employees were ever told that the hourly rates in the 2015 EA were aggregate loaded rates. There is no document issued to employees under s.180(5) of the Act detailing such provisions, and there is no evidence led by Qube that the rates have included components for weekend penalties, shift allowances, meal allowance or on-call allowance.

[88] A reasonable person in the position of the employees and employer who read and considered 2015 EA would have noticed material differences between it and the antecedent agreements in relation to the incorporation of the Award (with the loadings, penalties and allowances in the Award to apply to the Agreement rates) and the fact that hourly rate was not expressed to be inclusive of shift loadings, penalties and allowances, and they would have concluded that clause 4.2 meant what it said.

[89] The RTBU also submitted that Section 51(xxxi) of the Constitution acts in this matter as a qualification or restriction on legislative power. Section 51(xxxi) of the Constitution is in the following terms:

> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
>
> *The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.*

[90] Section 51(xxxi) is directed to acquisition as distinct from deprivation. The extinguishment of a proprietary right, its modification or deprivation may not, of itself, constitute an acquisition of property. Just terms will be afforded if the person whose proprietary interest is acquired receives 'full compensation' for what is lost.

[91] The RTBU submitted the Application seeks orders involving an acquisition of property from employees other than on just terms. Enterprise agreements confer rights and entitlements on employees, employers and industrial associations to whom they apply. By virtue of ss.181 and 182 of the Act, enterprise agreements are 'made' by being voted up by a majority of eligible employees. After an agreement is made, an application is required to be made under s 185 to the Commission for the agreement's approval. On its approval it becomes a 'statutory artefact' which specifies terms and conditions of employment for both an employer and its employees and imposes obligations and creates entitlements for both employers and employees. Those entitlements and obligations are enforceable in a court of competent jurisdiction.

[92] By the Application, Qube seeks to retrospectively extinguish rights and, as a matter of substance, acquire them in the sense contemplated by s 51(xxxi). Qube will obtain an identifiable and measurable benefit or advantage as a result of its success on the Application. Employees will lose valuable property rights and such losses will be acquisitions of property by Qube for the purposes of s 51(xxxi) of the Constitution. The Application thus seeks orders which will infringe s 51(xxxi) of the Constitution insofar as it seeks to acquire retrospectively employees' choses in action in relation to accrued entitlements. Section 217 of the Act does not and cannot extend to the making of orders of the kind sought that effect an acquisition of property other than on just terms.

[93] The RTBU submitted the Application, insofar as it seeks to retrospectively amend the 2015 EA and 2019 EA, is beyond power and must be dismissed. More particularly, the application to vary the 2015 EA is jurisdictionally incompetent as Qube is no longer covered by the 2015 EA and does not have standing under s 217(1)(a) of the Act to apply to vary that agreement. Such an outcome is mandated by the conclusions of the Full Bench of the Commission in *Qube Ports Pty Ltd v CFMMEU*.[12]

Consideration

(a) Application

[94] The jurisdictional prerequisite of an application made outlined in s.217(1) is satisfied as an employer covered by the 2015 EA and the 2019 EA has applied to remove an alleged ambiguity or uncertainty in each agreement.

(b) Variation of the Expired 2015 EA

[95] In *Qube Ports Pty Ltd v CFMMEU*, the Full Bench held that s.217(1)(a) of the Act permitted an employer to apply to vary an enterprise agreement only if the employer was covered by the agreement at the time the application was made.[13]

[96] While the Commission, as a non-judicial body, is not strictly bound by the doctrine of precedent so that it is obliged to follow decisions of a Full Bench, there are important public interest considerations which determine that single members of the Commission should adhere to decisions of a Full Bench that are relevant to the matter being determined, and Commission members at first instance have so followed Full Bench decisions.

