DECISION

Fair Work Act 2009
s.266—Industrial action related workplace determination

Australian Rail, Tram and Bus Industry Union, Australian Municipal, Administrative, Clerical and Services Union

v

Australian Rail Track Corporation Limited
(B2023/783)

DEPUTY PRESIDENT EASTON
DEPUTY PRESIDENT GRAYSON
COMMISSIONER CRAWFORD

SYDNEY, 15 MARCH 2024

Application for an industrial action related workplace determination in respect of bargaining with Australian Rail Track Corporation Limited – jurisdictional objection – whether the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement – whether bargaining ceases upon the making of a new agreement.

DECISION OF DEPUTY PRESIDENT EASTON

[1] The Australian Rail Tram and Bus Industry Union and the Australian Municipal, Administrative, Clerical and Services Union have applied for a workplace determination under s.266 of the *Fair Work Act 2009* (Cth). The two applicant unions were bargaining representatives for their members employed by the Australian Rail Track Corporation Limited. The Fair Work Commission is required to make workplace determinations in certain circumstances, including when the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement.

[2] A new agreement was made on 7 July 2023 and approved by the Commission on 25 September 2023. The Australian Rail Tram and Bus Industry Union (**RTBU**) and the Australian Municipal, Administrative, Clerical and Services Union (**ASU**) are covered by the new agreement. The RTBU and ASU argued that the Commission must nonetheless make a workplace determination because the bargaining representatives and the Australian Rail Track Corporation Limited (**ARTC**) did not settle all the matters that were at issue during the bargaining for the agreement that was made on 7 July 2023.

[3] ARTC argued that the Commission has no jurisdiction to make a workplace determination in the circumstances because the making of the agreement necessarily meant that bargaining has ended.

[4] In my view the Commission does not have any power or obligation to make a workplace determination in these circumstances. The *Fair Work Act 2009* (Cth) (**FW Act**) confers significant rights and obligations upon bargaining representatives. Those rights and obligations only relate to the bargaining process and to the agreement approval process. The FW Act does not otherwise confer rights upon bargaining representatives that extend beyond the bargaining process. When the *Australian Rail Track Corporation NSW Enterprise Agreement 2023* (**2023 Agreement**) was made the bargaining for that agreement necessarily ceased even though some bargaining representatives were not satisfied with the agreement made. Section 266 of the FW Act cannot be divorced from the bargaining process and does not apply after the bargaining ceases. The dissatisfied bargaining representatives cannot make an application for a workplace determination after the agreement has been made.

[5] The majority of the Full Bench has come to a different conclusion (see from [56] below). In the circumstances I will state my reasons as briefly as possible.

The Background

[6] ARTC is an Australian government owned corporation and the current operator of the Australian freight rail network. ARTC employs more than 2200 workers who help manage the transit of around 440 passenger and freight trains daily across its rail network.

[7] On 9 December 2022 ARTC issued a Notice of Representational Rights (**NERR**) to commence bargaining for the 2023 Agreement.

[8] The employee bargaining representatives for the 2023 agreement were the RTBU, ASU, The Association of Professional Engineers, Scientists and Managers, Australia, and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**), one employee bargaining representative and three individual bargaining representatives.

[9] On 16 and 21 June 2023 protected action ballot orders were made at the request of the RTBU, ASU and CEPU.

[10] On 28 June 2023 an access period commenced for the purposes of putting the 2023 Agreement to a vote. Some of the bargaining representatives opposed the proposed agreement.

[11] On 30 June 2023 the RTBU, ASU and CEPU served notices to take protected industrial action, including stoppages of work. On the same day ARTC applied to the Commission to make orders under s.424 of the FW Act to terminate or suspend the threatened protected industrial action.

[12] On 4 July 2023 Commissioner Crawford made an order terminating the protected industrial action in chambers and without a hearing (**Termination of Industrial Action Instrument**). The relevant unions did not oppose the order (see *Application by Australian Rail Track Corporation Limited TA Australian Rail Track Corporation* [2023] FWC 1636 at [24]).

[13] On 6 July 2023 voting for the 2023 Agreement commenced. Ultimately 85% of eligible employees voted, and of those 64% voted to approve the 2023 Agreement. The 2023 Agreement was "made" when the results were declared on 7 July 2023.

[14] On 11 July 2023 the RTBU wrote to ARTC seeking a meeting to discuss unresolved issues in bargaining. On 13 July 2023 ARTC responded, refusing to meet with the RTBU.

[15] On 14 July 2023, ARTC applied for approval of the 2023 Agreement.

[16] On 25 July 2023, the "post-industrial action negotiating period", which had started when the Termination of Industrial Action Instrument was made on 4 July 2023, ended. No application was made to extend the default 21-day period.

[17] On 1 August 2023, being shortly after the end of the 21-day "post-industrial action negotiation period" (per s.266(3)) the RTBU and the ASU formally applied for an 'industrial action related workplace determination' (per s.266(1)), relying on Commissioner Crawford's order terminating the protected industrial action. On 9 August 2023 Justice Hatcher made directions to prepare the matter for hearing before this Full Bench.

[18] On 25 September 2023 Deputy President Boyce approved the 2023 Agreement. The RTBU and the ASU opposed the approval. The unions argued that the employees covered by the 2023 Agreement were not fairly chosen, that reasonable steps were not taken to explain the terms of the Agreement, that the voting window was too short and that the agreement was not genuinely agreed because the question and answer format of the agreement was too difficult for employees to understand. Deputy President Boyce rejected each of these arguments (see *Re Australian Rail Track Corporation NSW Enterprise Agreement 2023* [2023] FWCA 3097), and his decision was not appealed.

[19] After the 2023 Agreement was approved, ARTC pressed its jurisdictional objection in these proceedings. With the consent of the parties the Full Bench heard and determined ARTC's jurisdictional objection prior to any consideration of the merits of the application.

[20] A hearing was held before the Full Bench on 24 October 2023. The RTBU and ASU were granted permission to be represented by Mr Saunders of counsel. ARTC was granted permission to be represented by Mr Parry KC and Mr Howard of counsel.

[21] The following historical industrial matters are important to understanding the present circumstances:

(a) the 2023 Agreement and its predecessor agreements apply to a large number of workers;
(b) the Unions represent a minority cohort;
(c) the RTBU has raised issues about the scope of the 2023 Agreement and predecessor agreements to no avail;
(d) the RTBU says the "practical effect of the scope as it stands means that operational workers have no effective bargaining power in EA negotiations." In this regard the RTBU relied on a survey of its membership that indicated that a majority of RTBU members did not vote to approve the 2023 Agreement; and
(e) the RTBU has made two unsuccessful scope order applications: see *Australian Rail, Tram & Bus Industry Union v Australian Rail Track Corporation (ARTC)* [2012] FWA 6329 and *Australian Rail, Tram & Bus Industry Union v Australian Rail Track Corporation (ARTC)* [2020] FWC 759.

