DECISION

Fair Work Act 2009
s.604—Appeal of decision

Qube Logistics (Rail) Pty Ltd t/a Qube Logistics
v
Australian Rail, Tram and Bus Industry Union
(C2024/3262)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT DOBSON

SYDNEY, 2 AUGUST 2024

Appeal against decision [2024] FWCA 616 of Deputy President Cross at Sydney on 1 May 2024 in matter number AG2023/2561.

Introduction

[1] Qube Logistics (Rail) Pty Ltd (Qube) has lodged an appeal, for which permission is required, against a decision of Deputy President Cross issued on 1 May 2024.[1] The decision concerned an application made by Qube for the variation of two enterprise agreements, the *QUBE Logistics (Rail) Train Crew and RTBU NSW Enterprise Agreement 2015* (2015 Agreement) and the agreement which replaced it, the *QUBE Logistics (Rail) Train Crew NSW Enterprise Agreement 2019* (2019 Agreement), pursuant to s 217 of the *Fair Work Act 2009* (Cth) (FW Act). Section 217 provides:

> **217 Variation of an enterprise agreement to remove an ambiguity or uncertainty**
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> (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.

[2] Most of the provisions of the Agreements relevant to Qube's application have the same numbering and are in identical terms, so they may be referred to conjointly. Firstly, clause 2 of each agreement provides that the agreement covers Qube and all its employees who are employed within New South Wales in any classification set out in the agreement. Secondly, clauses 4.1–4.3 provide:

> **4. Relationship to Parent Award and NES**

[1] [2024] FWCA 616.

> 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.
>
> . . .

[3] Clause 5 of the Agreements provides:

> **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

[4] The classification structure under the Agreements is set out in clause 27. Clause 29 provides for hourly rates of pay for each classification in tabular format. In the 2015 Agreement, clause 29 provides, for each classification, three types of hourly rate which are operative from various specified dates: an 'Hour Rate', an 'Overtime Rate' and a 'Casual Rate'. The amounts of the Overtime Rate are 60 per cent higher than the Hour Rate and the amounts of the Casual Rate are 25 per cent higher than the Hour Rate. The quantum of the Overtime Rate reflects clause 30.3, which expressly provides for 'overtime penalty rates of 1.6 standalone'. The expression 'Hour Rate' is not, in terms, defined in the 2015 Agreement, but clause 6.1 contains a definition of 'Hourly Rate' as follows:

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

[5] Clause 6.1 also defines 'Ordinary hours' as follows:

> '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.

[6] In the 2019 Agreement, there are four types of hourly rate specified in clause 29: 'Normal Rate', 'Overtime Rate', 'Casual Rate' and 'Overtime Casual Rate'. The quanta of the Overtime Rate and the Casual Rate are, respectively, 60 per cent (again reflecting the terms of clause 30.3) and 25 per cent higher than the Normal Rate. The Overtime Casual Rate is in each case double the amount of the Normal Rate (presumably reflecting the cumulative application of the 60 per cent overtime loading and the 25 per cent casual loading). The 2019 Agreement contains no definition of 'Normal Rate' but contains, in clause 6.1, the same definition of

'Hourly Rate' as the 2015 Agreement. It also contains a slightly different definition of 'Ordinary Hours':

> "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.

[7] The term 'Duty Cycle' is not defined.

[8] Qube's application sought three variations to each of the Agreements. First, clause 4.2 would be varied to provide:

> 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, 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.

[9] Second, 5.2 would be varied to read:

> 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.

[10] Third, the definition of 'Hourly Rate' in clause 6.1 of each agreement would be replaced with the following:

> 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)

[11] Qube's application sought that each agreement be varied retrospectively from its date of commencement.

[12] The context in which the application was made was that, on 23 June 2023, the Australian Rail, Tram and Bus Industry Union (RTBU), an employee organisation covered by the 2015 Agreement and the 2019 Agreement, instituted proceedings in the Federal Court of Australia claiming that its members employed by Qube had not been paid weekend penalty rates and shift loadings on ordinary time and allowances contained in the *Rail Industry Award 2010*[2] (Award) which were incorporated into each of the Agreements by clause 4.2. Qube's application thus sought to defeat the RTBU's claim by removing the source of the claimed entitlements.

[13] In his decision, the Deputy President first indicated that the application insofar as it sought to vary the 2015 Agreement must be dismissed on the basis that Qube did not have standing to bring the application. In respect of both Agreements, the Deputy President found that there was relevant ambiguity and uncertainty. However, he declined to exercise his

[2] From 29 May 2020, the *Rail Industry Award 2020* [MA000015].

discretion to vary the 2015 Agreement (if he had a valid application to do so before him) or the 2019 Agreement, and dismissed the application in its entirety.

[14] Qube contends in its notice of appeal that the decision was in error, in that the Deputy President's consideration of whether to exercise his discretion miscarried because he failed to consider the central elements of Qube's case or, alternatively, failed to provide adequate reasons for their rejection, and made material errors of fact. It also contends that the Deputy President erred in finding that it did not have standing to bring its application insofar as it related to the 2015 Agreement. It seeks that the Deputy President's decision be quashed and the matter be remitted for rehearing by a different member of the Commission.

[15] The RTBU has filed a notice of contention. It contends that the Deputy President erred in finding that that was ambiguity or uncertainty within the meaning of s 217 of the FW Act in the 2015 Agreement and the 2019 Agreement, that Qube's application should have been dismissed on the basis that no such ambiguity or uncertainty existed, and that the decision under appeal may be affirmed on these grounds.

[16] For the reasons which follow, we have decided to grant permission to appeal and dismiss the appeal. That outcome makes it unnecessary for us to determine the RTBU's notice of contention.

The decision under appeal

[17] The Deputy President began his substantive consideration of Qube's application by noting the non-contentious facts concerning the background to the making of the 2015 Agreement. These were that, prior to the making of the 2015 Agreement, Qube had acquired a number of rail businesses in New South Wales and, as a result of the operation of the transfer of business provisions in the FW Act, became bound by four enterprise agreements[3] which had previously applied to those businesses and their employees (transferred agreements). Each of these transferred agreements provided for a loaded rate payable for all ordinary hours of work incorporating certain penalty rates, shift loadings and, in some cases, allowances. None of the transferred agreements incorporated the Award. In making the 2015 Agreement, the parties attempted to consolidate the terms and conditions derived from the transferred agreements into a single enterprise agreement applying to all of Qube's NSW rail employees. During the operation of the 2015 Agreement, Qube paid the employees covered by it a loaded hourly rate for all ordinary hours worked, and did the same under the 2019 Agreement.[4]

[18] The Deputy President next considered the witness evidence adduced by the parties. Qube's witnesses were Dan Coulton, General Manager – Industrial Relations for Qube, Rodney Rich, a Train Driver with Qube, and Shayne Johnson, also a Train Driver with Qube. Mr Rich and Mr Johnson were involved as representatives of the RTBU in bargaining for the 2015 Agreement. The RTBU's witnesses were Kevin Pryor, a RTBU Organiser, and Peter Matthews, a RTBU Legal Officer. All the witnesses gave their evidence-in-chief by written witness statements and all except Mr Matthews were subject to cross-examination. The Deputy President commenced his consideration of the witness evidence by stating:

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[3] *P&O Trans Australia Train Crew Enterprise Agreement 2009* [AE875052]; *South Spur Rail Services Pty Ltd Employee Collective Agreement 2009* [AC318515]; *Southern and Silverton Railway Pty Ltd Enterprise Agreement 2009* [AC322979]; *Independent Railways of Australia Enterprise Agreement 2011* [AE886152].