[97] Noting that *Qube Ports Pty Ltd v CFMMEU* is apparently subject to an application seeking judicial review, on the current state of the decisions in this area, I intend to follow that Full Bench decision. The Application must be dismissed insofar as it seeks variation of the 2015 EA as Qube does not have standing to bring such an application. I note Qube acknowledges that the Full Bench decision stands in the way of it being found to have standing but notes the forthcoming proceedings to review that decision.[14]

(c) Ambiguity or Uncertainty

[98] Notwithstanding the above conclusion as to standing regarding the 2015 EA, the circumstances surrounding the making of both the 2015 EA and the 2019 EA principally relate to the events that occurred before the 2015 EA and are relevant considerations.

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

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

[100] Regarding the jurisdictional gateway of ambiguity or uncertainty, in *Monash University T/A Monash University (Monash),*[15] Deputy President Bell recently conveniently summarised the relevant determinative principles as follows:

> *[83] Broadly, s.217 requires consideration of three steps prior to the exercise of the power to vary an enterprise agreement to remove an ambiguity or uncertainty.*
>
> *• The first step, which is a jurisdictional prerequisite, is the finding of an ambiguity or uncertainty in an enterprise agreement.*

• The second step, which is also a jurisdictional prerequisite is that there is an application by one of the persons listed in s.217(1)(a) – (c).

• The third step addresses a question of discretion, signified by the fact that the Commission "may" exercise the power to vary an enterprise agreement.

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

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

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

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

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

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

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

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

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

(8) The words "ambiguity" and "uncertainty" are not synonymous: Bianco Walling, [75]. "There may, for example, be uncertainty in an enterprise agreement even when its terms are not ambiguous. The uncertainty may arise from the application of the unambiguous terms to a given set of circumstances. The distinction between patent ambiguity (linguistic ambiguity) and latent ambiguity (ambiguity in application) provides an illustration by analogy" (citations omitted).

(9) A form of "uncertainty" can extend to the common law analogy of uncertainty, where a provision might be found to be void, because no definite meaning can be

> *put on that provision. However, "uncertainty" in s.217 is not so limited: Bianco Walling, [77].*
>
> *[86] Bianco Walling makes clear, if clarity was required, that the task of identifying an ambiguity or uncertainty is not an especially onerous step.*
>
> [Emphasis added ; Footnotes omitted]

[101] The relevant primary question is whether the alleged ambiguity or uncertainty in each of the 2015 EA and the 2019 EA exist. It is immediately important to note that the Full Court in *Bianco Walling* held that the task of the Commission is not to interpret the enterprise agreement, as interpretation was directed at the one correct meaning of a document, but to determine whether the particular provision was ambiguous or uncertain.

[102] Arising from that distinction from interpretation, the Full Court held:[16]

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

[103] Notwithstanding that broader consideration of the parties' common intention in s.217 applications, it must be observed that there is no apparent issue between the parties as to the interpretation of the provisions sought to be varied as they currently stand. Qube simply submits that those provisions do not reflect the common intention or understanding of the parties. An ambiguity in application is asserted,[17] as well as an uncertainty.

[104] Noting, as Deputy President Bell did in *Monash*,[18] that the task of identifying an ambiguity or uncertainty in a s.217 application is not an especially onerous step, I find that there is an ambiguity or uncertainty arising from the non-application of the terms of the 2015 EA and the 2019 EA in the payments made to the employees covered by those agreements. However, I note that if the question before me was the proper construction and interpretation of the 2015 EA and the 2019 EA, a conclusion of ambiguity or uncertainty would not have been available on that basis.

(d) Discretion

[105] Having found that the clauses sought to be varied are ambiguous and uncertain, I am required to consider whether those clauses should be varied to remove the ambiguity or uncertainty.

