TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT BELL

AG2022/4262

s.217 - Application to vary an agreement to remove an ambiguity or uncertainty

Monash University T/A Monash University (Monash)
and
National Tertiary Education Industry Union
(AG2022/4262)

Monash University Enterprise Agreement (Academic and Professional Staff) 2019

Melbourne

10.01 AM, THURSDAY, 18 MAY, 2023

Continued from 11/05/2023

PN97

THE DEPUTY PRESIDENT: Good morning, everyone. I think, as my associate has indicated, we all have with us Commissioner Connolly who, at least I think until Monday, is the newest member of our Commission. Next Monday that is, but until then he's the newest member of the Commission and certainly it's been past practice and it's certainly what I did when members of the Commission join, they'll shadow existing members just to see, in particular, how the practices and procedures and our systems operate, from this side of the Bench as opposed to that side of the Bench. Otherwise, just to be clear, his capacity is observer only and the primary decision remains with me, but otherwise I'd ask you to welcome Commissioner Connolly.

PN98

Now, other than that, I shall take appearances.

PN99

MR J BOURKE: If your Honour please, I appear with Mr Andrew Denton, for Monash.

PN100

THE DEPUTY PRESIDENT: Good morning Mr Bourke, Mr Denton.

PN101

MS S KELLY: May it please the Commission, my name is Kelly, initial S, I appear with Mr Debets for the respondent.

PN102

THE DEPUTY PRESIDENT: Good morning Ms Kelly, Mr Debets.

PN103

Now, I just want to run through some housekeeping issues, which I'm hoping will be relatively swift. Just on my list of some possible housekeeping issues to touch on is just the non parties. I just want to make sure we're clear on that and whether there's any in the room. Just to make sure that everyone's got a copy and, more to the point, I've got a copy of everything that the parties think has been filed. Then I don't think it will be too controversial, but just how the parties intend, if there's any intention of just dealing with the evidence, given that we've got a court book. I'm assuming, tentatively, that there's no expectation that witnesses have to actually get into the witness box for their witness statements to be adopted. Ms Kelly, you're about to tell me some of them aren't even in the room, so - - -

PN104

MS KELLY: No, I certainly hope not.

PN105

THE DEPUTY PRESIDENT: That's definitely the right assumption.

PN106

MS KELLY: They're not here, Deputy President.

PN107

THE DEPUTY PRESIDENT: I think you're on strong ground anyway, so that's good.

PN108

Then I was just going to ask each of you if there is a general plan either of you had in mind for just the running of today and possibly anything else.

PN109

MR BOURKE: I'll talk about my plan - - -

PN110

THE DEPUTY PRESIDENT: Just one moment, just before we do, because your plan might get affected by the one thing I do want to get to the bottom of, which is non parties. Monash and the NTU have obviously seen the email that I sent from my Chambers on Monday, indicating that the non parties, 195, possibly 200, I haven't done a final count, aren't required. Just to be clear, I haven't heard anything back from my Chambers indicating that they wished to be heard. Can I just clarify though, from anyone in the room here, are there any non parties who have or haven't received an email from my Chambers, that are here today with some intention that you wish to be heard on some aspect of the matter. I'm getting a sufficient number of head shakes there that the answer, I think, to that is, 'No'. In which case I think then, Mr Bourke, you can take your lectern again.

PN111

MR BOURKE: For our part, your Honour, we would say that the easiest way forward is that all the material in the application book, so there's two volumes filed by us and one supplementary bundle, from the NTEU could simply go forward as evidence and submissions and possibly just given the one exhibit number.

PN112

THE DEPUTY PRESIDENT: Yes.

PN113

MR BOURKE: Then I think the way that both my friend and I see the case, is we would then move straight to closings. I think we both anticipate the case will finish today.

PN114

THE DEPUTY PRESIDENT: Yes. I think in light of what the position is with non parties, I think that's correct as well. I appreciate that. Last week, when (a), I was booking courtrooms, I wasn't entirely sure whether I was going to have two counsel address me or I was potentially going to have 10, 15, 50 people addressing me. That's been comfortably clarified.

PN115

Ms Kelly, did you have any different view as to how those court books, so volume 1, volume 2 and your supplementary, be treated on that basis?

PN116

MS KELLY: No, no different view, Deputy President. What I will do, in my address, is identify for you and for the record, what that material is and what we say it is relevant to, but content for it to be tendered as one bundle. I note there was an email from my learned friend's instructors to your Honour's Chambers attaching, I think, a dictionary definition. I'm not sure how my learned friend wants to deal with that material.

PN117

THE DEPUTY PRESIDENT: I'll put that in the bundle - - -

PN118

MR BOURKE: I think that could be used as an authority.

PN119

THE DEPUTY PRESIDENT: Yes, I'll put that in the bundle of authorities. I mean, strictly speaking, there's some submissions in the court book which we're not paying too much close attention to, but we know that they're submissions and we know that they're not evidence and they be treated as submissions. Otherwise, the dictionary definition, look, if it was in the court book it would go in, it's not, it can just go in as authorities, together with the bundle of authorities.

PN120

Just on that, I've got two bundles of authorities. I've got one from Monash and I've got one from the NTEU, plus the dictionary definition. I think I've got, or I do have the 217 application itself, although my physical copy that I've got on me is the one without the exhibits that I think were filed in relation to it, but I'm not too troubled by the exhibits, because I think they should be picked up elsewhere anyway. Is there anything else?

PN121

MS KELLY: There's no other material, Deputy President, but one issue arises in relation to the material.

PN122

THE DEPUTY PRESIDENT: Yes?

PN123

MS KELLY: Monash filed an amended submission in reply. The amended submission in reply is the one that's found its way into the court book but your Honour's Chambers will have a copy of the earlier version which, in my submission, is to be disregarded. I just wanted to put on record that that's my understanding of the position.

PN124

THE DEPUTY PRESIDENT: Inadvertently you're pushing against an open door on what I was doing anyway. So I was not having regard to the original one that's filed. My copy that I've been looking at and have with me, for this morning's purposes, is the updated one with the - which I'm assuming had court book references. If it had anything else in it, but that's the one I'm looking at.

PN125

MR BOURKE: There's no other changes.

PN126

THE DEPUTY PRESIDENT: Yes. Well, in that case, there was a similar issue, I think, for their original submissions as well. They were also updated, which I understand was for court book references.

PN127

MS KELLY: Yes.

PN128

THE DEPUTY PRESIDENT: Yes, excellent. All right, so I think we've dealt with the court book and everything that I should have I appear to have. Evidence, we've discussed and then it's really just the running order of today, in which case I think that would be Mr Bourke, you'll be going first. Ms Kelly and then you'll have an opportunity to reply.

PN129

MR BOURKE: Thank you.

PN130

As your Honour has indicated, this is an application, under section 217. Could we take you to that section, which is in our bundle of cases, at tab 5? If we could just read that section:

PN131

The Fair Work Commission may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following.

PN132

That's then listed:

PN133

If the Fair Work Commission varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement.

PN134

The point we wish to make is the only mandatory criteria for the exercise of discretion is the finding of ambiguity or uncertainty. Otherwise, the legislature has not intended to fetter what is a broad discretion, and we'll take you, eventually, to Bianco, which confirms a very broad discretion that your Honour holds.

PN135

Could we next go - pretty much all roads hereafter go to the schedule 3 of the 2019 Enterprise Agreement. It's in volume 1 of our application book, and it's tab 2, otherwise your Honour can find it, it's pdf 113 in Schedule 3.