ARTC's Jurisdictional Objection

[22] ARTC argued that:

(a) the making of the 2023 Agreement dealt with all matters at issue in the bargaining and dealt with all of the "issues" that the RTBU and ASU want included in a workplace determination;
(b) the making and approval of the 2023 Agreement meant that the Commission's jurisdiction to make a workplace determination over the same subject matter has ceased;
(c) the remit of the RTBU and the ASU as bargaining representatives was to bargain on behalf of those whom they represent in the bargaining process commenced by the NERR issued in December 2022;
(d) the making of the 2023 Agreement meant that this bargaining has ceased;
(e) as bargaining agents the unions do not have exclusive authority to settle matters for the purposes of s.266(1)(c);
(f) in the end it is the employees that are capable of settling all matters that were at issue with the employer for the purposes of s.266(1)(c); and
(g) neither the RTBU nor the ASU can 'unsettle' the agreement that was reached by those they represented in bargaining.

RTBU and ASU's submissions

[23] The RTBU and ASU argued that:

(a) As at the end of the post-industrial action negotiation period, a number of issues that were at issue in bargaining had not been settled between the bargaining representatives;
(b) the approval of the 2023 Agreement, over the objection of the bargaining representatives, did not change the fact that there were outstanding matters in relation to bargaining;
(c) the making of the 2023 Agreement did not mean that agreement was reached with the bargaining representatives. Bargaining representatives, let alone their views, have no role in the making of an enterprise agreement;
(d) the fact that an enterprise agreement was made does not indicate, one way or another, that the bargaining representatives have settled anything as between them; it is an utterly inapt way to describe this process. The concepts are quite discrete, and intended to be so;
(e) There is no textual support for the proposition that the obligation imposed on the Commission to make a determination is conditional on no new agreement being made;
(f) The ARTC's submissions "utterly ignore" the words 'the bargaining representative' in s.266(1)(c) as well as the surrounding textual and contextual factors and the ARTC's interpretation "is so divorced from text is unlikely to be correct";
(g) The making of a termination of industrial action instrument fundamentally changes the rights of both parties. This is consistent with the underlying scheme of the FW Act which is to balance competing rights. The purported ability for a workplace determination to be made, despite the approval of the 2023 Agreement, needs to be understood in that context;
(h) it is unlikely that parliament intended that the employer could retain all their rights but there be no balancing rights and obligations during a negation period after a termination order has been made (and employees cannot take protected industrial action); and

(i) section 278 allows a workplace determination to displace an enterprise agreement regardless of whether the agreement is operative, which expressly reflects an intention that workplace determinations may still be made in circumstances such as the present.

[24] The RTBU accepted that if no termination order had been made, and an enterprise agreement was made by way of a vote by employees in terms that a bargaining representative does not agree with, there is nothing a bargaining representative can do about that in the context of bargaining. A bargaining representative may oppose the approval of the agreement but that is not a bargaining activity.

Consideration – two key issues

[25] This matter draws two particular aspects of the FW Act into focus:

(a) whether the Commission has any jurisdiction or obligation to make a workplace determination after an agreement has been made and approved; and

(b) the role of bargaining representatives and whether bargaining representatives have any separate capacity or standing to press for a workplace determination after an agreement has been made.

The Commission's power to make workplace determinations

[26] Part 2-5 of the FW Act allows the Commission to make two different kinds of workplace determinations: industrial action related workplace determinations (see s.266-267) or intractable bargaining workplace determinations (see s.269-271).

[27] Section 266 requires the Commission to make an industrial action related workplace determination if certain conditions are met:

> **"266 When the FWC must make an industrial action related workplace determination**
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> Industrial action related workplace determination
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> (1) If:
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> (a) a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and
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> (b) the post-industrial action negotiating period ends; and
>
> (c) the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement;
>
> the FWC must make a determination (an industrial action related workplace determination) as quickly as possible after the end of that period.
>
> Note: The FWC must be constituted by a Full Bench to make an industrial action related workplace determination (see subsection 616(4)).

Termination of industrial action instrument

(2) A termination of industrial action instrument in relation to a proposed enterprise agreement is:

(a) an order under section 423 or 424 terminating protected industrial action for the agreement; or

(b) a declaration under section 431 terminating protected industrial action for the agreement.

Post-industrial action negotiating period

(3) The post-industrial action negotiating period is the period that:

(a) starts on the day on which the termination of industrial action instrument is made; and

(b) ends:
(i) 21 days after that day; or
(ii) if the FWC extends that period under subsection (4)--42 days after that day.

(4) The FWC must extend the period referred to in subparagraph (3)(b)(i) if:

(a) all of the bargaining representatives for the agreement jointly apply to the FWC for the extension within 21 days after the termination of industrial action instrument was made; and
(b) those bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement."

[28] The word "must" in s.266(1) means that if the conditions are met the Commission has no discretion to decline to make a workplace determination.

[29] Section 267 requires that an industrial action workplace determination include core terms (see s.272), mandatory terms (see s.273) and agreed terms (see s.274).

[30] "Agreed terms" are relevantly defined in s.274(2):

"An agreed term for an industrial action related workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement."

[31] Section 267(3) allows the Commission to include terms relating to unresolved matters:

"The determination must include the terms that the FWC considers deal with the matters that were still at issue at the end of the post-industrial action negotiating period."

[32] Any enterprise agreement that covers relevant employees ceases to apply to those employees upon the workplace determination coming into operation "and can never so apply again" (per s.278(1A)).

[33] Section 266 must be understood and applied in the context of the suite of legislative provisions that are directed to the bargaining for and making of an enterprise agreement.

[34] The statutory provisions relating to the making of an industrial action related workplace determination are replete with references to proposed agreements:

(a) protected industrial action can only be taken "for a *proposed enterprise agreement*" (s.408);
(b) employee claim action can only be taken "for a *proposed enterprise agreement*" and "for the purpose of supporting or advancing claims *in relation to the agreement*" (s.409);
(c) orders under s.424 can terminate "protected industrial action *for a proposed enterprise agreement*";
(d) section 266(2) refers to the making of a termination of industrial action instrument "in relation to *a proposed enterprise agreement*";
(e) the third precondition in s.266(1) refers to the settling of matters "that were at issue during the bargaining *for the agreement*";
(f) the agreed terms that must be included in a workplace determination (s.270(2) and s.274) are defined to be the terms "that the bargaining representatives *for the proposed enterprise agreement* concerned had, at the end of the post-industrial action negotiating period, agreed should be included *in the agreement*"; and
(g) a workplace determination be expressed to cover "the employees who would have been covered by *that agreement* (s.267(4)(b)).