[106] Particularly arising from the submissions of Qube that the common intention of the parties was the respective clauses as sought to be varied, that common intention is a significant consideration in the determination of this matter. As Watson VP held in *Re Australian and International Pilots Association*[19]:

> *The discretion of the Commission in the case of an ambiguity or uncertainty involves two questions. First, is it appropriate to vary the agreement? If so then secondly, what variations are appropriate? Similar considerations will often be relevant to both questions and hence the two questions frequently overlap. It is well established that a significant factor is the objectively ascertained mutual intention of the parties at the time the agreement was made [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].*
>
> [Emphasis added]

[107] More recently, the Full Bench of the Commission in *Construction, Forestry, Maritime, Mining and Energy Union & Ors v Specialist People Pty Ltd*,[20]found:

> *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.*
>
> [Emphasis added]

[108] While involving an application for interpretation of a certified agreement under s.413A of the *Workplace Relations Act 1996* (Cth), the judgment of Gray J in *Shop Distributive and Allied Employees' Association v Woolworths Limited*,[21] is instructive, where his Honour observed:

> *Counsel for the applicant contended that the past conduct of the parties could be relied upon as an aid in the construction of the Certified Agreement. There is authority that, if*

> *a provision has appeared in a series of agreements between the same parties, and if they can be shown to have conducted themselves according to a common understanding of the meaning of that provision, then it can be taken that they have agreed that the term should continue to have the commonly understood meaning in the current agreement. See Merchant Service Guild of Australia v Sydney Steam Collier Owners & Coal Stevedores Association (1958) 1 FLR 248 at 251 per Spicer CJ, 254 per Dunphy J and 257 per Morgan J, and Printing & Kindred Industries Union v Davies Bros Ltd (1986) 18 IR 444 at 452-453. It is necessary to take great care in the application of this limited principle, to avoid infringing the general principle that the conduct of parties to an agreement cannot be taken into account in construing the agreement. For the limited principle to operate, there must be clear evidence that the parties have acted upon a common understanding as to the meaning of the relevant provision and not for other reasons, such as common inadvertence as to its true meaning. See Australian Liquor, Hospitality and Miscellaneous Workers Union v Prestige Property Services Pty Ltd [2006] FCA 11 at [44].*
>
> [Emphasis added]

[109] I reject Qube's submission that it has established on the facts that the common understanding and intention of Qube and the RTBU was to preserve the existing operation of the loaded rates without separate penalties. That submission disregards:

(a) The evidence regarding the 22 January 2014 meeting, in which I have accepted Mr Pryor's explanation that there was agreement to allow clause 4 of Part A of the proposed agreement, which incorporated the Award, to provide for shift penalties and penalties for weekends;

(b) From 24 March 2014, the parties each prepared and exchanged a number of versions of the Part A Core Conditions document. Each version contained versions of the clauses sought to be varied in the form finally made in the 2015 EA;

(c) The proposed agreement that was subsequently provided to all employees for a vote contained the contained versions of the clauses sought to be varied in the form finally made in the 2015 EA;

(d) There were in fact three votes, and on each occasion the clauses sought to be varied were in the form finally made in the 2015 EA; and

(e) On 10 March 2016, the approval documents for the 2015 EA were lodged with the Commission by Qube, and those documents gave no indication of loaded rates being applicable, no modelling of rates on the basis that the rates were loaded rates, and no disclosure that weekend rates were lower than the Award rates.

[110] In those circumstances, an objective assessment of the agreement between the parties would be that the substantive agreement between the parties was as expressed, and with the attendant agreement in relation to interpretation and effect agreed by Qube and the RTBU, in the form finally made in the 2015 EA.

[111] That objective assessment would only be reinforced by a consideration of how such enterprise agreements are *"made"* under the Act. The Full Bench of the Commission observed:[22]

> *…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.*

[112] It is not known what the employees who voted on the agreements, but for Mr Johnson and Mr Rich, thought was the substantive agreement, though it is clear each agreement voted upon included the form of words now sought to be varied.

[113] While Mr Johnson and Mr Rich, who were employees and delegates, were called to give evidence regarding whether paying weekend loadings, shift penalties and allowances under the award was discussed in 2015, their initial denials of discussions rapidly evaporated.