PN136

THE DEPUTY PRESIDENT: I have that.

PN137

MR BOURKE: So the critical question is, when a teaching associate engages in consultation with a student, when are they engaged in associated work and then paid a rolled up amount of money to undertake that, and when should they be paid separately for that task, under what is called, 'Other required academic activity'.

PN138

Now, if you go, first, to clause 1, your Honour, of Schedule 3, you'll see a discussion about the notion of a rolled up form of payment for tutorial work. So in the second paragraph, except for repeat tutorials, the rates proscribed are paid per hour of tutorial delivered, or equivalent delivery through other than face-to-face teaching mode. This is important, 'Assume two hours associated work, as defined below', and we'll come to that.

PN139

So the scheme indicates that it is expected, and assume you could also say 'required', that you will do the associated work, in relation to the delivery of the tutorial. It's not an empty vessel of simply turning up and delivering the tutorial, you need to do everything around it that makes that an effective educational experience.

PN140

You then have the next paragraph:

PN141

A repeat tutorial is a second or subsequent delivery of substantially the same tutorial, in the same subject matter, within a period of seven days. The proscribed rates are paid per hour of tutorial delivered and assume one hours' associated work, as defined below.

PN142

So there's a reduced lump sum payment. Importantly, if your Honour then goes to two paragraphs down:

PN143

For the purposes of payment of a tutorial or repeat tutorial rate -

PN144

This is the assumed work:

PN145

associated work may encompass the following activities: preparation of tutorials.

PN146

You've got 'marking', you've got, 'incidental administration' and then the key dot point, in relation to this case, 'contemporary consultation with students involving face-to-face or email consultation prior to or following a tutorial'.

PN147

Now, we'll come back to this, in terms of - but the critical issue, really, is the meaning of 'contemporaneous'. The ordinary dictionary definition, which we'll

take you to, contemplates, 'At the same time'. We know that that is not the intention, because it talks about 'prior to or following a tutorial', and we also know it's not at the same time because it can involve email consultation. So that clearly contemplates there may be some passage of time, either before or after the tutorial, where communication and consultation, via email, is to occur.

PN148

Then we have, then, the critical question, 'At what point, over what duration, either before or after, do you move from being contemporaneous to not contemporaneous?'. We say that, front and square, creates an ambiguity or uncertainty. It's clearly created disputation between the parties and that needs to be resolved and say the best way to resolve that is for your Honour to amend the clause, to give it some clarification.

PN149

Further to that, the submissions filed in this proceeding, by the NTEU, with respect, we would say ignore the temporal issue. They simply say, 'Well, it means before or after'. But that leaves, wide open, 'Well, how long before? How long after? One day? One hour? One month?', they don't deal with that. They simply say the criteria is whether the consultation was required by the university or not.

PN150

Now, clearly, the notion of contemporaneous consultation is directed at a temporal aspect and how long that is, it's got nothing to do with whether the work is required. But this bifurcation that some student consultation is required, some is not, is a false bifurcation because all student consultation is required. It's part and parcel of the effectiveness of providing tutorials to support a student, support their learning, consistent with the fact that it's assumed that this type of work will occur. One critical thing you can't move is preparation for the tutorial, marking and we would say, also, contemporaneous consultation.

PN151

So in our submission, this bifurcation cannot work because all student consultation is required, and that's what you're being paid for, whether as part of a rolled up payment, under clause 1, or under clause 7, which we'll take you to shortly.

PN152

If your Honour could have a look - if your Honour can find our Shorter Oxford English Dictionary definition, which we sent through separately so you won't find it in a bundle.

PN153

THE DEPUTY PRESIDENT: No, I've got that.

PN154

MR BOURKE: So, in the right-hand column, about a third of the way down, you have the definition of 'contemporaneous', one, 'Existing or occurring at the same time'. So that definition simply cannot work. It must mean something else, with greater latitude, because it is not contemplating, at the same time as the tutorial. Then, two, 'Of the same historical or geological period, of the same

age'. In our submission, that's probably a better guide of what they're talking about.

PN155

There's the potential that contemporaneous is simply suggesting contemporaneous with the subject taught in that semester. A broad construction which we are not pitching for in our - we've chosen something a lot more conservative, we would say balanced, would be within the semester, if it's associated. Why not in the same semester, but we have chosen a boundary, we would say, consistent with industrial common sense approach of one week either side of the tutorial.

PN156

It can't be, and we don't read the current submissions as saying there is this word 'immediately', because, clearly, the drafters have not chosen the word 'immediately' and by contemplating people possibly going back to their desk, or their office, or their home, to then undertake email consultation, we would say it doesn't have to be immediate consultation either side of the tutorial.

PN157

Then if we could go, please, to clause 7? You can't read these clauses in isolation, you read them together to assisting giving meaning within the one schedule, Schedule 3. Clause 7 starts, 'Other required academic activity'.

PN158

Just the heading itself knocks out of the ring the bifurcated approach of the NTEU, that if it's required, it's under clause 7, if it's not required it's under clause 1, and they use the word 'required' effectively to equate, what it scheduled at the university's request?

PN159

Well, the problem with that is clause 7 is talking about 'other required academic activity'. That is consistent with the fact that clause 1, the work under clause 1, for which we paid a rolled up sum is also required.

PN160

Then if you go to, under that, 'Other required academic activity', you cannot ignore that composite phrase or concept. It's talking about 'other' and it's talking about 'required'.

PN161

Then you go to the third last dot point, 'Consultation with students'. So consultation with students, if their point is correct, that if that is required by the university, you in clause 7 and you cannot be in clause 1, that become impossible when you see the parenthesis, 'Other than as contemporaneous consultation for a tutorial or lecture'.

PN162

So that carve out is indicating that you could have required academic activity, by way of contemporaneous consultation, and that is a carve out. Outside of that if it's not contemporaneous it's paid separately as consultation with students. But if contemporaneous consultation is never triggered, if it's required you immediately

fall into clause 7, there's no need for the carve out, you don't get there. That confirms that we are talking about 'required' activity when we are also in the clause 1 space.

PN163

So that also confirms that clause 1 can contemplate consultation that's not what could be described as ad hoc, just being nabbed in the corridor to have a chat. It could contemplate the teaching associate organising consultation hours, either side of the tutorial, as long as the consultation is within what could be called contemporaneous, and we'll come back to that, or it could contemplate consultation where the university say, 'We want you to set up appropriate hours'.

PN164

But under the NTEU's construction, if a teaching associate decides to organise for consultation hours immediately after their tutorial for, let's say, one hour, that apparently is clause 1. But if the tutor in the very next room organises exactly the same consultation hours, straight after their tutorial, but that's at the suggestion or requirement of the university, we're apparently in clause 7.

PN165

When both matters, both types of work are contemplated as required, either by way of the rolled up payment or a separate payment, the only delineation is this temporal one of contemporaneous, which the NTEU are completely silent on whether you draw the line on that.

PN166

Contemporaneous can't mean straight after, for example, the tutorial, because, for example, you would have a teaching associate that has back-to-back tutorials. And if, at the end of, say, two or three back-to-back tutorials they decide to put on - make themselves available for consultation, why should that be not contemporaneous? Does it have to relate to the last tutorial, it can't relate to the first tutorial? That, in itself, suggests there needs to be some latitude given to that word.