[4] [2024] FWCA 616 [18]–[23].

> [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* ([2021] FCA 873, 308 IR 244 at [16]) is salient:
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> > … 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.

[19] The Deputy President then dealt with the evidence given by the individual witnesses in more detail. He found that the 'neither Mr Rich['s] nor Mr Johnson's evidence [in-chief for Qube] withstood the slightest scrutiny' and that their evidence given in cross-examination was supportive of the RTBU's case.[5] The Deputy President also made adverse credit findings against Mr Coulton, including that he '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'.[6] The Deputy President also made some more limited criticism of Mr Pryor's evidence concerning what he told, or did not tell, employees about the negotiation of the 2015 Agreement, but said these 'failures' had limited impact on the question of the common intention of the parties.[7]

[20] In the next part of his decision, the Deputy President set out his findings of fact. He first set out in greater detail the background to the bargaining for the 2015 Agreement, including that on 30 August 2013, the RTBU completed a draft log of claims for the agreement which included a claim for the payment of weekend shift penalties expressed in the following terms: 'Weekend shift penalties Sat 1.5 and Sun 2.0'.[8] This occurred against a background whereby the existing agreements provided for a loaded rate payable for all ordinary hours which compensated for weekend and shift penalties and any allowances not otherwise included.[9] On the basis of Qube's preference for a series of State-based agreements rather than a single national agreement, the agreed process for the bargaining was (as described by the Deputy President) as follows:

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[5] Ibid [28]–[33].

[6] Ibid [34]–[36].

[7] Ibid [37]–[39].

[8] Ibid [47].

[9] Ibid [45].

> [50] …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'.

[21] The Deputy President then made findings concerning a meeting which occurred on 22 January 2014 concerning the Part A 'Common Conditions':

> [53] On 22 January 2014, a high level meeting occurred at the RTBU National Office at Trades Hall in Sydney. Qube [was] 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.

[22] As to subsequent bargaining meetings in the period from 22 January to 24 April 2014, the Deputy President found that the records of these meetings included various references to the RTBU agreeing to remove a claim for weekend and shift penalties, but apparently accepted Mr Pryor's evidence that this was a reference to removing those claims from Part B in respect of the NSW agreement. He further found that, from 24 March 2014, the various drafts of the Part A 'Common Conditions' document exchanged by the parties all contained the clauses in the 2015 Agreement now sought to be varied by Qube, and quoted Mr Coulton's witness statement 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).[10]

[23] The Deputy President found that the draft enterprise agreement provided by the RTBU (which included what became clause 4.2 of the 2015 and 2019 Agreements) was a 'significant departure' from the transferred agreements.[11] He then made findings concerning the process,

[10] Ibid [56].

[11] Ibid [57].

after the Part A 'Common Conditions' were merged with proposed Part B conditions to apply in NSW, by which the 2015 Agreement was made. This involved, in the first instance, Qube requesting employees to vote on a proposed agreement which was not fully supported by the RTBU because of perceived inadequacy in the wage increases. Mr Coulton attended all of Qube's Rail depots to meet with employees and discuss the terms of the proposed agreement, and the Deputy President referred to his evidence 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'.[12] The proposed agreement was voted down in August 2015, as was a second proposed agreement with an improved wage offer in November 2015. Finally, a third proposed agreement was approved by employees on 19 February 2016 and the 2015 Agreement was thereby made.

[24] In respect of the approval process for the 2015 Agreement, the Deputy President found:

> [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.

[25] As to the 2019 Agreement, the Deputy President found that the 2019 Agreement was 'in large part a rollover' of the 2015 Agreement, and that neither the RTBU nor Qube made any claim for any change to clause 4 or the 'Hourly Rate' definition.[13] As to the approval process, the Deputy President found:

> [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.
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> [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.

[26] The Deputy President found that it was in October 2020, shortly after the 2019 Agreement was approved, that Mr Matthews formed the belief that the rates in that agreement were base rates of pay which were subject to penalties and allowances.[14] This has become an issue in bargaining to replace the 2019 Agreement, which has been ongoing since May 2022. The decision records that, on 1 March 2023, in response to a letter from Mr Matthews which outlined good faith bargaining concerns about unilaterally-proposed changes to clause 4.2, Mr Coulton sent an email to Mr Matthews explaining Qube's position. This email stated, among other things:

> 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

[12] Ibid [61].

[13] Ibid [67].

[14] Ibid [70]–[71].

> 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).
> . . .
> 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…

[27] The Deputy President then made findings concerning the process leading to the initiation of the RTBU's underpayment claim in the Federal Court.[15]

[28] The decision then sets out the Deputy President's summary of the parties' submissions. In summarising Qube's submissions, the Deputy President referred to a document it provided entitled 'Qube's "Road map" of propositions and subsidiary findings necessary to find that Qube agreed to pay the Award penalties and loadings' (Road Map submission). This document contained 15 propositions each of which, Qube contended, would have to be accepted for the RTBU's case to be accepted. The Deputy President set out in full each proposition.[16]

[29] In his consideration, the Deputy President first dealt with the issue of Qube's standing to bring an application for variation of the 2015 Agreement. He referred to the Full Bench decision in *Qube Ports Pty Ltd v CFMMEU*[17] which determined that s 217(1)(a) of the FW 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. The Deputy President said that he intended to follow this decision, while noting it was currently subject to an application for judicial review, and dismissed Qube's application insofar as it sought variations to the 2015 Agreement.[18]

[30] In respect of the issue of whether the 2015 and 2019 Agreements were ambiguous or uncertain, the Deputy President found that 'there is an ambiguity or uncertainty arising from the non-application of the terms of the 2015 [Agreement] and the 2019 [Agreement] in the payments made to the employees covered by those agreements'.[19] However, the Deputy President 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', with Qube submitting that 'those provisions do not reflect the common intention or understanding of the parties', and said that 'if the question before me was the proper construction and interpretation of the 2015 [Agreement] and the 2019 [Agreement], a conclusion of ambiguity or uncertainty would not have been available on that basis'.[20]

[31] Having found ambiguity and uncertainty, the Deputy President considered whether he should exercise the discretion under s 217(1) to vary the Agreements as proposed. The Deputy President regarded the common intention of the parties as a significant consideration in the exercise of the discretion and referred to the decisions in *Re Australian and International Pilots*

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[15] Ibid [76]–[81].

[16] Ibid [82].

[17] [2023] FWCFB 102.

[18] [2024] FWCA 616 [95]–[97].

[19] Ibid [104].

[20] Ibid [103]–[104].