[35] A workplace determination necessarily involves the Commission using its arbitration powers to determine particular terms of an industrial instrument in the absence of agreement between the bargaining representatives, the employer and employees. This arbitration power is only available in two specific circumstances:

(a) when a termination of industrial action instrument has been made following threatened or actual protected industrial action, and the Commission decides that it is appropriate that protected industrial action be terminated rather than suspended (see *Re Svitzer Australia Pty Limited* [2022] FWCFB 213 at [38]-[46], (2022) 320 IR 91 at 104-108) or
(b) when bargaining has become intractable and there is no reasonable prospect of an agreement being reached (s.235).

[36] Clearly this arbitration power is only available in very limited circumstances and only available when the bargaining parties (bargaining representatives as well as parties to the proposed agreement) cannot reach agreement by themselves in relation to a proposed agreement.

[37] When the 2023 Agreement was made by way of a vote, the Commission's very limited arbitration power to make a workplace determination ceased, not least because the relevant parties (the employer and a majority of voting employees) reached agreement by themselves.

[38] To the extent that the relevant provisions of the FW Act might be available to facilitate the making of enterprise agreement (see s.171), there is no work left for those provisions once an agreement is made.

[39] There is no discernible rationale in the statute for allowing the Commission to use its very limited arbitration powers to displace the terms of an agreement properly made by relevant parties, particularly if that agreement has been approved by the Commission.

[40] The interaction provisions of s.278(1) mean that even if the Commission were to make a workplace determination that displaced the terms of a properly made and approved agreement, there is nothing to stop the employer and a majority of employees making a new agreement that would in turn displace the workplace determination.

Consideration: Bargaining Representatives

[41] If the RTBU and the ASU's argument is correct then after protected industrial action is terminated by order under s.424, any bargaining representative who has not settled their issues about an agreement can press the Commission to make a workplace determination that deals with the matters that were still at issue *regardless of whether or not an agreement is made*. The resultant workplace determination would then displace the agreement made for all employees covered by the agreement. I do not think this argument is correct and the argument overstates the role of bargaining representatives.

[42] The FW Act confers certain rights and obligations upon bargaining representatives. Under the FW Act, and putting aside greenfield agreements and multi-employer agreements:

(a) the role of bargaining representatives is recognised in the Objects of Part 2-4 of the FW Act (s.171);
(b) bargaining representatives must be appointed in writing (s.176(1) and s.178);
(c) a NERR issued by an employer must advise employees of the right to be represented by a bargaining representative (s.173(1));
(d) a bargaining representative may give the employer who will be covered by a proposed agreement a request in writing to bargain (s.173(2A));
(e) bargaining representatives must meet the good faith bargaining requirements (s.228), including recognising and bargaining with other bargaining representatives (s.228(1)(f));
(f) a bargaining representative may apply to the Commission for:
    (i) bargaining orders (s.229),
    (ii) an intractable bargaining declaration (s.234);
    (iii) a majority support determination (s.236(1)),
    (iv) scope orders (s.238(1)),
    (v) assisted dispute resolution (s.240(1)), and
    (vi) protected action ballot orders (s.437(1));
(g) bargaining representatives may be the subject of a bargaining order (s.231);
(h) bargaining representatives can provide or withhold consent for the Commission to arbitrate a dispute about bargaining (s.240(4));
(i) only bargaining representatives can notify of protected industrial action (s.414(1));
(j) once an enterprise agreement is "made" a bargaining representative:
    (i) can or must apply to the Commission for approval of the enterprise agreement (section 185(1));

(ii) can file a declaration to notify of their support, or opposition, to approval (section 185(2)),
(iii) can apply to be covered by the agreement if the bargaining representative is an employee organisation (s.183);
(iv) must be consulted when the Commission considers undertakings proffered by the employer in the approval process (s.190(4));

(k) bargaining representatives can oppose the approval of an agreement on certain grounds; and
(l) bargaining representatives must disclose the benefits they receive under the enterprise agreement (s.179(1)).

[43] All of these rights and responsibilities relate to either the bargaining process for the making of an agreement or the approval process once an agreement is made.

[44] Importantly, none of these rights enable a bargaining representative to make a final decision about the terms of a proposed agreement. Ordinarily whatever may be agreed between bargaining representatives during bargaining is subject to the whole agreement being put to a vote of eligible employees. As the term suggests, bargaining representatives are representatives of those who have appointed them, but they are not agents or proxies.

[45] One distinctive feature of enterprise bargaining is that a majority of employees can make an agreement against the wishes of the minority of employees. Similarly, an agreement can be made against the wishes of some or even all of the employee bargaining representatives.

[46] The reference in s.266(1)(c) to bargaining representatives "settling" matters between them during the bargaining for an agreement must be understood in this context. Bargaining representatives are entitled to be supportive or unsupportive of a proposed agreement, but their views are not determinative. Bargaining representatives can make or consider proposals (see s.228). In the normal course of bargaining proposals are put, considered, rejected and/or accepted. Through these exchanges some matters become settled and others do not. There is no requirement that all matters be settled between the bargaining representatives before an agreement can be put to a vote, and the matters that are settled between the bargaining representatives are subject to a vote of eligible employees.

[47] The rights and obligations of bargaining representatives during the post-industrial action bargaining period are different to the rights conferred during ordinary bargaining but are nonetheless confined to representative bargaining rights. Matters that are agreed by the bargaining representatives during the post-industrial action bargaining period become agreed matters (s.274) that must be included in the resultant workplace determination (s.267). Matters that are not agreed between the bargaining representative are amenable to arbitration – the scope of the unresolved matters defines the boundaries of the Commission's arbitration function (s.267(3)). As such, bargaining representatives have a more direct influence on the final terms of the instrument during this post-industrial action bargaining period.

[48] Even during this post-industrial action bargaining period bargaining representatives do not have rights or interests that are separate to the rights or interests of those who have appointed them. The only 'matters' that can be 'at issue' are matters about a proposed agreement. The only matters that can be 'settled' are matters about a proposed agreement.

[49] There were no more matters about the proposed agreement that could be at issue once the proposed agreement was voted on and made. Some or all bargaining representatives might not have been satisfied with the terms of the Agreement, and some bargaining issues might not have been settled before the vote, but the bargaining representatives no longer had any capacity to make or accept proposals about a proposed agreement, or advance matters about a proposed agreement, or settle matters about a proposed agreement.

[50] The above understanding of the Commission's power to make workplace determinations is consistent with the observations of Justice O-Callaghan in *Health Services Union of Australia Victoria No. 1 Branch v Specialist Diagnostic Services Pty Ltd trading as Dorevitch Pathology* [2017] FCA 1200 and also with the Full Bench of the Commission in *Re Dorevitch Pathology Workplace Determination* [2018] FWCFB 5778.