[114] Qube's submission that weight should be placed on the RTBU's and Mr Pryor's alleged failure to publicise the significant gains achieved, or spend vastly more time seeking significantly smaller gains, is irrelevant. There are clear reasons why it may be perceived that, during and after the course of a negotiation, a party may seek to downplay achievements in bargaining.

[115] As to the submission that it is relevant that no steps were made to ensure that employees were paid Award penalties and loadings in circumstances where Mr Pryor must have known that Qube was not paying them, I note the unchallenged evidence of Mr Matthews as to the difficulty in calculating pay based on timesheets and pay slips. There were only five example payslips in evidence, and none were readily understandable to an uninstructed reader.

[116] In March 2023, in order to determine if there had in fact actually been any underpayment, Mr Matthews undertook modelling of two Qube roster periods. This task involved reviewing an employee's roster for a given pay period, reviewing their timesheets for that same period, calculating a schedule of flat rates, calculating a schedule of rates incorporating penalty rates and allowances, modelling the actual hours worked against both schedule of rates, and comparing the results to the employee's actual payslip for that period.

[117] By 11 May 2023, Mr Matthews had only modelled two fortnightly pay periods, using the records of two Qube employees who are RTBU delegates. From this task he concluded:

> (a) The complexity of timesheets and payslips caused discrepancies that were unexplained;
>
> (b) Penalty rates, shift allowances, and on-call allowances, were not being paid, but work was being performed that would ordinarily attract such payments;

(c) No Individual Flexibility Agreements were applicable in the examples he had considered;

(d) If penalty rates and shift/on-call allowances had been paid, in the examples he had modelled, employees would have been entitled to an extra $500-700 per week.

Conclusion

[118] I find that an application to vary the 2015 EA and the 2019 EA has been made.

[119] The Application as it relates to the 2015 EA must be dismissed as Qube does not have standing to bring such an application.

[120] I consider the 2015 EA and the 2019 EA to be ambiguous or uncertain due to the non-application of the terms of the 2015 EA and the 2019 EA in the payments made to the employees covered by those agreements.

[121] I do not, for the reasons given above, exercise my discretion to vary either agreement.

[122] In light of my conclusions above, it is unnecessary to deal with the RTBU's submissions regarding Section 51(xxxi) of the Constitution.

[123] The Application under s.217 is dismissed.

DEPUTY PRESIDENT

Appearances:

Mr M Follet SC and *Mr D Ternovski* of Counsel on behalf of the Applicant.

Mr P Boncardo of Counsel on behalf of the Respondent.

Hearing details:

6 and 7 December 2023.

Sydney.

In-Person.

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[1] [2023] FWC 2318.

[2] (2021) 308 IR 244 at [16].

[3] Transcript PN 181 and 182.

[4] Transcript PN 292 and 293.

[5] Transcript PN 329.

[6] Transcript PN 2144.

[7] Transcript PN 2159.

[8] Transcript PN 854, 898 to 901, and 914.

[9] Transcript PN 215.

[10] Transcript PN 263.

[11] *Monash University v NTIEU* [2023] FWCFB 181 at [39].

[12] [2023] FWCFB 102

[13] Ibid at [13] and [60].

[14] Transcript PN 269.

[15] [2023] FWC 1148, confirmed on Appeal in *Monash University v National Tertiary Education Industry Union* [2023] FWCFB 181.

[16] *Bianco Walling* at [68].

[17] JW Carter, *The Construction of Commercial Contracts*, 2013, Hart Publishing at [18-27].

[18] At [86].

[19] (2007) 162 IR 121 at [17].

[20] [2019] FWCFB 6307, at [42].

[21] (2006) 151 FCR 513, at [31].

[22] *Monash University v National Tertiary Education Industry Union* [2023] FWCFB 181