Association,[21] *CFMMEU v Specialist People Pty Ltd*[22] and *SDAEA v Woolworths Ltd*[23] in this respect. The Deputy President rejected Qube's submission that it had established that the common understanding and intention of Qube and the RTBU was to preserve the existing operation of the loaded rates without separate penalties, finding that this disregarded:

> (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;
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> (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 [Agreement];
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> (c) The proposed agreement that was subsequently provided to all employees for a vote contained the [] versions of the clauses sought to be varied in the form finally made in the 2015 [Agreement];
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> (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 [Agreement]; and
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> (e) On 10 March 2016, the approval documents for the 2015 [Agreement] 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.[24]

[32] The Deputy President rather found that an objective assessment was that the substantive agreement between the parties was as expressed in the 2015 Agreement.[25] He further found that while it was not known what the majority of employees who voted on the agreement thought was the substantive agreement, it was clear that each agreement voted upon included the form of words which Qube now sought to vary.[26] The Deputy President regarded as irrelevant that Mr Pryor had not 'publicised the significant gains' said to have been achieved in the 2015 Agreement[27] and, on the basis of Mr Matthews' unchallenged evidence, attributed the RTBU's failure to ensure employees were paid the Award penalties and loadings to the difficulty in calculating pay based on timesheets and pay slips.[28] On the bases identified, the Deputy President dismissed Qube's application.

Appeal grounds and submissions

[33] As earlier outlined, grounds 1–3 of Qube's appeal allege that the Deputy President failed to consider, or failed to give adequate reasons for rejecting, its Road Map submission and its written and oral submissions to the effect that Mr Pryor's evidence should not be accepted. Qube submitted in relation to these appeal grounds that its factual case below had two key

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[21] [2007] AIRC 303, 162 IR 121 [17].

[22] [2019] FWCFB 6307 [42].

[23] [2006] FCA 616, 151 FCR 513, 152 IR 95 [31].

[24] [2024] FWCA 616 [109].

[25] Ibid [110].

[26] Ibid [112].

[27] Ibid [114].

[28] Ibid [115]–[117].

planks: first, that the objective facts made the RTBU's assertion that Qube had agreed to pay the ordinary-time penalty rates, shift loadings and allowances in the Award (Award penalties) implausible and demonstrated that the converse was true; and, second, that Mr Pryor's evidence for the RTBU should be disbelieved because he had 'repeatedly lied and obfuscated'. It was submitted that, before the Deputy President could find that Qube agreed to pay the Award penalties, he needed to grapple with each of the propositions in the Road Map submission and find that it was not implausible or that it was not necessary to find the asserted agreement to pay the Award penalties. However, although the Deputy President recited the propositions, he had not dealt with them apart from touching on two of them, namely why Mr Pryor did not tell RTBU members of his 'supposed big win' in getting Qube to agree to pay the Award penalties and why he did not complain about Qube not paying the Award penalties. In respect of Qube's attack on Mr Pryor's credibility, it was likewise submitted that this was not dealt with either except in the same two respects. The Deputy President therefore either erred by failing to consider and take into account clearly articulated, significant, and centrally relevant submissions or by failing to detail the extent to which parties' submissions had been understood, accepted or rejected and to articulate the essential grounds for reaching a decision and address material questions of fact in a manner disclosing the steps that led to a particular result.

[34] By ground 4 of the appeal, Qube contends that the Deputy President's finding that the RTBU failed to inform its members about Qube's supposed agreement to pay Award penalties was because it was seeking to 'downplay achievements', and that Mr Pryor could not discern that Qube was not paying Award penalties from the pay slips, was contrary to the evidence. Further, it contends that the Deputy President's finding that Qube agreed to pay the Award penalties was glaringly improbable and contrary to compelling inferences in the case because it was implausible when measured against the following objective facts:

- If the rates in the 2015 Agreement were not loaded, that would be an implausible industrial bargain given that the rates were higher than all the loaded rates in the four transferred agreements previously applying. The payment of the Award penalties would represent an additional pay increase of over 20 per cent.

- It was inherently unlikely that Qube would have agreed to pay the Award penalties by a sidewind through an Award incorporation clause, without even seeing the text of the clause, and at the very first high-level meeting, without its lead negotiator (Mr Coulton) present and before even receiving a log of claims.

- The subsequent conduct of the parties during bargaining would be implausible if Qube had, from the beginning, agreed to pay the Award penalties. This included: Qube's rejection and the RTBU's withdrawal of its claim for weekend penalties; the RTBU's failure to communicate its 'supposed big win' to its members; Qube failing to communicate the supposed agreement to pay the Award penalties when trying to 'spruik' the 2015 Agreement at three separate votes; Qube and the RTBU continuing to negotiate over small differences in increases to the rates over two years; and Qube modelling the remuneration under iterations of the 2015 Agreement on the basis of loaded rates.

- The post-approval conduct of the parties, including: the RTBU agreeing to an enterprise agreement with Qube for Victoria which contained expressly loaded rates which were the same as those in the 2015 Agreement; Qube failing to pay the Award penalties; the failure of employees to query the non-payment of the

> Award penalties, and the failure of Mr Pryor to ensure that Qube was paying the Award penalties.

[35] Qube further submitted that the evidence of its supposed agreement to pay the Award penalties came from Mr Pryor, a 'hopeless witness who lied and obfuscated throughout this evidence', and provided examples of this. It also submitted that there are strong textual indications in the 2015 Agreement pointing to the rates of pay being loaded supporting the proposition that the parties intended loaded rates. For these reasons, it was submitted, the Deputy President's finding accepting Mr Pryor's account of the 22 January 2014 meeting was unsustainable and, once that account is rejected, the objective facts point to there being no agreement to pay the Award penalties and to a common mutual intention that the rates in the 2015 Agreement, and therefore the 2019 Agreement, would be loaded.

[36] By its fifth appeal ground, Qube challenges the Deputy President's finding that Qube did not have standing to apply to vary the 2015 Agreement. However, Qube accepted that the Commission would follow *Qube Ports Pty Ltd v CFMMEU* unless and until it was overturned by the Federal Court, and on that basis ground 5 was only formally pressed.

[37] The RTBU submitted, in response to appeal grounds 1–3, that it did not matter that the Deputy President did not deal discretely with each of the propositions in Qube's Road Map submission or address each of the matters which Qube asserted undermined Mr Pryor's credibility, since he was not required to do so. It submitted that the Deputy President, as a matter of substance, resolved the central argument raised by Qube: he rejected its factual case and accepted the RTBU's factual case. He was not required to descend into each of the various matters relied upon by Qube to contend he should find in its favour. Further, the RTBU submitted that any failure to consider a substantial argument would only constitute jurisdictional error if the failure was 'material' in the sense that it deprived Qube of a realistic possibility of a successful outcome. Any failure to consider the Road Map submission or the submissions as to Mr Pryor's credibility was not material because the Deputy President's acceptance of Mr Pryor's evidence about the agreement reached on 22 January 2014 meant that the premise of Qube's case fell away. Further, it was submitted, these submissions were not 'relevant considerations' in the sense described in *House v The King*.[29] In respect of the alleged inadequacy of reasons, the RTBU submitted that the Deputy President was not required to set out his responses to each and every aspect of the Road Map submission or the submissions concerning Mr Pryor's credibility. Rather, he was required to articulate the essential grounds on which his decision not to exercise the discretion under s 217 to vary the Agreements rested, and he did so in [109]–[117], having made factual findings and assessed the credibility of the witnesses.