[51] In the Federal Court proceedings the union bargaining representative applied to the Court for an injunction to prevent the employer from putting a proposed agreement to a vote of employees after the Commission had made an order terminating protected industrial action (see [2017] FCA 1200 at [7]). In considering whether there was a prima facie case for an injunction Justice O'Callaghan said at [22]:

> "The second ground upon which the applicants rely is a contention for which they concede there is no authority. Put briefly, and I trust without doing disservice to counsel's very able written submissions, the applicants say that, properly construed, once a termination of industrial action instrument has been made (which in this case happened when the Commission made a termination of industrial action instrument on 4 September 2017), the statutory processes under ss 181 and 186 of the Act are not available unless the bargaining representatives for the proposed agreement settle all matters in dispute in the bargain. The applicants contend that because, as is common ground, not all matters in dispute have yet been resolved, Dorevitch has no power to ask its relevant employees to make the proposed agreement under s 181 and the Commission has no power to approve it under s 186. In my view, counsel for Dorevitch is correct to submit that there is nothing in the scheme of the legislation or any particular provision which supports an argument that the making of a termination of industrial action instrument ousts the right of an employer and its employees to exercise their workplace right to make an enterprise agreement. In my view, that would be an unlikely notion for Parliament to have intended and, absent any sufficiently clear indication from the words of the statute, or authority of any kind to support it, I would reject the proposition that there is a prima facie case to be made in that regard."

[52] In the proceedings before the Full Bench the HSU argued that the employer had acted unreasonably in bargaining by putting a proposed agreement to a vote after the protected industrial action had been terminated (see [2018] FWCFB 5778 at [80]). The Full Bench did not accept this submission, responding at [82(6)] as follows:

> "In response to the specific matters raised by the HSU:
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> …
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> (6) Assuming, without deciding, that conduct after the termination of protected industrial action is relevant to the s 275(f) consideration, we do not consider it

> to be clear that Dorevitch's abrupt decision on 25 September 2017 to put its wage offer to a vote of employees was contrary to s 266. Although s 266 is far from pellucid on the issue, the fact that s 266(1) requires the making of a workplace determination only where "the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement" by the end of the post-industrial action negotiating period implies that if all such matters are settled, then an enterprise agreement rather than a workplace determination will follow. Arguably, where employees vote to approve an enterprise agreement during the post-industrial action negotiating period, all such matters are settled. Further, the evidence did not clearly establish that it was Dorevitch's decision to put its proposed agreement to a vote of employees that caused the 3 October 2017 conference not to proceed."

[53] The Commission has no power to make a workplace determination because, in the context in which s.266 appears under the FW Act, bargaining has concluded and the bargaining representatives do not have any capacity or authority to bargain, negotiate or settle any issues between them.

Conclusion

[54] For these reasons there is no power, in my view, for the Commission to make a workplace determination as sought by the RTBU and the ASU. Section 266 only has work to do if there are matters in issue about a proposed agreement. When the 2023 Agreement was made by a majority of voting employees there ceased to be any further matters about a proposed agreement that the bargaining representatives could settle or pursue in a workplace determination. In these circumstances the requirements of s.266 have not been met and s.266 does not require that the Commission make a workplace determination.

DECISION OF DEPUTY PRESIDENT GRAYSON AND COMMISSIONER CRAWFORD

Background

[55] Deputy President Easton's dissenting decision summarises the background, materials filed, submissions and the relevant statutory provisions. We adopt those summaries and will not repeat them.

[56] For the reasons outlined below, we have arrived at a different decision to Deputy President Easton. We have decided to dismiss ARTC's jurisdictional objection.

Principles of statutory construction

[57] The principles of statutory construction are well-settled. As per the Full Bench in *Advantaged Care Pty Ltd v Health Services Union* [2021] FWCFB 453 (*Advantaged Care*), the exercise of statutory interpretation requires a consideration of the ordinary grammatical meaning of the words used in the statute; having regard to the context of the provision including the language of the FW Act as a whole, the current state of the law, the mischief that the provision was intended to remedy and its relevant legislative history and the purpose of the legislation. [1]

[58] The Full Bench in *Advantaged Care* made the following comments with respect to the significance of a statute's purpose to its interpretation:[2]

> "Section 15AA of the *Acts Interpretation Act 1901* requires that a construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object (noting that s.40A of the FW Act provides that the *Acts Interpretation Act 1901*, as in force at 25 June 2009, applies to the FW Act). The purpose or object of the FW Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the FW Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires us to construe the FW Act, not to rewrite it, in the light of its purpose."

[59] The majority judgment (Rares and Colvin JJ) in C*ommunications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited* [2020] FCAFC 205 contains the following summary of the relevant principles for statutory construction, including with particular reference to industrial law:

> "The principles to be applied when construing legislative provisions are well established. As stated by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14]:
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> > The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
> >
> > Consideration of context must be understood in its widest sense and is undertaken at the first stage of the process. Although context may provide a reason to depart from the ordinary meaning and usage of the words, a very general purpose will not provide much context and the nature of the task, which requires the interpretation of the language of the statute, must not be lost in the process of contextual construction: *The Queen v A2* (2019) [2019] HCA 35; 373 ALR 214 at [32]-[37] (Kiefel CJ and Keane J).
> >
> > Care must be taken to ensure that any purpose identified as a guide to the resolution of ambiguity in a particular case is specific enough to be deployed in that way: *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11; (2006) 228 CLR 529. Also, the Court must not conjure a purpose that is more specific than the context discloses and then use that purpose to construe the legislation: *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [26]; and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194 at [21].

> As was noted in *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223; (2018) 268 FCR 128 at [80]-[84] (Allsop CJ, Griffiths and O'Callaghan JJ), there are challenges in applying a purposive approach where it is apparent that interacting purposes were balanced in settling upon the particular terms of legislative provisions. This is evidently the case with a provision of the kind presently under consideration. As the object of the Act in s 3 provides, the Act seeks to achieve a balance between the interests of employers and employees. It has done so by conferring minimum entitlements upon employees covered by the Act's provisions. Many of those entitlements manifest in obligations which circumscribe the payments to be made by employers to employees. However, the Act then relieves employers of the obligation to make payments to employees in the specific circumstances set out in the stand down provisions. In those circumstances, it is difficult to discern from the legislation as a whole a purpose that would aid in determining a construction issue that requires a conclusion to be reached as to where in ss 524 and 525 the balance between the interests of employers and employees has been struck.
>
> Where there is no available indication of a specific purpose that aids the construction, the focus must be upon the textual meaning which requires consideration of the text in the context of the legislation as a whole: *Carr v The State of Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [6].
>
> Particularly in a field like industrial law where there is a history of legislative provisions that deploy concepts that have their origins in earlier statutes the terms of which have been interpreted by the Courts to form a body of associated law, the pre-existing law may provide part of the context in which to consider the statutory provisions: *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 at [165] (Gummow, Hayne and Heydon JJ); and *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 254 CLR 247 at [42]. Terms may be carried into legislation on the basis that they have acquired a particular meaning through past usage within the particular context being addressed by the legislation or may be adopted to change or alter the effect of past approaches. In either case, the context may be important in determining the intended meaning."[3]

Consideration

Interpreting the relevant provisions

[60] The question to be resolved in this case concerns whether the jurisdictional pre-requisites for the Commission to make an industrial action related workplace determination in s.266(1) of the FW Act are satisfied. For the reasons that follow, we consider that they are.