PN167

Consistent also with some type of common sense approach, you could have a student approach a teaching associate immediately after a tutorial with a question, and the teaching associate says, 'Look, can we talk about that later today or tomorrow?'. If they organise it, say, for later that day or tomorrow, does it suddenly become, because the passage of time, has to be paid under clause 7, separately. But if the teaching associate immediately consults with the student about that query, there's no extra payment, it's part of the roll up, again demonstrating there needs to be some latitude given to that meaning but it also demonstrates we're not talking about working out whether you're in clause 1 or clause 7, by deciding whether the teaching associate has chosen, off his or her own bat, to consult at a particular time, as distinct from the university saying, 'You should do that'.

PN168

Could we take, your Honour, to our form F1, where you will see the proposed amendment, under order 2 or release sought?

PN169

THE DEPUTY PRESIDENT: I've got that in front of me. Can I just confirm, that is still the precise form of the amendment sought?

PN170

MR BOURKE: Correct.

PN171

THE DEPUTY PRESIDENT: Yes.

PN172

MR BOURKE: So what we have done, and it's the same issue arise regarding lectures, we've said:

PN173

For the avoidance of doubt, contemporaneous consultation means, 'Consultation associated with a tutorial that occurs proximate in time -

PN174

And there's been some, 'What does that mean?', we have given that a boundary:

PN175

for example, within a week before or after'.

PN176

So we've given a clear line or boundary for the parties to work within, 'Was the consultation within a week?'. If it's after, you are in the clause 7 space. But we've also put to bed - there's no further dispute that it's got nothing to do as to how the consultation may be scheduled. Whether it's scheduled by the teaching associate or scheduled at the request of the university does not change whether you're in clause 1 or clause 7, and there's no suggestion at all, in the drafting, that that should be the outcome, and that is the dividing rod in deciding how people are paid.

PN177

The other problem, if the dividing line is, 'Did the university require it?', there's also a very difficult forensic problem. Because if the dividing line is simply temporal, all you need to know is, 'When was the consultation?'. If it's not contemporary, if it's not contemporaneous, 'Okay, it's clause 7'.

PN178

But if the dividing line is, 'Was it required by the university?', you then have to drill down to the particular time the consultation occurred. Did some more senior person say, 'I want you to organise that time.', there may not necessarily be a paper trail. And when does a direction - does it need to be a formal direction or can it be a comment in the corridor, 'Listen, do you mind, there's a lot of students not understanding this area of this topic, do you mind setting up an hours' consultation, after your tutorial?'. Is that a direction? If it is, how does payroll work all this out.

PN179

It will require a deep forensic analysis of whether the trigger of requirement has occurred, or whether it was (indistinct) of the teaching associate's own bat. And there can be a fine line. At what point where an academic is told, 'We are expecting you to consult with students', does that become interpreted as, 'That's a direction', even when the academic chooses, off their own bat, to set up scheduling times, does that become a requirement?

PN180

In our submission, the enterprise agreement was not set up so it was contemplated there would be this mini investigation as to the circumstances in which someone consulted. You don't get that. It is assumed all consultation is required. The ambiguity is, when does it cease to be contemporaneous. But otherwise we could have a mini case, regarding each consultation, to examine, 'Was I required to do that? I thought I was, they told me it was required. Okay, I chose the hours of consultation but I knew I had to do it. Is that clause 1, clause 7?'. That's not the conversation that Schedule 3 invites.

PN181

Now, can we go now to how the NTEU put their position, in the Federal Court, regarding their statement of claims, and this simply underlines there is ambiguity here.

PN182

If your Honour could go to, it's bookmark 7 of our volume 1?

PN183

THE DEPUTY PRESIDENT: Yes, I've got that, beginning court book 539.

PN184

MR BOURKE: If your Honour goes, it's paragraph 17, pdf 544, the claim is set up, at 17:

PN185

At all times material in this proceeding, the university directed some teaching associates to undertake consultation with students, during windows of time that were fixed and determined in advance.

PN186

So in the claim there's additional layers that the direction has to be fixed and determined in advance. Then you move to 18:

PN187

The student consultation was a fixed period of time advertised to students for a period of time in which the teaching associate was available for consultation.

PN188

So, as we understand the claim, if the teaching associate chooses to consult at fixed periods of time, and advertises that, they're in clause 1. But if they do that, at the direction of the university, they're in clause 7. You could have exactly the same things going on with one tutor and another, different payment.

PN189

That is an elaborate scheme of requirement that whether you're in 1 or 7 it's got to do whether it's a fixed period of time, whether it's advertised to the students. You simply don't get it from the language. I'm not even sure they're pressing that anymore because is the NTEU saying that it has to be advertised, or just that you're directed to do the consultation, I don't know. So the complaint is that that is not associated work, that's dealt with at 19.

PN190

Now, how the case was put by the NTEU back then was examined by Snaden J, on 17 November 2022. With respect, we would say many of the arguments in the current submission to the NTEU were put to his Honour, as to why this Commission should not exercise any discretion, regarding 217, his Honour rejected it. But also his Honour rejected the argument that there's no prospects of success and this case should not go forward because there was no ambiguity. His Honour finding that the very nature of the word 'contemporaneous' involves questions of degree in itself, is ill-defined and lacks clear boundaries. That's exactly what we're saying and why there is a need for an amendment. His Honour found that the first port of call for this issue to be thrashed out should be the Commission, as the specialist tribunal.

PN191

If your Honour could go to the judgment, it's book mark 8 of our volume 1 of the application book?

PN192

THE DEPUTY PRESIDENT: Yes, I've got that.

PN193

MR BOURKE: Could we first examine the arguments of the NTEU as to why - they sought a stay of the 217 proceeding and you'll see his Honour recount many of the arguments currently before your Honour, that the claim - our claim here could extinguish the claim in the Federal Court. It won't change the situation regarding the earlier enterprise agreement. His Honour did not accept those arguments, in terms of staying this case and, in fact, stayed the Federal Court case, taking the view that it was preferable this matter be thrashed out, in relation to the 2019 agreement, in this forum.

PN194

If your Honour goes to paragraph 9? The NTEU's application, and this is for the stay of this proceeding, on the basis that:

PN195

The application that Monash has commenced in the Commission will or might prejudice the application upon which the NTEU moves in this court. The proposition is straightforward enough. It is said that if the Commission proceeds to vary the provisions that are in dispute and to do so retrospectively, in a way that is consistent with Monash's preferred construction of them, then that will summarily compromise the basis upon which those claims, under the 2019 EA, here is sought to be agitated, though it will, for obvious reasons,

have no bearing on those that are brought, in reliance upon the earlier enterprise agreement.

PN196

Although it is unnecessary now to decide, the proposition appears to be sound. If the Commission agrees to vary to the 2019 enterprise agreement in a way that prefers the textual constructions to which Monash adheres, and if it does so, with retrospective effect, then that would appear very likely to extinguish at least part of the cause of action that the NTEU seeks to prosecute in this court.

PN197

Likewise, were the Commission to accept that the 2019 EA was attended by relevant ambiguity or uncertainty and to resolve it by given effect to the NTEU's preferred construction, it seems inevitable that that would impact on Monash's defence of the claims put here, or some of them.

PN198

There is, though, no real doubt that unless the Commission is restrained from proceeding in the way that the NTEU hopes to restrain it, there is at least some prospect that the NTEU causes of action here will be irreparably compromised. That, though, is often the case in applications for anti suit injunctions. Whereas here it may be accepted that there exists, on foot, two related proceedings, which turn, to some degree, on a common question, here the construction of clauses of the 2019 EA, the challenge for the court is to assess which of the competing jurisdictions is the most appropriate, or to phrase it unfortunately, in precise language of the authorities, which align most with the interests of justice.