[38] As to appeal ground 4, the RTBU submitted that the critical factual finding made by the Deputy President was that, at the meeting on 22 January 2014, Mr Pryor had agreed with Mr Owens that the proposed clause 4 of the agreement being negotiated would incorporate the Award and provide for the payment of shift penalties and loadings — which agreement was subsequently reflected in draft versions of the proposed agreement circulated from 24 March 2014. It submitted that the Deputy President's findings were made having seen and heard the witnesses give evidence, and his factual findings were affected by his impressions about their credibility and reliability. Those factual findings should not be overturned unless they are glaringly improbable or contrary to compelling inferences. The RTBU submitted that Qube's

[29] [1936] HCA 40, 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ).

submissions disregarded that Mr Pryor's evidence about the bargaining for the 2015 Agreement was supported by significant objective facts and contemporaneous documents, and that Qube also ignored the evidence of its own witness Mr Rich which was contrary to its case and the problematic aspects of Mr Coulton's evidence. It concluded that there was nothing improbable about the agreement reached and that Qube had not satisfied the high threshold required to controvert the Deputy President's factual findings adverse to its case.

[39] The RTBU submitted that appeal ground 5 should be dismissed because no attempt had been made to contend that *Qube Ports Pty Ltd v CFMMEU* was incorrectly decided.

Notice of contention

[40] The RTBU submitted that the Deputy President's observation that there was no issue between the parties about the interpretation of the clauses of the 2015 and 2019 Agreements which Qube sought to vary necessarily meant that his finding that the relevant provisions of the Agreements are ambiguous and uncertain was in error. His conclusion that ambiguity or uncertainty arose from non-application of the impugned terms to payments made to the employees was misplaced, since ambiguity does not arise merely because an agreement term is capable of being applied in more than one way. It was submitted that, to the extent that 'common intention' or 'mutual intention' were relevant in ascertaining ambiguity or uncertainty, this must focus on the objective common intention of Qube and the employee voting group, which was to be ascertained by considering the text of the Agreements and how they would reasonably have been understood. The purport of clauses 4, 5.2 and the definition of 'Hourly Rate' in clause 6.1 of the Agreements is pellucidly clear, and there was no evidence that employees were ever told that the rates in the Agreements were loaded rates.

[41] Qube submitted that the Deputy President's conclusion that the Agreements were ambiguous or uncertain as to whether they contained loaded rates was plainly correct. It is sufficient for a finding of ambiguity that there are alternative arguable constructions of the Agreements. It was submitted that the Agreements contain provisions that point to the rates being loaded (or against them being not loaded), including that:

- the Agreements provide for a single flat rate to be paid for 76 hours per fortnight, averaged over the roster cycle, regardless of when they are worked and without specifying any different rates for ordinary time that would apply depending on the time of day and day of the week;
- the Agreements expressly set out the hourly rates for overtime and casual work as dollar amounts for ease of reference, but do not similarly specify the rates applicable when shift loading and weekend penalties apply, suggesting that it is not contemplated that they are payable;
- clause 32.4 provides for employees required to sign on during a rostered day off to be paid at normal time, regardless of the time of day, again suggesting that the Award penalties do not apply;
- the 60 per cent overtime rate prescribed by the Agreements is lower than the Sunday penalty rate prescribed by the Award for ordinary time, which leads to an absurd outcome if the Award weekend penalty rates apply and overtime is worked on a Sunday since the rate of pay would reduce once overtime commenced; and
- the same issue arises under clauses 35.3, 34.2(a) and 39.4, which deal with payments outside of a rostered shift at the overtime rate.

[42] Qube further submitted that the context in which the 2015 Agreement was made gives rise to ambiguity and uncertainty. If it were found that there was a common understanding that the rates were intended to be loaded rates, or that Qube did not agree to pay the Award penalties on top of the agreement rates, there would be ambiguity and uncertainty on that issue. Ambiguity and uncertainty also arose because the predecessor transferred agreements contained loaded rates, the employees were never told that the 2015 Agreement departed from that position when they voted upon it, and for seven years afterwards the employees made no complaint about not receiving the Award penalties.

Permission to appeal

[43] We have decided to grant permission to appeal because the subject matter of the proceedings below is clearly of significant importance to the parties and is such as to justify appellate review of the decision under appeal.

Consideration of the appeal grounds

[44] Qube, as the applicant for the proposed variations to the 2015 and 2019 Agreements in the proceedings below, carried the burden of persuasion. That meant that it was for Qube to persuade the Commission that the requisite ambiguity or uncertainty existed and that the discretion should be exercised in its favour. The usual basis for the exercise of the discretion to vary an agreement under s 217, once ambiguity or uncertainty is established, is that the variations would resolve the identified ambiguity or uncertainty in a way which gives effect to the common intention or substantive agreement of the makers of the agreement in question. This principle has been expressed in two decisions that were referred to by the Deputy President. The first is a decision of the Australian Industrial Relations Commission (AIRC) concerning the equivalent provision to s 217 in the *Workplace Relations Act 1996* (Cth). In *Re Australian and International Pilots Association*,[30] the AIRC said:

> [17] 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. It is not appropriate to rewrite an agreement or install something that was not inherent to the agreement when it was made. 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. 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.
>
> [18] The task of identifying the objectively ascertained mutual intention of the parties does not depend on evidence of what each party says they intended. It is a more confined task. …
>
> (footnotes omitted)

[30] [2007] AIRC 303, 162 IR 121.

[45] In *CFMMEU v Specialist People Pty Ltd*,[31] a Full Bench of this Commission said in relation to the exercise of the discretion under s 217:

> 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.[32]

[46] The authorities make it clear that, for the purpose of the exercise of the discretion under s 217 and its predecessor statutory provisions, the common intention of the parties (if any) must be ascertained objectively. This was discussed in greater detail in the recent decision of the Commission (Bell DP) in *Application by Monash University*[33] (affirmed on appeal[34]). In this decision, the Deputy President discussed the distinction between the search for the *imputed* common intention of the parties in construing a legal instrument and that for the *actual* common intention in an action for rectification of a contract. In the latter respect, the Deputy President referred to the following passage in the judgment of Kiefel J in *Simic v New South Wales Land and Housing Corporation*:[35]

> What is necessary to be shown is the actual intention of each of the parties. This has often been referred to by intermediate appellate courts as the subjective intention of the parties. A court, in determining whether the burden of proof is discharged, may be said to view the evidence of intention objectively, in the sense that it does not merely accept what a party says was in his or her mind, but instead considers and weighs admissible evidence probative of intention. It is in this sense that statements such as that of Hodgson J in *Bush v National Australia Bank Ltd* [(1992) 35 NSWLR 390, 406], that common continuing intention 'must be objectively apparent from the words or actions' of each party, may be understood.