[61] For the purposes of s.266(1)(a) and (b), there is no dispute in this case that a termination of industrial action instrument in relation to the relevant proposed agreement was made by the Commission on 5 July 2023[4] and that the 21-day post-industrial action negotiation period ended on 26 July 2023.[5]

[62] There is also no argument raised in these proceedings that the making of a termination of industrial action instrument prevents an employer from asking employees to vote for a proposed agreement. The RTBU and ASU did not attempt to prevent the 2023 Agreement from being made or approved on the basis that a termination of industrial action instrument was in operation and that argument would be inconsistent with the Federal Court's judgment in *HSU v Dorevitch Pathology* [2017] FCA 1200. However, we consider that this is the extent of the authority that can be drawn from that judgment.

[63] The critical issue that is in dispute, and must be determined, in this case is whether the actions of the relevant employees in voting to "make"[6] the 2023 Agreement on 6 and 7 July 2023 means that the "bargaining representatives" for the 2023 Agreement have "settled all of the matters that were at issue during bargaining" pursuant to s.266(1)(c). If the answer is yes, there will be no jurisdiction for the Commission to make a determination because the jurisdictional pre-requisites in s.266(1)(c) are not satisfied.

[64] ARTC's jurisdictional objection turns on the proper construction of s. 266(1)(c) of the FW Act.

[65] For the reasons that follow, we do not accept that the making of the 2023 Agreement had the effect of settling all matters that were at issue between the bargaining representatives during bargaining for the purposes of s.266(1(c) of the FW Act.

[66] As outlined above, ARTC submit that the "making" and subsequent approval of the 2023 Agreement had the effect of "*settling all matters that were at issue between the bargaining representatives during bargaining*" for the purposes of s.266(1(c) of the FW Act. As submitted by the ARTC, the purpose of section 266(1)(c) (and the FW Act as a whole) resides in its text and its structure. The ASU and RTBU contend that there is no textual or contextual support for the proposition that the powers of, and obligations imposed on, the Commission to make a determination are subject to, or otherwise conditional upon, no new enterprise agreement being made.

[67] As found in *Advantaged Care,* exercises of statutory interpretation consider the ordinary grammatical meaning of the words of the provision, the context of the provision itself, how language is used in the rest of the FW Act, the current state of the law, the mischief that the provision was intended to address, and the relevant legislative history of the provision. It is also relevant to consider the purpose of the legislation.

[68] The text of s.266(1) of the FW Act, which identifies the relevant preconditions for the making of a workplace determination, has been set out above in Deputy President Easton's decision at [27] above.

[69] Section 182(1) of the FW Act is relevant because it defines when an enterprise agreement is made. This section states:

> **"When an enterprise agreement is made**
>
> *Single-enterprise agreement that is not a greenfields agreement*

> (1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is *made* when a majority of those employees who cast a valid vote approve the agreement."

[70] Section 182(1) is in Subdivision A of Division 4 of Part 2-4 of the FW Act. In the Guide to Part 2-4, in section 169 of the FW Act, Subdivision A of Division 4 is said to deal "*with the approval of proposed enterprise agreements by employees and sets out when an enterprise agreement is made*".

[71] Section 266 is in Division 3 of Part 2-5 of the FW Act. In the Guide to Part 2-5, in section 258 of the FW Act, Division 3 is said to deal "*with industrial action related workplace determinations. The FWC must make such a determination if: (a) a termination of industrial action instrument is made in relation to a proposed enterprise agreement; and (b) after the end of the post-industrial action negotiating period, the bargaining representatives for the agreement have not settled the matters that were at issue during bargaining for the agreement*."

[72] Sections 266(1)(c) and 182(1) are not directed to the same legal process. Section 266(1)(c) is directed at a process of negotiation and settlement between relevant negotiating parties, in the ordinary sense. Section 182(1) is directed to a process whereby employees are asked to vote on and make an enterprise agreement. There are several important differences between s.182(1) and s.266(1)(c):

(a) Section 182 refers to a voting process and prescribes what is required for a positive vote. Section 266 does not refer to a voting process at all, it refers to matters being "*settled*" between "*bargaining representatives*".
(b) Section 182 is directed at a process between the employees to be covered by the agreement and the employer. The employees "*covered by the agreement*" are not "*bargaining representatives*" unless they have been appointed as contemplated by s.176(1)(c) and (4). In this case, only four of the 807 employees[7] to be covered by the proposed agreement were also bargaining representatives in an individual capacity. Therefore, there is a substantial difference in composition between the employees that voted to approve the 2023 Agreement under s.182 and the bargaining representatives for the proposed agreement.

(c) The approval process under s.182 is directed at an entire proposed agreement. An employee cannot vote to approve some parts, but not others, of the proposed agreement. It is a "take it or leave it" proposition. In contrast, the process under s.266 contemplates some matters being agreed by bargaining representatives and other matters not being agreed.
(d) The "making of an agreement" under s.182 does not necessarily have to involve any negotiation, bargaining or settling of matters in dispute, in the ordinary sense, at all. An employer can potentially prepare an agreement, follow the regular procedural steps, and then have a majority of employees vote to approve the agreement. That process is completely different to the post-termination of industrial action process, where the involvement of bargaining representatives is a fundamental component.

[73] Should s.266(1)(c) have been intended to refer to bargaining representatives settling "matters that were at issue during bargaining for the agreement" by making an agreement, as is submitted by ARTC, we consider that s.266(1)(c) would have concluded with the words "*or a new agreement made*". In our view it is telling that these words have been omitted.

[74] We also consider that the wording and process prescribed in s.266(4) of the FW Act highlights the central role of bargaining representatives once a termination of industrial action instrument is made. This sub-section permits "*all of the bargaining representatives for the agreement*" to "*jointly apply*" for an extension of the post-industrial action negotiating period. The application can be made "*if those bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement*." There is no role for the employees to be covered by the proposed agreement in this process, unless they are specifically appointed as bargaining representatives. Self-evidently, bargaining representatives do not need to be employees and employees do not need to be bargaining representatives. Even if an employee is a bargaining representative, their role in the process prescribed by s.266 attaches to their appointment as a bargaining representative and is not predicated on their employment status.

[75] Given the significant differences between the language used, processes contemplated and purposes of s.182 and s.266(1)(c) of the FW Act, we do not accept on an ordinary reading of s.266(1)(c) that the process of employees "*making*" an agreement under s182(1) of the FW Act has the effect that the bargaining representatives have "*settled*" all matters for the purposes of s.266(1)(c) of the FW Act as contended by ARTC.