PN199

There are a number of circumstances here that inform the court's assessment in that regard. First, the nature of the power that Monash has asked the Commission to exercise is, I think, of some significance. The power to vary an enterprise agreement, under section 217, is a specific statutory power of long-standing.

PN200

We heavily rely on that, in terms of when one gets to the discretion, your Honour.

PN201

There is no basis upon which this court might assume, and it is not suggested that it might be exercised improperly or in a manner that exceeds the jurisdiction so conferred. NTEU must be presumed to have had appropriate opportunities before the Commission to oppose the relief that Monash hopes to secure.

PN202

The possibility that it might do so successfully does not seem beyond fantasy though, to be clear, that is not for this court to decide.

PN203

The prejudice that will befall Monash if interim interlocutory injunctive relief is granted, then lies in it being denied the opportunity to benefit from those specific and long-standing statutory processes. Those benefits include that the processes before the Commission are designed and intended to be administered quickly and cost effectively and that, if it succeeds in persuading the Commission to grant the relief that it seeks, that will all may go at least some way to resolving the controversy now before the court.

PN204

Second, the fact that Monash has commenced the proceeding in the Commission, at least in part, so as to defeat some of the rights that are asserted in this litigation is of no moment. Absent some suggestion that proceeding in the Commission has been brought to further some improper purpose or purposes, which is a conclusion that the court was wisely not invited to draw, or some reason to think either that the Commission might exceed or misapply its jurisdiction, or that the case before it is foredoomed for failure, a topic to which I shall shortly return, this court should, I think, be slow to interfere with the due progression of matters put conventionally before a specialist tribunal that is charged, by statute, to do precisely what has been asked of it, particularly should that be so where, as here, the appropriate and orthodox determination of such matters might legitimately and properly bear upon the conclusions that are warranted in related proceedings before this court.

PN205

Why, it might rhetorically be asked, should an applicant be able to defeat, by means of an anti suit, or equivalent injunction, a defence to a claim that might otherwise and legitimately be or become sound.

PN206

Then could we take your Honour to paragraph 26 of Snaden J's judgment? This is where his Honour deals with the submission. The NTEU suggested there was no prospects of success, in relation to the 217. At 26:

PN207

As to that, the NTEU submits, 'On the evidence before this court, Monash cannot establish that its application 217, to borrow from Finkelstein J in Warramunda, has some prospects of success'.

PN208

Then if your Honour moves to 27:

PN209

It is at this juncture that attention should turn to the clauses, in the 2019 EA, that are disputed. In doing so, this court is concerned to identify whether they might be attended by ambiguity or uncertainty on which Monash's application, under section 217, might be brought to bear. It is unnecessary for this court should conclude one way or another, it will suffice I should inform an impressionistic view.

PN210

Cases are then cited. Then moving to 28:

PN211

I turn then to the terms of the 2019 agreement, clause 25.1 of that instrument provides that, 'Teaching associate staff will be paid a sessional hourly rate, as specified in Schedule 2'.

PN212

Schedule 2 of the 2019 agreement then identifies rates of pay that are applicable to different categories of work. Schedule 3 sets out defining the task that comprise each such category, insofar as concerns work undertaken by teaching associate staff. It distinguishes work associated with the provision of tutorial and lecture-based learning from other required academic activity.

PN213

The latter is defined and then there's a reference to that third last dot point.

PN214

Clauses 1 and 2 of Schedule 3 concern work associated with, respectively, tutorials and lectures. Each identifies that teaching associate staff will be required to engage in associated work which, in each case, define to include contemporaneous consultation with students, involving face-to-face or email consultation, prior to or following a tutorial lecture.

PN215

So his Honour summarises clauses 1 and 2 exactly the way we have put that. Then at 30:

PN216

The dispute that has arisen and upon which the present proceedings in Monash's application focuses concern student consultations in which teaching associate staff have engaged, in connection with tutorials and lectures, otherwise than immediately prior to or thereafter.

PN217

As we have said, as we read the NTEU's submissions in this proceeding, they're no longer pressing this required of 'immediately'. The question is, were they required or not, by the university.

PN218

The NTEU maintains that such consultation was not contemporaneous consultation and therefore qualified as other required academic activity. Monash maintains that such work is sufficiently contemporaneous with tutorials and lectures so as to qualify as contemporaneous consultation.

PN219

The scope for legitimate debate about what is and what is not contemporaneous consultation is immediately apparent on the face of the instrument.

PN220

Now, that statement itself, when you look at the authorities as to the low threshold for finding ambiguity or uncertainty to give this Commission jurisdiction, in our respectful submission, should be enough and there's been no meaningful examination and criticism of Snaden J's approach here, which was - the judgment was delivered after significant argument by the parties.

PN221

Perhaps it is limited, as the NTEU contends, to consultation that occurs immediately prior to or after the tutorial or lecture, perhaps it extends, to some measure, to consultation that occurs within some period either side of a tutorial or lecture. Contemporaneity is conceptually a question of degree, ill-defined or undefined, it is a concept that naturally and for want of clear boundaries, leans itself to disputation.

PN222

One hundred per cent this is leaning itself to disputation and we would say, front and square, one of the very purposes of 217 is to reduce or eliminate or minimise the scope for disputation by the parties, during the life of an enterprise agreement.

PN223

Then going to 32:

PN224

NTEU contends that in order that it might establish some prospect of success, in its application under 217, Monash ought to have led but did not lead evidence, before this court, to establish that the relevant provisions of the agreement failed to give effect to the common intention of the parties.

PN225

Misalignment of that nature would. it is true, assist in demonstrating relevant ambiguity or uncertainty. In particular, how the Commission might resolve it, but is not the only way in which prospects of success might be made impressionistically apparent.

PN226

I am satisfied there is some prospect that Monash will be able to establish relevant late and probably late ambiguity, solely on the strength of the words that the provisions employ.

PN227

So there's a number of things that emerge from this. The NTEU say, 'We can't make out common intention of the parties'. His Honour is making clear that common intention of the parties doesn't necessarily mean subjective, it can mean the objective common intention. That's, strictly speaking, how it should be approached, as a matter of contract and as discussed in Telstra, unless there is clear material that, subjectively, the parties were at idem from extrinsic material.

PN228

THE DEPUTY PRESIDENT: Just to be clear on that, that's an objective assessment for assessing whether or not there's an ambiguity or uncertainty?

PN229

MR BOURKE: In our submission, the concepts overlap because common intention, you're really talking about a task of interpretation. And in undertaking that task you may identify ambiguity or uncertainty.

PN230

THE DEPUTY PRESIDENT: Yes. You mentioned 'contract' then, but if it was a contractual rectification case, then the common intention is the actual intention of the parties.

PN231

MR BOURKE: Correct. But that can be also inferred by the objective surrounding circumstances. But common intention is also used as a tool, simply for defining, 'Well, what was the intention?', by looking at the words of the contract.

PN232

THE DEPUTY PRESIDENT: In which case, what's the difference between that and construction?

PN233

MR BOURKE: There's probably little difference, no difference. And you'll see that in Bianco, they're not really searching for common intention, they're just asking, 'Is there an ambiguity or uncertainty?'. So we really say, to the extent common intention has any factor to play, it's really a matter that can be assessed objectively, which is, 'What was the common intention of the parties?'. Well, you look at the enterprise agreement and the words, unless you're in this rectification type space, which we're not here.