[47] The Deputy President went on to say:

> [143] So far as earlier authorities regarding the statutory predecessors of s.217 are concerned, such as *Tenix*, they identify the requirement for an 'objectively' determined common intention. I would approach that task 'in the sense' described by Kiefel J above, namely as a search for actual mutual intention through a prism of considering and weighing the admissible evidence probative of actual intention.
>
> [144] If it were otherwise, then it would appear that the task of finding common intention in an enterprise agreement is essentially one of construction, albeit (perhaps) against a slightly expanded set of evidence from which the parties' imputed intention is determined.
>
> [145] 'Common intention' — however approached — for the purposes of an enterprise agreement is not lightly found. As Justice Gray stated in *Australian Liquor, Hospitality and Miscellaneous Workers Union v Prestige Property Services Pty Ltd* (2006) 149 FCR 209, '[c]are must be taken, however, to distinguish a common understanding from common inadvertence' and that '[t]here can be no meeting of minds, no consensus, if no-one has thought about the issue.'

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[31] [2019] FWCFB 6307.

[32] Ibid [42].

[33] [2023] FWC 1148.

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

[35] [2016] HCA 47, 260 CLR 85 [42].

> . . .
> [147] His Honour observed that, in addition to 'inadvertence' that might otherwise explain a past practice, there might also be instances involving 'an act of generosity on the part of the [employer], from which it has now resiled.' The observations of Gray J have been endorsed by Full Court decisions. To the list of 'inadvertence' and 'generosity', I would perhaps add guarded disagreement. Disputes about the operation of provisions of enterprise agreements are often resolved on a situational basis without the parties reaching agreement about the substantive future operation of the provision. The fact that the (disputed) provision of the enterprise agreement is then restated without amendment in a subsequent enterprise agreement does not indicate a common intention — it may indicate no more than an 'agreement to disagree' in the interests of industrial peace at that point in time.
>
> (citations omitted)

[48] We agree with the Deputy President's observations, with the qualification that the 'words or actions' of parties relevant to ascertaining common intention will include the text of the relevant provisions in the agreement which was ultimately made.

[49] There is some difficulty in readily applying the notion of ascertaining the common intention of 'parties' in relation to non-greenfields enterprise agreements made under the FW Act. As the Federal Court Full Court observed in *Toyota Motor Corporation Australia Ltd v Marmara*,[36] an enterprise agreement 'is an agreement in name only' and is 'made' by the employer and 'the employees who are employed at the time the agreement is made and who will be covered by the agreement' (s 172(2) of the FW Act).[37] In *CFMMEU v Specialist People*, the Full Bench said:

> … Although there are no 'parties' per se to enterprise agreements made under Part 2-4 of the FW Act, any concept of mutual objective intention that might inform the proper interpretation of an agreement would need to take into account the intention or understanding of employees, who after all are those who make the agreement when by majority they approve it under s 182.[38]

[50] As was pointed out in *Monash University*, it is challenging to ascertain the intention of the relevant employees given that it is not necessary that all employees vote and it will often be unknown how particular employees voted, let alone how employees affected by a particular clause might have voted or considered that clause.[39] However, we consider that it is at least relevant to have regard to the terms of the agreement upon which the employees voted and any explanation given to them as to those terms prior to the vote, whether by the employer pursuant to s 180(5) of the FW Act or otherwise. Further, it will usually be appropriate to take into account the words and conduct of bargaining representatives of employees during the bargaining process for the agreement — particularly where, as here, there is only one bargaining representative which represents the large majority of employees covered by the agreement.

[51] While giving effect to the common intention or substantive agreement of the parties to resolve ambiguity or uncertainty is the usual basis upon which the discretion in s 217 is exercised, it is not necessarily the only basis for the exercise of the discretion. However, Qube's originating application made it clear that, in respect of the exercise of the discretion under s 217, it contended that Qube and the RTBU had a 'mutual common intention' that the rates of pay in

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[36] [2014] FCAFC 84, 222 FCR 152, 244 IR 335.

[37] Ibid [88].

[38] [2019] FWCFB 6307 [49].

[39] [2023] FWC 1148 [148].

the 2015 Agreement were loaded rates and that the Award penalties were not payable in addition thereto, and that this mutual intention subsisted at the time when the 2019 Agreement was made. Qube's written submissions below likewise make it apparent that its case stood or fell on the existence of a common intention for the 2015 Agreement to operate on the basis of a loaded rate for ordinary time which was inclusive of weekend penalties, shift loadings and allowances:

> … It is Qube's case that:
>
> (a) the terms of the objectively ascertained 'substantive agreement' reached between Qube and the RTBU were crystal clear;
>
> (b) the terms of the 'substantive agreement' that employees objectively thought they were voting on, were also crystal clear; but
>
> (c) as is common with many variation applications involving ambiguity or uncertainty, the 'substantive agreement … was ambiguously or uncertainly reduced to writing' through the inclusion of clause 4 of those agreements, dealing with the relationship between the agreements and the Award and the NES.

[52] The first of the variations to the Agreements sought by Qube in its application would entirely remove the second sentence of clause 4.2, which expressly provides that the loadings, penalties and allowances in the Award apply to the rates of pay in the Agreements, and would add words which would have an effect entirely the opposite of what the second sentence plainly says. To persuade the Commission to exercise its discretion to make such a variation, it would be necessary to establish the existence of a common intention on the part of Qube, the RTBU and the relevant employees, demonstrated by their words and actions, that clause 4.2 was to have an effect directly contrary to its plainly-expressed terms. That would obviously be a difficult task absent very clear evidence of such a common intention. The further variations sought by Qube seek to buttress this first variation and present a similar level of difficulty. For example, the proposed variation to the definition of 'Hourly Rate' in clause 6.1 would add the Award penalties as matters included in that rate in circumstances where the existing text provides only that the annual leave loading was included.

[53] We will turn to Qube's specific grounds of appeal shortly. However, it is necessary to observe at the outset that the evidence of the contemporaneous documents and the evidence otherwise not in dispute concerning the words and actions of Qube, the RTBU and the employees in relation to the bargaining for and the making of the 2015 Agreement provide no identifiable positive support for the proposition that there was a common intention that the Award penalties were not to apply to the hourly rates in the agreements. Indeed, the evidence favours the contrary proposition. The key elements of this evidence were as follows.

[54] *First*, it is not in dispute that the bargaining proceeded against the background of the terms of the four transferred agreements, which provided for loaded rates of pay. None of those agreements contained any provision incorporating the terms of the Award, three of them excluded the operation of awards (using varying terminology),[40] and they all contained provisions which expressly identified the rates as incorporating payment for certain penalties

[40] *P&O Trans Australia Train Crew Enterprise Agreement 2009* [AE875052] clause 4.1; *South Spur Rail Services Pty Ltd Employee Collective Agreement 2009* [AC318515] clause 4.1; *Southern and Silverton Railway Pty Ltd Enterprise Agreement 2009* [AC322979] clause 4.1.

and allowances.[41] The terms of the 2015 Agreement represent a clear departure from this position: clause 4.1 incorporates the terms of the Award (except for its award flexibility and facilitative provisions clauses), clause 4.2 specifically refers to the application of Award loadings, penalties and allowances to the rates in the agreement, and there is no provision stating in any way that the 'Hour Rates' in clause 29 are loaded rates (other than in respect of annual leave loading).