[76] In our opinion, the text of s.266 (1)(c) makes it plain that it is the lack of settlement of matters in issue by "*bargaining representatives*" (as opposed to there being no enterprise agreement made by employees) that is the jurisdictional pre-requisite to an exercise of power by the Commission under s.266(1). ARTC's submission ignores the express and unambiguous language of s.266(1)(c) which requires that "*the **bargaining representatives** for the agreement have not settled all of the matters that were at issue*"(emphasis added).

[77] We consider that the use of the term "*bargaining representative*" is significant. It was open to the legislature to use different language if the intention was that a determination could not be made by the Commission where employees have made an agreement. The usage of this specific term places the emphasis on the role of bargaining representatives as opposed to "*the employees to be covered by a proposed agreement*". We also consider that the term "*settled*" has been deliberately used to signify how agreement is reached inter partes under s.266(1)(c), whereas a reference to an agreement being "*made*", which is the language used in s.182 to define when an agreement is reached between an employer and the relevant employees, has not been included.

[78] We also do not consider, on the evidence before us, that what occurred after the termination instrument was made could be described as the bargaining representatives having "*settled all of the matters that were at issue during bargaining."* There is no dispute that there were several outstanding matters between ARTC and the RTBU and ASU when the instrument was made. These included: the scope of the agreement, wage rates, sick leave conditions, disputes procedure, workgroup leader conditions, public holiday conditions and long service leave.[8] It is hard to see how any of these matters were "*settled*" between the "*bargaining*

representatives" during the post-industrial action negotiating period that followed the making of the instrument. ARTC refused to meet with the RTBU and ASU to discuss these outstanding matters.[9] What occurred is that ARTC put its positions on these matters to a vote of employees. While the positive vote by employees had the effect of making the 2023 Agreement, it did not settle the matters between ARTC and the RTBU and ASU. That can only occur by agreement between the bargaining representatives or via a determination by the Commission. If a determination is required, the terms of the 2023 Agreement will be relevant to the determination made by the Commission, given s.275(ca) of the FW Act.

History of the relevant provisions

[79] We accept the RTBU and ASU's submission that an analysis of relevant predecessor provisions suggests the "*settling*" of matters under s.266(1) is not intended to mean the same thing as employees voting to "*make*" an agreement under s182(1) of the FW Act.

[80] The predecessor provision, s.170MX(3)(a) of the *Workplace Relations Act 1996* (**WR Act**), required the Commission to arbitrate a dispute where:

> "the negotiating parties have not settled the matters that were at issue during the bargaining period (whether or not by making an agreement) …"

[81] These words suggest two things. Firstly, matters could be "*settled*" under this provision without the "*making of an agreement*". Secondly, matters between the negotiating parties could be "*settled*" by "*making an agreement*". However, as submitted by the RTBU and ASU, the bracketed words must be understood in the context of the WR Act regime where employee organisations and employees could directly make non-greenfields agreements. The omission of the bracketed words in the FW Act is consistent with an update to reflect that the bargaining representatives cannot make an "*agreement*" to settle the matters at issue for a non-greenfields agreement. There is no need for the words "(whether or not by making an agreement)" in the FW Act because the bargaining representatives cannot "settle" the matters by making an enterprise agreement. A non-greenfields enterprise agreement can only be made, via a vote from employees under s.182(1).

Has bargaining ceased?

[82] ARTC made the following submission:

> "The RTBU and ASU's remit as bargaining representatives was to bargain on behalf of who they represented after the service of the NERR on 9 December 2022. The making of the 2023 Agreement meant that this bargaining had ceased. Their role as bargaining agents was to carry out the functions the FW Act prescribes. If an Agreement had not been made, there would still be bargaining in place and functions to perform set out in Part 2-5. As representatives of the employees for whom they were bargaining, the RTBU and ASU have no power to overturn the settlement (or agreement of) those employees through the voting process."

[83] We do not accept this submission. If an Agreement had not been made, regular bargaining under the FW Act would not have continued. There is a final opportunity for the bargaining representatives to settle outstanding matters during the post-industrial action negotiating period and then the Commission is required to resolve any outstanding issues. That normal bargaining would not simply continue is demonstrated by the fact that the ability of the RTBU and ASU to take protected industrial action has been removed by the Commission. We do not accept the intent of the FW Act is for regular bargaining to continue after the relatively extreme step of making a termination of industrial action instrument. This would be bargaining without the main tool of leverage for employees.

[84] While the Federal Court observed in *Dorevitch* that a termination of industrial action instrument does not prevent an employer from requesting that employees vote for a proposed agreement, this right operates subject to the employee bargaining representatives having the right to settle issues during the post-industrial action negotiating period and to have outstanding matters arbitrated by the Commission. The employer's right to have employees vote on an agreement is balanced by the ability of the employee bargaining representatives to engage in the process under s.266 of the FW Act. We do not consider that these processes are mutually exclusive.

[85] We do not consider that the ongoing right of an employer to request that employees vote for a proposed agreement after a termination of industrial action instrument is made, means the same thing as bargaining still being ongoing, as submitted by ARTC. The employer is able to have employees vote to approve an agreement. In some circumstances, this will then be considered by the Commission for the purposes of a workplace determination as required by s.275(ca) of the FW Act. There will also be cases where the bargaining representatives are supportive of the agreement's terms and hence all matters at issue are *also* settled by the agreement being made for the purposes of s.266(1)(c).

[86] We also reject ARTC's submission that the Federal Court dealt with the same issue that is contentious here in *Dorevitch*. There is no dispute in this case that ARTC was entitled to have employees vote to approve and agreement and to have the agreement approved by the Commission. That is what occurred. The contentious issue here is different and requires consideration of whether the act of employees making an agreement under s.182 also has the effect of settling all issues between bargaining representatives under s.266(1)(c) of the FW Act. The Federal Court did not address this issue in *Dorevitch* and the only consideration of this

particular issue appears to be in *obiter* by a Full Bench in *Re Dorevitch Pathology Workplace Determination* [2018] FWCFB 5778 (*Re Dorevitch*). [10]

[87] Regarding the Full Bench's obiter in that case, as set out above, we consider that the observation in that matter was made in circumstances entirely different to this case. The parties in *Dorevitch* were not at odds with one another as to whether the matters that were at issue during bargaining had been settled, and the Full Bench had not had the benefit of full argument on this point. The Full Bench's observation in *Re Dorevitch*, now relied upon by ARTC, was made as part of the consideration of matters arising under s 275 of the FW Act including, pursuant to s 275 (f), the extent to which specific conduct of bargaining representatives was reasonable.[11]

[88] Accordingly, we do not consider that we are bound to follow the obiter in *Re Dorevitch* on whether making of an enterprise agreement under s.182(1) of the FW Act renders matters in dispute during bargaining "*settled*" for the purposes of s.266.

[89] We also consider that s266(1)(c) needs to be considered within the context of the entire bargaining regime under the FW Act.