PN234

THE DEPUTY PRESIDENT: It might be we're at slightly crossed purposes here, but it's an important point just to get to the bottom of.

PN235

I didn't understand there needs to be a search or absence of common intention for the assessment stage of ambiguity or uncertainty. But what the NTEU is putting, as I understand it, is that for the exercise of any discretion, the only matter that I could have regard to, for deciding whether or not a variation is made, or if we're talking contract it would be a rectification, is whether or not there's a common intention. I guess, if I could perhaps foreshadow, that's not free from some difficulty in the sense that - well, you're saying that common intention is assessed objectively.

PN236

MR BOURKE: If I can just step back?

PN237

THE DEPUTY PRESIDENT: Yes.

PN238

MR BOURKE: If you go to 217, the only task you have to ask for jurisdiction, ambiguity or uncertainty and then, consistent with Bianco, you have a broad discretion. You don't have to get caught up, 'Does it go through some common intention?'.

PN239

THE DEPUTY PRESIDENT: I understand that, although there you can probably take it on notice, there will be authorities that the NTEU is going to take you to that suggest, on the discretion stage, it ought to be limited to whether it's a common intention, common understanding. I think some of the Full Bench decisions refer to the substantive agreement. I think that's a language picked up on the NTEU's submissions, in the sense that any variation ought to only reflect that common understanding, in that sense. That's the bit I'm just trying to get to, what does common understanding mean, in that regard?

PN240

MR BOURKE: Really, all Full Bench decisions, unless they're post Bianco, really it should be dealt with immense amount of caution, because Bianco really unpacked this and you won't find, we'll take you to the case, any suggestion that there is requirement for this element of common intention for there to be an exercise of (indistinct), it's not there. There's a broad principle, well known, of applying equity, common sense, and general principles that apply to the Commission's task.

PN241

But we would say, to the extent you want to consider common intention, that can be found objectively by the parties are bound by the agreement they signed and we say, on that basis, the amendments we want are, in fact, consistent with the best construction of Schedule 3. But there is some cases where extrinsic evidence, around the negotiations, may demonstrate or be an aide to what is common intention and may suggest something different from what, on its face, is a textual analysis, but we don't have that here because both parties agree there is no extrinsic material that suggests a particular construction.

PN242

THE DEPUTY PRESIDENT: Yes, I understand. The NTEU is using that point as a sword in this particular matter, coupled with the proposition that I must, on the NTEU's case, find a common intention.

PN243

MR BOURKE: That's effectively (indistinct) 217, you won't find it.

PN244

THE DEPUTY PRESIDENT: I understand. Look, I'm probably conscious I've diverted you from your flow of where you were up to with his Honour's judgment and you're probably going to come back to some of these issues later, so I'm content for you to hop back into your flow.

PN245

MR BOURKE: But if I can just say, to the extent you want to give way to common intention, we know it can only be a textual task because the parties can't

point to anything that shows any meeting of minds, in terms of extrinsic material, and we say our construction is more consistent with the words. You can't get this bifurcation based on required, as propounded by the NTEU.

PN246

Can I move then, further discussion regarding this ambiguity issue, in terms of his Honour, at 34. Yes, this is an interlocutory judgment but this was judgment delivered, after written submissions were filed, oral argument and, I think, I don't remember for how long, it will be in the judgment, but his Honour adjourned it at least overnight.

PN247

At 34, if you go to the last sentence, the last four lines:

PN248

The sophisticated parties -

PN249

And this is discussing the sense that you err on the side of finding ambiguity:

PN250

That sophisticated parties that are advised by experienced practitioners have -

PN251

This is a reference to the parties before Snaden J:

PN252

expended the energy that they have in preferring their respective constructions, or the relevant provisions, is, itself, as circumstances suggest, that the competing constructions are open to be advanced and that the provisions in question are, in that sense, ambiguous and uncertain.

PN253

Then, at 35:

PN254

Allied to that observation is the likely approach of the Commission to Monash's application. It has been said that the Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention.

PN255

And citing Bianco.

PN256

Now, if it's convenient, If I could take the court now to Bianco, because that really sets out how you approach the task, under section 217. That's tab 1 of our bundle of cases. If your Honour goes to paragraph 67?

PN257

THE DEPUTY PRESIDENT: Sorry, which paragraph?

PN258

MR BOURKE: Sixty-seven.

PN259

THE DEPUTY PRESIDENT: Yes.

PN260

MR BOURKE: This is the joint judgment of Flick, White and Perry JJs. This is a discussion, in the context of is the task about construction as distinct from simply the task about whether there's an ambiguity or uncertainty:

PN261

However, the identification of the true meaning of a provision is distinct from the question of whether it is ambiguous or uncertain. Ambiguity exists when a provision in an enterprise agreement is capable of more than one meaning.

PN262

And then authority is cited:

PN263

The ambiguity may be apparent on the face of the document or may become apparent only when extrinsic evidence is adduced. A provision may be ambiguous even though it is capable of interpretation. This means that it was not necessary for the FWC to interpret the 2016 Agreement in order to reach a conclusion concerning the presence of ambiguity or uncertainty. It also means that the Deputy President was wrong in thinking that he was dealing with an interpretation case.

PN264

Then moving to 68:

PN265

There are practical consequences for the FWC's ascertainment of ambiguity or uncertainty for the purpose of section 217 being different in character from the interpretation of an enterprise agreement. One is that there was no need for the Commission to feel constrained in the matters to which it may have regard by the principles developed for the interpretation of enterprise agreements. Moreover, the Commission is obliged, in performing its functions or in exercising its powers in relation to a matter under the Act, to take into account, amongst other things, 'equity, good conscience and the merits of the matter'.

PN266

That just is a reflection of how broad the discretion is. There's not some mandatory hoop to jump through, called 'common intention'. There's then a reference to section 578:

PN267

Furthermore, the Commission is not bound by the rules of evidence and procedure.

PN268

Five-nine-one.

PN269

Each of those provisions applies to the discharge by the Commission of its functions under 217. The consequence is that, far from being precluded from having regard to evidence of the parties' common intention and to the history the clause, the Deputy President was permitted to have regard to them as part of the equity, good conscience and the merits of the matter.

PN270

So common intention, history, they are matters that can be taken into account, but they're not mandatory thresholds that must be met, they're part of a mix of the very broad concept of equity, good conscience and merits.

PN271

THE DEPUTY PRESIDENT: But this is in the search of whether there is an ambiguity or uncertainty. Isn't that what this paragraph is directed at?

PN272

MR BOURKE: In our submission - - -

PN273

THE DEPUTY PRESIDENT: That's not to say that - - -

PN274

MR BOURKE: There may be an overlap. There may be overlap and it may be unhelpful to completely bifurcate the search for ambiguity with common intention, because they do overlap, in terms of although it's not an interpretation task, you can't ignore interpretation issues that may arise.

PN275

THE DEPUTY PRESIDENT: Yes. Well, perhaps to give a common law analogy, if it was a contractual dispute the parallel evidence rule will knock out a whole bunch of evidence that parties that might, if you wanted to say, particularly as to any individual party's state of mind. But if it was a rectification case, that can all come back in. That may nor may not succeed on rectification, it might not be sufficient, but it's more - not open slather, but it's more open.

PN276

MR BOURKE: Correct. But, of course, in rectification you would have to prove that it was a common intention, not my intention.

PN277

THE DEPUTY PRESIDENT: Yes. Yes, correct.