[55] *Second*, the RTBU's 'Qube NSW Log of Claims' of 30 August 2013, which was endorsed by the RTBU's NSW members in October 2013, included a specific claim for the payment of penalty rates on weekends: 'Weekend shift penalties Sat 1.5 and Sun 2.0'. A spreadsheet comparing the claims for NSW and Victoria prepared by the RTBU on 6 December 2013 showed a NSW claim for 'Weekend shift penalties' and a Victorian claim for 'Shift penalties plus weekend shift penalties'.[42] This represented a clear intention on the part of the RTBU to depart from the position prevailing in NSW under the four transferred agreements. This log of claims was provided to Qube by the RTBU (although when this occurred is unclear) and formed part of the subject matter of the bargaining.

[56] *Third*, there is no dispute that the parties ultimately adopted Qube's position that there should be separate State-based agreements which consisted of a 'Part A' containing common national conditions and a 'Part B' containing State-specific conditions. An email from Mr Coulton to the RTBU dated 29 October 2013 disclosed Qube's intention as to how this would work:

> [With] respect to [] standardised [national] 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.[43]
>
> (underlining added)

[57] This letter discloses that Qube intended that it would be the common national conditions in Part A which would deal with the issue of penalty rates. Subsequent events show that clause 4 in its final form was developed as part of the Part A conditions.

[58] *Fourth*, the National Office of the RTBU had developed at or by the time of the commencement of the bargaining a 'National Model Enterprise Agreement 2013'. This included the following provision:

> **5. RELATIONSHIP TO PARENT AWARD AND NES**
>
> 5.1. This Agreement wholly incorporates [insert name of award] as it stood at [insert date] or as varied from time to time (the Award), except for the Award Flexibility and Facilitative Provisions clauses.

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[41] *P&O Trans Australia Train Crew Enterprise Agreement 2009* [AE875052] clause 15.7; *South Spur Rail Services Pty Ltd Employee Collective Agreement 2009* [AC318515] clause 11.1.1; *Southern and Silverton Railway Pty Ltd Enterprise Agreement 2009* [AC322979] clauses 10.1.1 and 10.2; *Independent Railways of Australia Enterprise Agreement 2011* [AE886152] Part B clause 2 (definition of 'Hourly Rate').

[42] Witness statement of Kevin Pryor (20 November 2023) annexure KP-9.

[43] Ibid annexure KP-8.

> 5.2. 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.
>
> 5.3. Where there is any inconsistency between the Award and this Agreement, the terms of this Agreement shall prevail.
>
> . . .[44]

[59] Although this document was intended to apply to employers generally, not just Qube, it may readily be inferred that the above provision formed the basis upon which clauses 4.1–4.3 of the 2015 Agreement were subsequently drafted.

[60] *Fifth*, it is not in dispute that there was an initial meeting to discuss the Part A conditions on 22 January 2014 between Mark Owens for Qube, Allan Barden (from the RTBU's National Office) and Mr Pryor for the RTBU. Mr Pryor made a contemporaneous handwritten note at the meeting which states:

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

[61] Notwithstanding Qube's general attack on Mr Pryor's credibility, there was no challenge of substance to the authenticity of this note,[45] which was made on a page of a Pacific National agreement which Mr Pryor said he took to the meeting. 'MO' is clearly a reference to Mr Owens, and it can be inferred that the note records something he said. 'Agree to leave clause 4 (Part A) to cover shift penalties & weekends' is to be understood as meaning that it was agreed that clause 4 would deal with the subject matter of shift and weekend penalty rates. This is consistent with the fact that the RTBU had advanced claims about these subject matters in respect of both NSW and Victoria and is also consistent with the terms of clause 4.2 of the 2015 Agreement. As the Deputy President found, the note also records Mr Owens rejecting the inclusion of a clause requiring forecast master rosters to work out applicable penalties in advance, a style of rostering which Qube could not accommodate. The 2015 Agreement does not require forecast master rosters, but rather provides for such rosters as an option. This further supports the proposition that the note correctly records an agreement reached at the 22 January 2014 meeting.

[62] *Sixth*, on 7 February 2014, the RTBU sent Mr Coulton by email a list of Part A and Part B clause titles which included, as clause 4 in Part A, *Relationship to Parent Award or NES*. On 18 February 2014 Mr Coulton sent an email to the RTBU in response to the 7 February email which stated:

> I have had a look at the below and in essence am ok with the proposed structure and split between core conditions and state based specifics. Obviously I will be wanting to see the specific wording proposed for the clauses before I agree to include in the agreement.

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[44] Ibid annexure KP-11.

[45] It was put to Mr Pryor in cross-examination that '…you've made up a reason to explain a note that you've added after the event'. He denied this. The matter was not pursued beyond this: transcript, 7 December 2023, PNs 1940–1952.

> Clauses of particular interest are 8,9,16,18,20,25. For example clause 8 salary sacrifice, this is not something we would generally include so am interested in what you are proposing here.
> As I have intimated previously the base structure I was wanting to use for the agreement is the current POTA document obviously there will be new clauses included and others excluded but that is what the negotiation process is all about.
> If you have some wording you can provide for me to rev[iew] or I can rev[iew] as part of the negotiations with Kevin and Mark in order to get things rolling.[46]

[63] By 14 March 2014, the RTBU had developed a draft of Part A for the Qube bargaining process which referred to Qube as the employer and which contained, at clauses 4.1–4.3, the provisions that were set out in clauses 5.1–5.3 of the National Model Enterprise Agreement 2013 (set out at [58] above). On 17 March 2024, Qube sent the RTBU a document which included its current position concerning each item of the RTBU's NSW log of claims for Part B. Item 4 was 'Weekend shift penalties Sat 1.5 and Sun 2.0', which had the status of 'Under Review', with Qube's position being stated as: 'No - should remain standard, particularly give[n] guarantee[d] 76 hours'. An updated version of this document dated 23 April 2014 indicated that the RTBU had agreed to 'remove' the claim, and the matter was categorised as 'Closed'.

[64] On 20 June 2014, Qube provided the RTBU with a marked-up version of the Part A conditions previously provided by the RTBU on 14 March 2014. This contained no changes to clauses 4.1–4.3. On 5 September 2014, Qube provided another version of the Part A conditions which set out in red text its remaining concerns. There were no concerns expressed about clauses 4.1–4.3, which remained in the same terms and ultimately became clauses 4.1–4.3 of the 2015 Agreement. By this time the definition of 'Hourly Rate' in clause 6.1 had been amended to state that that rate 'includes leave loading'[47] — but, notably, not any other Award entitlement.

[65] This history is consistent with the agreement reached at the 22 January 2014 meeting recorded in Mr Pryor's note. The issue of weekend shift penalties and loadings would be dealt with in clause 4 of the Part A conditions, which remained in subsequent drafts of the agreement unaltered. In this context, the RTBU's NSW-specific claim for 'Weekend shift penalties Sat 1.5 and Sun 2.0' in Part B was regarded as closed. We note the preference in Mr Coulton's email quoted at [62] above for the 'base structure' of the 'current POTA document' (which was a reference to one of the transferred agreements). However, Mr Coulton gave no indication that this preference related to the continuation of a loaded rates structure and made clear that he was amenable to the inclusion of new clauses. This is consistent with Qube's agreement to the inclusion of clauses 4.1–4.3.