[90] When ARTC successfully applied to terminate protected industrial action in relation to bargaining for the proposed 2023 Agreement, the members of the RTBU and ASU lost the ability to take any further protected industrial action in support of their positions. Further, if a workplace determination is made, the RTBU and ASU will not have the ability to take protected industrial action if ARTC commences negotiations for a new enterprise agreement, until after the nominal expiry date of the workplace determination. This arises because of the restriction in s.417(1)(b) of the FW Act. Given a new enterprise agreement will displace the workplace determination immediately when it commences operating, this is a substantial limitation for the unions.

[91] Therefore, if ARTC and the workforce wish, they will be immediately able to commence negotiations for a new enterprise agreement to replace the workplace determination. The RTBU and the ASU will not have access to protected industrial action during the negotiations. The unions will have access to the scope order jurisdiction in relation to this bargaining. The good faith bargaining requirements will apply, but bargaining orders will only be accessible from either 90 days prior to the nominal expiry date of the workplace determination, or when ARTC requests employees to vote on a proposed agreement. In our view, these outcomes provide balance between the interests of the parties and can be described as the bargaining and determination provisions of the FW Act operating harmoniously.

Interaction rules

[92] We consider the instrument interaction rules in s.278 of the FW Act are consistent with the interpretation of s.266(1)(c) which we have determined above.

[93] Section 278 of the FW Act reads:[12]

> **"Interaction of a workplace determination with enterprise agreements etc.**
>
> Interaction with an earlier enterprise agreement

(1A) If:

(a) an enterprise agreement applies to an employee in relation to particular employment; and

(b) a workplace determination that covers the employee in relation to the same employment comes into operation;

the enterprise agreement ceases to apply to the employee in relation to that employment, and can never so apply again.

Interaction with a later enterprise agreement

(1) If:

(a) a workplace determination applies to an employee in relation to particular employment; and

(b) an enterprise agreement that covers the employee in relation to the same employment comes into operation;

the determination ceases to apply to the employee in relation to that employment, and can never so apply again.

Interaction with another workplace determination

(2) If:

(a) a workplace determination (the earlier determination) applies to an employee in relation to particular employment; and

(b) another workplace determination (the later determination) that covers the employee in relation to the same employment comes into operation;

the earlier determination ceases to apply to the employee in relation to that employment when the later determination comes into operation, and can never so apply again."

[94] It is clear from the wording in s.278(1A) that the FW Act intends to permit a workplace determination to operate to the exclusion of a previous enterprise agreement, even if the previous enterprise agreement has not nominally expired. We did not find ARTC's submissions to the contrary to be persuasive and do not consider the language in s.278(1A) to be ambiguous.

[95] It is also clear that s.278(1) is intended to permit a later enterprise agreement to operate to the exclusion of a workplace determination, even if the workplace determination has not nominally expired. Counsel for the RTBU and ASU accepted that this was correct during the hearing.

[96] We read these provisions as meaning that a workplace determination in this matter would replace the 2023 Agreement. Equally, a new enterprise agreement "made" after any workplace determination commences operating will displace the workplace determination. The industrial merits of these arrangements may be debatable, but we consider that the wording of s.278 is clear in terms of how the FW Act intends the various instruments to interact. We consider the instrument interaction rules demonstrate contemplation of the potential for a workplace determination to override an enterprise agreement that has not nominally expired, and that this outcome has been deliberately permitted under the FW Act.

Purpose and object of the provisions

[97] As we have set out at [58] to [59] above and per s.15AA of the *Acts Interpretation Act* and s.40A of the FW Act, the Commission is to employ an approach to legislative construction that promotes the purposes or objects that are consistent with those prescribed by the FW Act, over a construction that does not promote those purposes or objects.

[98] The RTBU and ASU submitted, and we accept, that a "*bargaining period*" and a "*negotiation period*" are two distinct creatures of the legislation and accordingly provide different roles for bargaining representatives. The Unions submitted that the Termination of Industrial Action Instrument both diminished employees' powers in bargaining by the limitation on industrial action in one sense, and in another sense, enhanced those powers by way of providing bargaining representatives the ability to agree or not agree on matters in contest and to have the remaining dispute arbitrated by the Commission. The Unions posited that the scheme under the FW Act is "*fundamentally concerned with balancing rights and obligations*" and contended that a construction that did not recognise the imbalance between the employer and employees' positions would not be purposively supported.

[99] The ARTC submitted that the alternative reading of these sections is consistent with the identified purposes of the FW Act, relevantly the stated object at s.3(f): "*achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action*". The ARTC submitted that this purpose of the FW Act was enacted by a framework that "*enables collective bargaining in good faith, particularly at the enterprise level*" at s.171(1)(a) with the Commission in the role of facilitator at s.171(1)(b). We note that s. 171 is the object of Part 2-4 of the FW Act, and not Part 2-5, where s.266 resides.

[100] In our view, the interpretation urged by the RTBU and ASU is consistent with the overarching object of the FW Act to provide a "*balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians [including] by … achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action".* A balanced framework with an emphasis on collective bargaining underpinned by good faith bargaining obligations and clear rules governing industrial action does not tell against an interpretation of s 266(1)(c) that establishes a mechanism for arbitration, following the termination of industrial action, where the bargaining representatives, duly appointed by employees as part of the collective bargaining process, have not been able to settle all matters in that good faith bargaining. We consider that the bargaining process between the bargaining representatives is brought to an end by the making of an order terminating industrial action and, as submitted by the RTBU and the ASU, the FW Act seeks to balance the diminished powers for employees by way of providing bargaining representatives the ability to agree or not agree to matters of contest and to have the remaining dispute moderated by the Fair Work Commission. We accept this submission and consider that the interpretation proposed by the RTBU and ASU best achieves the purposes of the FW Act. Per *Advantaged Care*, s.15AA of the *Acts Interpretation* Act requires the FW Act to be construed in light of its purpose, and not to rewrite it. We consider that the ARTC's preferred construction would effectively require the Commission to rewrite s.266(1)(c) by removing all references to bargaining representatives.

[101] While ARTC referred to the objects of Part 2-4 of the FW Act and particularly the reference to "*enterprise-level collective bargaining*" and a further reference to bargaining "*at the enterprise level*", we do not consider these objects to be determinative given s.266 is located in Part 2-5 of the FW Act which is directed at workplace determinations. Part 2-5 of the FW Act is directed at the Commission's role in resolving intractable bargaining disputes and making determinations where protected industrial action has been terminated. The role of determinations is to operate in a situation where enterprise level collective bargaining has been occurring but has hit a roadblock of sufficient significance that the intervention of the Commission is required (including the suspension or termination of industrial action causing significant damage to the Australian economy, endangering life, personal health or welfare of the population or part of it, or where bargaining has become intractable). This does not detract from the objects of the FW Act to achieve productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

Absurd, odd or unjust outcomes

[102] ARTC's submissions focused heavily on perceived odd, absurd, or unjust outcomes if the bargaining representatives for an agreement can subsequently approach the Commission for a determination altering the terms approved by the relevant employees in accordance with s.182 of the FW Act.