PN278

MR BOURKE: As we said, on both sides, the history, the documentation has been examined and it doesn't assist with that task. So we're left with the objective task of looking at what was the text the parties agreed.

PN279

Then can we move to paragraph 70:

PN280

It may well be the case that the mere existence of rival contentions as to the meaning or application of a provision or provisions in an enterprise agreement is not sufficient to indicate ambiguity or uncertainty for the purposes of 217. Instead, the Commission is to consider the matter objectively.

PN281

That's important when it's coming to the task of ambiguity, uncertainty.

PN282

In that objective consideration, an assessment of the matters relied upon for the competing contentions will be important, including evidence that the parties to the agreement had a common understanding as to the meaning of the terms they used in their agreement. A reading of the enterprise agreement as a whole may indicate ambiguity or uncertainty in one or more of its clauses. And, as was noted by the Full Bench in Tenix, 'The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention'.

PN283

So there's a clear indication that the legislature is not wanting to set up significant hurdles for the exercise of the power to make a variation that may minimise or reduce disputation, during the life of an enterprise agreement and, consistent with that, even something like an assessment of ambiguity or uncertainty, you don't have to find beyond reasonable doubt, for example, you can simply err on the side of finding that, if you find it's arguable.

PN284

THE DEPUTY PRESIDENT: Yes, 'Rival contentions advanced and an arguable case made out.

PN285

MR BOURKE: Yes. We would say we get to that zone, for the very same reasons Snaden J observed, and also in his own - you can describe it as impressionistic, but after significant argument he clearly was of the view the word 'contemporaneous'. Just look at it yourself and you've got difficulties. You've got difficulties in drawing boundary lines.

PN286

THE DEPUTY PRESIDENT: Perhaps on that basis - mean he also indicated that the NTEU had a prima facie case, on its substantive claim, which, arguably, suggests that there's rival contentions and everyone's got an arguable case.

PN287

MR BOURKE: Correct.

PN288

THE DEPUTY PRESIDENT: So that gets me to ambiguity, if that's all fine. Yes, I understand. All right, that's fine.

PN289

MR BOURKE: There's then a discussion, at 74, the meaning of ambiguity. It's very low threshold, 'Doubtfulness, uncertainty, equivocal', and at 75:

PN290

Although there is some relationship between these meanings, the definitions indicate that the two terms are not synonymous. There may, for example, be uncertainty in an enterprise agreement even when its terms are not ambiguous. The uncertainty may arise from the application of the unambiguous terms to a given set of circumstances. The distinction between patent ambiguity, linguistic ambiguity, and latent ambiguity, ambiguity in application, provides an illustration by analogy.

PN291

We would say the classic case here is it's difficult, if you can't have agreement of what 'contemporaneous' means, when are you in clause 1, when are you in clause 7. The construction put up by the NTEU doesn't work, in terms of, 'Is it required?', and are they adding this layer that it must be posted, the time and then you've got an investigation, 'When was it required and not required?'.

PN292

Of course our overriding point that the Schedule 3 definitely indicates that contemporaneous consultation and consultation that is not contemporaneous are both required. So that tool of interrogation simply doesn't work.

PN293

Can I then come to the NTEU have filed evidence that some departments do pay teaching associates, under clause 7, for scheduled hours of consultation. It appears, given the nature of the way a claim was brought in the Federal Court, that that is saying that most departments don't. That disparate practice simply underlines that there is an ambiguity because even across Monash departments it's applied differently.

PN294

Now, there's some type of straw man set up. It's suggested if our amendment is made then we'll start asking teaching associates to perform unlimited numbers of consultation hours. There's no suggestion or any risk of that. No evidence put forward of any basis for that. Any clause, and it's application, must be seen as being applied and interpreted in a common sense way. For example, where clause 1 says, 'In order to provide a tutorial there's associated work and it includes, for example, preparation, marking and consultation', you can't sensibly construe those obligations of associated work to mean that would permit Monash to ask someone to do a student consultation, for example, of two hours, in relation to one tutorial. It cuts out the room for all the other associated work. So that, in our submission, is just a reds under the beds type scenario and those types of extreme examples are unhelpful. It is simply not on the table that that type of approach would occur.

PN295

Could I say, there's been some criticisms of our proposed amendment. The very nature of the English language, you can do pot shots, 'What does this

mean? What does that mean?', it's a criticism about the word 'proximate', but we've then put a boundary around it as one week either side. That's easily done. But they're not coming up with an alternative amendment, they come up with a construction which is unworkable and completely contrary to the language in Schedule 3. So, in our submission, something has to be done.

PN296

You'll see there's a statement, in volume 2, of Tony Williams, and there's also a number of other teaching associates that. you'd have to say, give baffling evidence that, 'When I consult with students - the global summary of a lot of this evidence is, 'When I consult with students I hardly ever talk about the subject, I do student type counselling, get into people's personal issues and career advice'. We don't know how this fits into the case, because that evidence was never addressed in the NTEU's submissions.

PN297

MS KELLY: Your Honour, I don't like interrupting in closing addresses, but my learned friend has called out the statement of Tony Williams, and that statement says, 'The most common topics of discussion at consultations were assessment and marking'. So if my learned friend wants to make a point about the evidence it should be anchored in the evidence and it should be accurate.

PN298

MR BOURKE: Anyway, the point I want to make, and I'll take you to the document, is to the extent student consultation navigates outside of the subject matter the teaching associate is teaching, but doesn't lend itself to dealing with, one way or the other, regarding the issues concerning Schedule 3. But we will say, to the extent teaching associates start getting involved in personal counselling or career advice type matters, it's not part of their duties. They shouldn't do it. There's specific people trained to do that, at Monash. Teaching associates are not so trained and Mr Williams, in fact, he's produced a whole stack of handbooks, and that's what he's been told.

PN299

If your Honour goes to our volume 2 of the application book, and if your Honour goes to page 1591, 1591, that's pdf.

PN300

THE DEPUTY PRESIDENT: Sorry. My definition of volume 2 is the non party material. I think your volume 2 is probably the same as mine, which is the first volume that needed to be split into two folders.

PN301

MR BOURKE: Correct.

PN302

THE DEPUTY PRESIDENT: Yes. Court book, sorry, what page was it, or tab?

PN303

MR BOURKE: It's just listed as 'Tony Williams', it doesn't have a specific tab, but if you put in the pdf number 1591 you'll come up with the 2022 handbook that

Mr Williams - sorry, it's in volume - sorry, volume 1. Sorry, I apologise, it's tab 32, I'm told, volume 1. Does your Honour have, 'Liaising with students'?

PN304

THE DEPUTY PRESIDENT: On page 1591?

PN305

MR BOURKE: Yes.

PN306

THE DEPUTY PRESIDENT: Yes, '8.0 Liaising with students'.

PN307

MR BOURKE: So this is a handbook for 2022. There's a discussion, 'Liaising with students':

PN308

> *You will often encounter students who might benefit from counselling, language learning and disability support. It is important that you refer them to the appropriate service and do not feel that you have to provide all the assistance yourself.*

PN309

There's then a list of various services. Then if you go down to 8.4, 'Counselling', there's a reference to the fact that:

PN310

> *Students sometimes view their tutor as a counsellor, or at least someone they can offload their worries. You are not trained for or expected to provide this service.*

PN311

Then there's a suggestion about the type of things that might be raised. So that's in the handbooks that Mr Williams has produced. That's the 2022 handbook. Equivalent statements, which he produces in other handbooks Mr Williams produced, the 2019 handbook, that's at pdf 1556 to 57, there's the 2017 handbook, 1522-23. The 2016 handbook, that's on page 1489. The 2015 handbook, 1458.