[66] *Seventh*, Mr Coulton's own evidence was that, at the bargaining meetings he attended, clause 4 was never discussed or raised by either party and did not change. Further, he said in his first witness statement: 'No-one ever said or stated what the clauses were supposed to do, nor how they were supposed to operate (if at all)'.[48] That evidence is, by itself, destructive of the proposition that there was a common intention that clause 4.2 would not operate in accordance with its terms.

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[46] Witness statement of Kevin Pryor (20 November 2023) annexure KP-15.

[47] Witness statement of Dan Coulton (20 October 2023) annexure DC-11.

[48] Ibid [53].

[67] *Eighth*, Qube requested its NSW workforce to vote upon a proposed enterprise agreement three times. On the final occasion, the proposed agreement was voted up by the employees and the 2015 Agreement was thereby made. On each occasion, the proposed agreement contained clauses 4.1–4.3. Section 180(5) of the FW Act required Qube, prior to each vote, to take all reasonable steps to explain the terms of the proposed agreement and their effect to the employees employed at the time in order for the agreement to be ultimately capable of approval by the Commission. Clause 4.2 of each version of the proposed agreement expressly referred to the payment of Award loadings, penalties and allowances upon or in addition to the rates of pay in the agreement and, except for the rate of overtime which was otherwise expressly provided for, might reasonably be understood by employees voting on the agreement as intended to have effect according to its terms. There is no evidence that any explanation to the contrary was ever provided to employees. If there was ever any written explanation of the effect of the terms of the proposed agreements (apart from the quantum of the increases to the hourly rates) provided by Qube to its employees, it was not placed into evidence. Mr Coulton apparently met with employees at each depot to discuss at least the first proposed agreement, but he did not give evidence that he ever explained the effect of clause 4.2 or that he told employees that the rates were loaded rates inclusive of weekend penalties, shift loadings and allowances. His evidence was merely in the negative: 'I did not at any stage say that award penalty rates, loadings and allowances would be paid in addition to those hourly rates'.[49] There is therefore no basis to conclude that the employees, when they voted to make the 2015 Agreement, had any clear basis for understanding that clause 4.2 would not have effect according to its terms because the 'Hour Rates' in the agreement were loaded rates.

[68] *Ninth*, in Mr Coulton's Form F17 declaration which accompanied Qube's application to the Commission for approval of the 2015 Agreement, he averred that the agreement did not contain any terms that were less beneficial than the Award for the purpose of the better off overall test in s 193 of the FW Act. That answer is not consistent with the position that, despite the plain wording of clauses 4.1 and 4.2, the effect of the terms of the 2015 Agreement is that it excludes the operation of ordinary-time shift loadings, weekend penalties, and allowances contained in the Award. The Commission's decision of 29 March 2016 to approve the 2015 Agreement[50] relied upon Mr Coulton's declaration:

> [3] In the Employer's Declaration in support of the application (Form F17) Mr D Coulton, National Industrial Relations Manager, identified the *Rail Industry Award 2010* [MA000015] as the relevant reference instrument for the purposes of the Better Off Overall Test (the 'BOOT'). Mr Coulton said that the Agreement provides for a number of conditions that are more beneficial than the terms of the Award and that there are no less beneficial terms. The Agreement provides for higher rates of pay, more generous allowances, enhanced overtime and 14% employer contribution to superannuation. I am satisfied that the Agreement passes the BOOT.
>
> (underlining added)

[69] Qube relies upon the fact that, after the 2015 Agreement was made and approved, it negotiated an enterprise agreement with the RTBU to cover its Victorian train crew[51] which contained hourly rates essentially the same as those in the 2015 Agreement but which were clearly loaded rates. However, this Victorian agreement did not contain any equivalent to clauses 4.1–4.3 of the 2015 Agreement but rather stated that it was 'intended to cover the field

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[49] Ibid [72].

[50] [2016] FWCA 1720.

[51] *Qube Logistics Rail Train Crew Victorian Enterprise Agreement 2015* [AE424210].

in relation to all matters relating to the terms and conditions of employment of all employees whose employment is subject to this Agreement' (clause 4.1), and expressly provided that '[t]he rates of pay prescribed will be inclusive of all payments, including shift & weekend penalties…' (clause 14.7) as well as allowances (clause 14.8). The Victorian agreement therefore does not assist Qube's position because it indicates that, where the Qube and the RTBU had a common intention for the hourly rates of pay to be loaded rates which displaced Award entitlements to weekend penalties, shift loadings and allowances, this was expressly and unambiguously stated in the agreement.

[70] It is in the above context that Qube's appeal grounds may properly be considered. Relevantly to grounds 1–3, it was the Deputy President's duty to consider and address in his reasons submissions which were significant, which touched upon the core duty being discharged and which were centrally relevant to the decision being made. He was not required to refer in his decision to every piece of evidence and every contention advanced by the parties, with much depending on the importance of the submission to the claims being made. Further, the fact that a submission was not expressly addressed in his decision does not mean that it was not considered, and an inference would not readily be drawn in that respect in what was otherwise plainly a comprehensive decision.[52]

[71] As we have earlier outlined it was Qube's central contention, consistent with the usual approach in s 217 matters, that it was the objective common intention of Qube, the RTBU and the relevant employees that the rates in the 2015 Agreement were loaded rates which excluded the application of the weekend penalty rates, shift loadings and allowances in the Award. It is plain that the Deputy President considered this case by reference to the evidence concerning the history of the bargaining for and the making and approval of the 2015 Agreement and, at [109], rejected it. His reasons for doing so are made apparent in [109]–[117]. In this way, we consider that the Deputy President properly discharged his duty to consider and address Qube's case.

[72] We do not consider that any appealable error arises from the fact that the Deputy President did not, in his decision, make express findings in respect of each of the 15 propositions contained in Qube's Road Map submission. That submission was, in our view, fundamentally misconceived and not relevant to the central question of whether the common intention contended for by Qube was demonstrable. The premise of the submission was that each proposition would have to be accepted in order to accept the RTBU's case that Qube had agreed to pay the Award penalties and loadings. However:

(1) Qube was the applicant in the matter and bore the burden of persuading the Commission that the contended-for common intention existed. It was not entitled to succeed on the mere basis of a non-acceptance of the RTBU's case.

(2) The issue for determination was not what Qube had agreed, or not agreed, to do in the 2015 Agreement. Objectively, what Qube had agreed to was what was expressed in the terms of the 2015 Agreement. What subjective intention might be imputed to Qube as to what it thought it was agreeing to was irrelevant to the search for common intention. Common intention, as earlier discussed, is to be ascertained from what is objectively apparent from the words or actions of each

[52] *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157, 240 IR 178 [47]; *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184, 236 FCR 593 [46]–[47].

> party, not from what one party says was in their mind. It may be accepted that Mr Coulton at least did not consciously intend that the Award penalties would be payable upon the rates contained in the 2015 Agreement (or the 2019 Agreement). However, that is not evidence of common intention, and the outcome which prevailed is better explained by inadvertence and a lack of diligence on the part of Qube.