[103] As per the Full Bench in *Advantaged Care*:

> "It is, of course, permissible to approach the interpretation of legislation by taking into account the consequences of giving a particular meaning to an Act. As noted by Pearce, 'interpretation by reference to consequences is essentially a shorthand version of the purposive approach to interpretation.' Characterising a possible interpretation as 'extraordinary', 'capricious', 'irrational' or 'obscure' is to say, in effect, that the legislature cannot have intended such a meaning.
>
> But there are limits to such an approach. If the text does not permit an alternative construction then reliance on unsatisfactory consequences is unlikely to be productive. In circumstances where the text, context and purpose support the adoption of a particular interpretation it is a serious step to reject that interpretation on the basis that it could produce an anomalous or undesirable result."
>
> As Campbell J observed in *Ganter v Whalland*:
>
> "an anomaly arising from what, on all other tests of construction, is the correct construction of legislation, must be a very serious one, before the court is justified in using that anomaly as a reason for rejecting what otherwise seems the correct construction. Were courts to act otherwise, they would risk taking over the function of making policy choices which properly belongs to the legislature."[13]

[104] The construction that we have favoured may, in some limited circumstances, including after the termination instrument was made, lead to the Commission issuing a determination when an enterprise agreement has been made by employees and approved by the Commission. We do not consider that this outcome could be said to justify a finding that the legislature cannot have intended the meaning of s 266(1) that we prefer.

[105] Using this case as an example, following the conclusion of the post-industrial action negotiating period, the Commission, the independent statutory tribunal, is granted the power to potentially make a determination displacing the terms of the 2023 Agreement to "deal with the matters that were still at issue at the end of the post-industrial action negotiating period". It must do so by taking into account the matters specified in s.275 of the FW Act. One of these is "the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees."[14] This in effect is a statutory direction to take the 2023 Agreement into account when making the determination. Another safeguard to prevent an absurd, odd or unjust outcome is the requirement that the Commission must also, pursuant to s 267(2), include in a determination any terms that the bargaining representatives for the proposed agreement had agreed, at the end of the post-industrial action negotiating period, should be included in an agreement.

[106] While it may be considered undemocratic to allow a decision of the Commission to override the terms of the 2023 Agreement that the relevant employees voted to approve, the Commission is granted significant power under the FW Act to set terms and conditions of employment. This is most obviously the case with modern awards. It is also the case with

enterprise agreements, which only take legal effect if approved by the Commission.[15] This in effect means that the Commission can override a vote in favour of an agreement by deciding not to approve the agreement if the requirements of 186 and 187 are not met. The Commission can also order that protected industrial action that has been approved by a vote of relevant employees following the making of a protected action ballot order is suspended or terminated. This is another example of the wishes of a majority of a cohort of employees being impacted by the Commission exercising its statutory functions.[16] The Commission can also override the wishes of a majority of employees who have indicated they wish to bargain for an enterprise agreement by declining to make a majority support determination, if the Commission does not consider making a determination is reasonable in all the circumstances.[17]

[107] The provisions identified above demonstrate that the outcome of a voting process can be overruled by the Commission in a range of circumstances under the FW Act. Given this statutory context, we do not consider it is absurd, odd or unjust for this to be able to also happen by the making of an industrial-action related workplace determination.

[108] When all these factors are considered, we do not consider that the RTBU and ASU's proposed construction results in particularly problematic or imbalanced industrial outcomes. The ARTC, RTBU and ASU (and the other employee bargaining representatives) will have an opportunity to argue for different conditions to those appearing in the 2023 Agreement via a workplace determination. As counsel for ARTC accepted during the hearing, this is not akin to a right of "veto" over the terms. It is an opportunity to argue before the Commission about what should be included in the determination based on the factors identified in s.275 of the FW Act. All parties will have precisely the same opportunity in these proceedings. Further, the terms of the 2023 Agreement must be taken into account by the Commission when considering what terms should be included in the determination.

[109] We also consider it is relevant that a termination of industrial action order naturally involves the Commission intervening in the bargaining process between employers, bargaining representatives and employees. Employees do not get a vote about whether a termination order should be made. That is the case despite a consequence of the order ordinarily being that a workplace determination will follow that will set their minimum conditions of employment. This is a substantial intervention from the Commission, that is only made where protected action will generate significant risks to the economy or the public. This intervention is a substantial departure from how bargaining normally progresses. It is unsurprising that this intervention and departure leads to quite a different process and outcome than arises for the resolution of bargaining claims by "*making*" an agreement under s182(1) of the FW Act.

[110] This case has raised a unique legal point that has not previously been considered. We suspect that this is because the circumstances in which an employer will be able to have an agreement successfully voted up after the making of a termination of industrial action instrument are likely to be few and far between. The circumstances of this case are unusual in that the blue-collar workforce appears to be significantly more unionised than the white-collar workforce and appears to have different priorities in bargaining. The differences between the two cohorts have generated significant litigation over the years.

Conclusion

[111] We do not consider that the "*making*" of the 2023 Agreement had the effect of "*settling all matters that were at issue between the bargaining representatives during bargaining*" for the purposes of s.266(1)(c) of the FW Act.

[112] As a result, we determine that the Commission must proceed to make a workplace determination and ARTC's jurisdictional objection is dismissed.

DEPUTY PRESIDENT

Appearances:

L Saunders of Counsel for the Applicants
F Parry KC of Counsel and *L Howard* of Counsel for the Respondent

Hearing details:

2023.
Sydney
October 24.

Printed by authority of the Commonwealth Government Printer

<PR772393>

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[1] *Advantaged Care Pty Ltd v Health Services Union* [2021] FWCFB 453 (‘***Advantaged Care’***) [22].

[2] *Advantaged Care* [23].

[3] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited* [2020] FCAFC 205 per Rares and Colvin JJ at [30] to [35].

[4] *ARTC v RTBU & Ors* [2023] FWC 1636.

[5] Section 266(3) of the FW Act.

[6] Section 182(1) of the FW Act.

[7] Attachment MB-16 to the statement of Merrilyn Beer, Exhibit R1.

[8] RTBU and ASU submissions dated 11 September 2023 at [20] to [40].

[9] Attachment TW3 to Mr Warnes' statement, Exhibit A1.

[10] *Dorevitch* at [82]

[11] *Re Dorevitch Pathology Workplace Determination* [2018] FWCFB 5778 [82(6)].

[12] This subsection was inserted in accordance with Schedule 4 of the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* and took effect on 1 July 2023. It was operating when the Termination of Industrial Action Instrument was made and when the 2023 Agreement was made and approved.

[13] *Advantaged Care* [56]-[67].

[14] Section 275(ca) of the FW Act.

[15] Section 54(1) of the FW Act.

[16] Section 424 of the FW Act.

[17] Section 237(2)(d) of the FW Act.