PN312

So moving to 'discretion', in our submission, clearly clauses 1 and 2 are currently affecting thousands of employees. There's clearly - we're in no man's land and there's a clear dispute about they should be interpreted and applied. In our submission, this is front and square exactly what 217 is about, in terms of removing that, making the schedule workable and everybody knowing where they stand.

PN313

In our submission, the proposal of the NTEU that we simply do nothing and let's just all go to the Federal Court and have it out, in our submission is failing to

recognise the legislative intent of that long-standing provision and ignores the notions of equity and good conscience that this needs to be fixed.

PN314

There's then the suggestion that, 'But there'll be no change to earlier agreements', so be it, that's reality with any often application of 217, when there are historical similar clauses. Also that was an argument advanced before Snaden J, who recognises the reality that you shouldn't shut out the jurisdiction of this Commission.

PN315

There's some suggestion we're attempting to rewrite the schedule. We are not, we're attempting to give it a sensible construction so it's workable, going into the future.

PN316

There's then a submission made by the statement of Ms Linda Gale, that we would be breaching the better off overall test, in her opinion. Of course the power under 217 has got nothing to do with the BOOT test, it's simply removing an ambiguity, not changing the boundaries and, of course, the BOOT test, you need to apply across the entire agreement, not simply focus on one clause. This is not the occasion to have an argument about the BOOT test.

PN317

There was then a submission made that in those particular departments where scheduled consultation is paid, under clause 7, people may be worse off and in order to ensure no one is worse off we have provided, at Annexure A, that's 1615 of volume 1 of the application book, an undertaking to ensure that irrespective of any variation, anyone that's currently enjoying clause 7 benefits, where they're required to schedule consultation, that will not change during the life of the 2019 agreement.

PN318

There's then the suggestion of, 'Don't do anything because we've got bargaining going on'. As we've said, in our reply submissions, there's a long way to go on bargaining. There's clearly going to be an impasse on bargaining over this clause and how it works and the redrafting of it. We could be a long way down the track. Historically, each of these enterprise agreements has taken a long time to negotiation. In our submission, we should just park this, we're going to continue to have disputation over the 2019 agreement even if we do reach agreement on bargaining. That should not be a reason for not exercising the discretion, under 217.

PN319

Then there's a point made that, 'There's a lot of people who have filed submissions opposing the variation'. Your Honour is entitled to take that into account, in your broad discretion, but there's also, I think we've got 4500 people were notified, so there's a lot of people who did not file objections but we would say, at the end of the day, the competing matters that we have put forward are the objections of 100 plus individuals should not get in the way, in terms of your exercise of discretion,

but we would accept you're entitled to take it into account, because of the width of your discretion.

PN320

Unless there are any other matters.

PN321

THE DEPUTY PRESIDENT: What I understand the NTEU's primary position on discretion, which is that - and they use the word 'only', but whether it's the word 'only' or it's common intention is a matter to have regard to, or given serious weight to, I mean what do you say - I mean the NTEU says there is no common intention, what's your position on whether there is and, if there's not, what are the guiding factors?

PN322

MR BOURKE: As we said, it can be one factored away into account. We would say, given that there's no intrinsic material to assist in construction, you can find a common intention but, essentially, it's by looking at a textual analysis to see what the parties agreed on. In our submission, once you do that the proposed variation that we week, in our submission, is the most industrially sensible approach, in terms of resolving the issue.

PN323

I should have taken you, there is a discussion, the Telstra case, which is in our bundle, we expressed the caution that it's pre Bianco, to it needs to be read with caution, but there is a discussion about common intention and an objective analysis of that. It's tab 3 of our bundle of authorities. Full Bench of Ross VP, Lacey SDP and Smith C, and if your Honour goes to 32, please, paragraph 32. As we say, this has got to be read now, in light of Bianco, where Bianco does not single out, as some critical issue, mutual intention. But look, at 32:

PN324

The objectively ascertained mutual intention of the parties, at the time the agreements are made, is clearly relevant to the exercise of the discretion.

PN325

That's dealt with as objective. Then if your Honour moves to 39:

PN326

The objectively ascertained mutual intention of the parties, at the time agreement is made, is to be determined, in each case, as it is clearly relevant to the exercise of discretion.

PN327

We agree, relevant, not mandatory, but it's an objective task. Then if you move to 51:

PN328

We turn now to consider the mutual intention of the parties to the agreement. As suggested by the authorities, the starting point is the words of the agreements themselves.

PN329

We say that supports the fact there's no dividing line, based on whether you're being asked to schedule a consultation time or not. There is ambiguity regarding the meaning of contemporaneous and we say an industrially common sense approach is to put a boundary around it of a week either side.

PN330

Then, at paragraph 40:

PN331

It is important to note that a finding as to the objectively ascertained mutual intention of parties does not, of itself, dispose of the matter. It does not resolve all the issues pertaining to the exercise of the discretion conferred on the Commission.

PN332

THE DEPUTY PRESIDENT: If common intention is approached on an objective basis and I've got to say that's something that's repeated in other authorities, one of the issues I'm trying to grapple with, how's that different from construction?

PN333

MR BOURKE: I don't think, in the end, it is different from construction.

PN334

THE DEPUTY PRESIDENT: I mean one of the NTEU's cases, and again it's a pre Bianco case, so it'd have your asterisk

PN335

next to it, Watson VP refers to Codelfa, which is a quintessential construction.

PN336

MR BOURKE: And this case also deals with Codelfa.

PN337

THE DEPUTY PRESIDENT: Yes.

PN338

MR BOURKE: The only thing I would add is common intention can include, as your Honour mentioned, a special case of - a kind of rectification case that the words - you can't rectify the words and not reflect the mutual intention of the parties, where that evidence is clear, there was a mutual intention. Some type of drafting mistake, so to speak. But other than that, and no party is alleging there's been some drafting mistake, we've both gone through the history of these agreements and found nothing. What you're left with is simply common intention is another word for meaning of the words.

PN339

THE DEPUTY PRESIDENT: Well, it might be that there's possibly - a judicial court is going to have to make some decisions on this, in the future, but if it's no more than construction, then it sort of raises some challenges as to the utility of common intention as a touchstone or as a guiding factor, or the sole factor in the

NTEU's case, for variation. Putting aside that issue - well, there have been judicial cases where judicial caution has been expressed in rushing to a finding of common intention, and I'm thinking, in particular of Gray J's, a couple of his earlier decisions, *SDA v Woolworths* I think is one, and I'm hoping you know the ones that I'm talking about. That has more or less been echoed in some Full Court decisions as well.

PN340

But the gist of what his Honour was saying is that if there's to be a search for common intention there needs to be some caution in finding it. Where things are being looked objectively, there could be a number of explanations for why things are done. Just industrial harmony at the time, no one thought about the provision, or other factors, as opposed to a common intention of an actual kind, as opposed to a common intention derived through rules of construction to impute a common intention, if I might put it at that level.

PN341

So where do you see, if at all, in any of that sort of spectrum of ideas, of how common intention is approached, in a variation case, post Bianco perhaps at least?

PN342

MR BOURKE: Yes. So we would say, first thing, Bianco doesn't particularly emphasise common intention, to the extent it does, just in the mix. You come back to concepts; equity, good conscience. Ambiguity (indistinct), totally different question. They make clear that's not really an interpretation task.