[73] In any event, it is apparent that the Deputy President was alive to Qube's Road Map submission, since he set it out in full in the decision at [82]. That submission, as explained, sought to frame the case in a particular and, in our view, impermissible way, but the Deputy President was not obliged to adopt that framing of the case in the structure and reasoning of his decision. The factual matters adverted to in the submission were generally dealt with by the Deputy President in his findings of fact at [40]–[81] and then considered through the prism of a correct understanding of the principles applicable to the ascertainment of common intention at [105]–[117]. In doing so, we consider that Deputy President properly discharged his duty to consider Qube's case.

[74] As to Qube's submission concerning Mr Pryor's credibility, that submission was plainly addressed in the decision and, indeed, substantially accepted. At [26], as earlier recounted, the Deputy President made a general finding that he could not place any significant weight on the evidence of any of the witnesses, apart from Mr Matthews', unless corroborated. That finding plainly encompassed Mr Pryor. At [37]–[39], the Deputy President addressed two specific criticisms made by Qube about the credibility of Mr Pryor's evidence. He accepted the first, which related to Mr Pryor's evidence that it had 'slipped his mind' to tell employees about the 'massive windfall gain' in obtaining Qube's agreement to pay weekend penalties, shift loadings and allowance. However, the Deputy President — correctly in our view — said that this had limited impact on the question of common intention (at [38]) and was irrelevant (at [114]). The Deputy President rejected the second criticism and gave his reasons for doing so.

[75] In any event, Qube's focus on the credibility of Mr Pryor's evidence was something of a straw man. In the circumstance where Qube bore the burden of persuasion, it is significant that the Deputy President made findings adverse to the credibility of all of Qube's witnesses. Further, the Deputy President, as earlier recounted, stated his intention at the outset at [27] to make factual findings based on the contemporaneous documents and uncontroverted facts. Qube did not take issue with that approach to fact-finding in the appeal. In that context, Mr Pryor's evidence, except where corroborated by contemporaneous documents or other evidence, had very little relevance to the outcome. The Deputy President's reasons for his conclusion that Qube had failed to establish the common intention it contended for at [109]–[117] make it apparent that this conclusion was not dependent on any aspect of Mr Pryor's evidence that was not corroborated by the documents or Mr Matthews' unchallenged evidence.

[76] Accordingly, grounds 1–3 of the appeal are rejected.

[77] Ground 4 of the appeal raises a number of alleged errors of fact. The contentions of factual error addressed in Qube's appeal submissions fall into the following main categories, which may be disposed of as follows:

(1) Qube contends that the Deputy President erred in finding that the 'RTBU failed to inform members about Qube's supposed agreement to pay Award Penalties was because it was seeking to "downplay achievements"'. The Deputy President made

no such finding; at [114] he simply said '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'. This was a statement made in support of his primary conclusion that this issue was irrelevant. We agree that it was irrelevant. As we have discussed earlier, the position is that there was no evidence that the employees were told anything by Qube, or the RTBU, about the meaning of clauses 4.1 or 4.2, nor is there any evidence that they were told by anyone that the rates in the 2015 Agreement were loaded rates. In the face of the text of the agreement upon which they voted, there is no basis to conclude therefore that the employees held the common intention which Qube seeks to ascribe to them.

(2) Qube contends that the Deputy President erred in finding that 'Pryor could not discern that Qube was not paying Award Penalties from the payslips'. The Deputy President made no such finding. As already explained, the Deputy President referred at [39], [76]–[77] and [115]–[117] to the unchallenged evidence of *Mr Matthews* about the difficulty in identifying Qube's non-payment of the penalties and allowances.

(3) It is contended that the Deputy President erred in finding that 'Qube agreed to pay Award Penalties'. The Deputy President did not make any finding in such terms nor, for the reasons earlier explained, was this the relevant issue. The critical finding that the Deputy President did make was that Qube had not established its case of common intention.

(4) Further to (3), Qube contends that it was implausible for various reasons that it agreed to pay the Award penalties. The question of implausibility is one which arises only from Qube's subjective perspective. An objective analysis of the words and actions of the parties during the bargaining and approval process render it entirely plausible that there was, objectively assessed, a common intention for the Award penalties to be paid — particularly in circumstances where the RTBU made a claim for weekend penalties to be paid and Qube agreed to a provision which in express terms provided for Award penalties to be paid on the agreement rates.

(5) Additionally to (3), Qube contends that the alleged finding was made on the basis of the evidence of Mr Pryor, who was 'a hopeless witness who lied and obfuscated throughout his evidence'. For the reasons already explained, the actual outcome determined by the Deputy President was not dependent on the evidence of Mr Pryor except where corroborated by the documents or other evidence. In respect of the Deputy President's findings concerning the 22 January 2014 meeting, he relied upon Mr Pryor's evidence on the basis that it was corroborated by a contemporaneous note of the meeting made by Mr Pryor (see [53]–[54]). Qube has not advanced any submission as to why the Deputy President was not entitled to do so.

[78] The notice of appeal raises the more general contentions that the Deputy President erred in failing to find that:

- Qube and the RTBU had a mutual common intention at the time when the 2015 Agreement was made, that the rates of pay in the 2015 Agreement would be

'loaded' rates and that no Award penalties or loadings would be payable on top of these rates, whether through clause 4 of Part A of the 2015 Agreement or otherwise; and

- the above mutual intention subsisted at the time when the 2019 Agreement was made.

[79] This contention of error is rejected. The analysis of the objective evidence concerning the parties' words and actions during the bargaining, making and approval of the 2015 Agreement which we have earlier set out makes it clear that the Deputy President did not err in his non-acceptance of Qube's case as to common intention. We do not consider that any contrary finding was available on the evidence.

[80] To the extent that the notice of appeal makes further contentions of factual error which were not further articulated in Qube's appeals submissions, they are rejected. Ground 4 of the appeal is rejected in its entirety.

[81] Ground 5 was only formally advanced by Qube. The Deputy President did not err in following the Full Bench decision in *Qube Ports Pty Ltd v CFMEU*. In any event, the Deputy President concluded that he would not exercise the discretion to vary the 2015 Agreement even if Qube had standing to apply to vary that agreement. We have found that the Deputy President's conclusion in this respect was not subject to appealable error, and we would reach the same conclusion ourselves. Accordingly, ground 5 is rejected.

[82] Having dismissed all of Qube's grounds of appeal, it is unnecessary for us to determine the notice of contention. We simply observe, as the RTBU accepted, that the Deputy President was bound by the Federal Court Full Court decision in *Bianco Walling Pty Ltd v CFMMEU*,[53] and his decision as to ambiguity and uncertainty was consistent with the principles stated in *Bianco Walling*.

Orders

[83] We order that:

(1) Permission to appeal is granted.

(2) The appeal is dismissed.

PRESIDENT

[53] [2020] FCAFC 50, 275 FCR 385, 294 IR 458.

Appearances:

R Dalton KC with *D Ternovski*, counsel for Qube Logistics (Rail) Pty Ltd t/a Qube Logistics.
H Borenstein KC with *P Boncardo*, counsel for the Australian Rail, Tram and Bus Industry Union.

Hearing details:

2024.

Sydney:
9 July.

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<PR777832>