PN343

If you want to, in part of the mix, look at common intention, as I said, absent that special case, where there's really been a drafting mistake, and there's clear evidence as to what parties intended to do, moving away from that case, you're in Codelfa space.

PN344

But, as your Honour says, common intention does not mean, 'That was the true intention of the parties', here's a legal fiction, that's construction. It's that the parties are bound by the agreement they struck, that's contract law, that's the effect of the approach of enterprise agreements.

PN345

So when is the use of common intention? As your Honour says, parties may not have really properly concentrated their mind on how this is all going to work, but you are bound by the language and you're only then left with a textual task.

PN346

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

PN347

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

PN348

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

PN349

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

PN350

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

PN351

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

PN352

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

PN353

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

PN354

MR BOURKE: Correct.

PN355

THE DEPUTY PRESIDENT: I understand.

PN356

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

PN357

THE DEPUTY PRESIDENT: I understand, thank you.

PN358

MR BOURKE: Is there anything else?

PN359

THE DEPUTY PRESIDENT: Nothing. I suspect that there'll be a couple of things that arise in reply anyway.

PN360

MR BOURKE: All right, thank you.

PN361

THE DEPUTY PRESIDENT: All right, thank you.

PN362

Ms Kelly?

PN363

MS KELLY: Thank you, Deputy President. Might I have 15 minutes to take instructions about a number of matters that have arisen in the course of my learned friend's address this morning?

PN364

THE DEPUTY PRESIDENT: Do you want a brief adjournment, do you?

PN365

MS KELLY: Yes, please.

PN366

THE DEPUTY PRESIDENT: How are we going for time? That shouldn't be a problem. Shall we rise until, say, 11.45 then?

PN367

MS KELLY: That would be convenient, thank you, Deputy President.

PN368

THE DEPUTY PRESIDENT: Thank you everyone, we'll adjourn until 11.45.

SHORT ADJOURNMENT **[11.35 AM]**

RESUMED **[12.02 PM]**

PN369

MS KELLY: Thank you, Deputy President, and my apologies for the additional time that was taken just then.

PN370

I propose to deal, Deputy President, with matters in the following order. I want to say something, at the outset, about principles, because, as you're aware, we are apart on a number of matters of principle. I then want to deal with, at a high level, the evidence and to identify for you, Deputy President, what that evidence is and what it goes to. I then want to explain why there's no ambiguity in the clause and you can be satisfied that that's the case. I then want to say something about the mutual intention, in the context of this case and, of course, on my client's case, that is a matter of significance, less so on my learned friend's submissions. Then, finally, I want to turn to the question of the exercise of discretion.

PN371

Can I emphasise, Deputy President, that the question of discretion does not turn on whether or not you accept the submissions that I will make on the role of common intention, on the question of your power to vary the agreement. Whether or not that submission is accepted, in my submission, you wouldn't exercise the discretion in any event.

PN372

If, Deputy President, you accepted that aspect of my submission, you, ultimately, wouldn't need to determine the question of principle to which I will now turn.

PN373

THE DEPUTY PRESIDENT: Can I just get you to run that by me again, just that proposition, if I may, just so I've got that clear in my mind?

PN374

MS KELLY: Yes. If I persuaded you, Deputy President, that this is not a case in which the discretion ought to be exercised, irrespective of whether or not common intention is the touchstone for the exercise of the discretion at all, then you wouldn't need to resolve that question.

PN375

THE DEPUTY PRESIDENT: Yes, I understand.

PN376

MS KELLY: If I don't so persuade you, then it will be necessary for that issue to be determined.

PN377

Can I start, Deputy President, with Bianco, to which my learned friend took you. Bianco tells us three relevant things. The first is that, and I think this is uncontroversial, section 217 is substantially the same as the predecessor sections; sections 116 and 117 of the Industrial Relations Act 1998, and then section 170MV(6) of the Workplace Relations Act.

PN378

So when we come to construe and apply section 217 of the Fair Work Act, we can look back to the earlier authorities. That assumes some significance because of what my learned friend put earlier, about the relevance of those authorities, in light of the Full Court's decision in Bianco.

PN379

The second category of things that Bianco tells us is uncontroversial. It speaks to the question of how ambiguity or uncertainty is to be determined and there's no dispute about those principles, Deputy President.

PN380

However, and this is the third category, these are the things that Bianco doesn't tell us, and it becomes critical in this case. Bianco does not deal with the question of how the discretion is to be exercised if ambiguity or uncertainty is found.

PN381

So it is accepted, Deputy President, that ambiguity or uncertainty is a jurisdictional fact. Unless you're satisfied of that ambiguity or uncertainty, the discretion, under section 217 is not enlivened.

PN382

Bianco says nothing whatever about whether and how the discretion ought to be exercised, if ambiguity or uncertainty is found. It, that case, that is, was not concerned with that second question and it made no findings about that second question.

PN383

So, among other things, Deputy President, it does not answer the question of whether or not common intention is a further - I withdraw that. It does not answer the question of what the role of common intention is, in the exercise of discretion, and it may be one of three things.

PN384

It might be one relevant consideration to be taken into account, with many others. It might be a mandatory consideration or it might, in fact, be a further jurisdictional fact. Bianco does not tell us the answer to that question.

PN385

When you put that proposition to my learned friend, Deputy President, he said something like, 'It's not helpful to bifurcate the two inquiries and they may overlap'. Now, if what my learned friend meant by that is that common intention is relevant to both inquiries, you can look to common intention for the purpose of determining whether there is ambiguity or uncertainty and you can also look to common intention for the purposes of exercising discretion, I don't cavil with that proposition.

PN386

But if he intended to convey that the two inquiries can overlap, then they cannot. It is well established that we determine the jurisdictional fact first before we turn to consider whether or not the discretion ought to be exercised.

PN387

Next, Deputy President, my learned friend put the proposition that because of Bianco we treat everything that came before it with significant caution. That is a proposition that cannot and should not be accepted. As I've identified, Bianco says nothing whatever about the exercise of discretion. That forms no part of the case and the Full Court had nothing to say about it, because the Full Court wasn't asked to say anything about it.

PN388

Equally importantly, Bianco is littered with references to the very earlier authorities that my learned friend says you should treat with caution, Deputy President. The Full court there relies on the Pilots decision, the Tenix decision, the Beltana decision, all of the decisions that have come before, both under 217 and the predecessor legislation. Those decisions are called on, by the Full Court, for foundational propositions about the operation of section 217.

PN389

So we put entirely to one side the idea that Bianco says anything at all about the controversy between us, on the question of the mutual intention of the parties. In my submission, no support is found, in Bianco, for the proposition that the earlier authorities, to which I'm about to take you, should be treated with caution. Indeed, the reliance on those earlier authorities, by the Full Court, suggests that, in fact, they continue to have application and currency.

PN390

The mutual intention question is obviously of significance, on my client's case, and it's significant, Deputy President, irrespective of the role it plays. Whether it's a jurisdictional fact, a mandatory consideration or a significant relevant consideration, it is a significant aspect of each of the ways in which my client defends the application brought by Monash. I'll deal with those propositions in turn, and in reverse order, Deputy President.

PN391

First, the authorities make clear that, at a minimum, the mutual intention of the parties is a matter that the Commission may take account of, in the exercise of discretion, and is a significant factor in the exercise of discretion.

PN392

The authorities that make good that proposition have been provided to you in the respondent's bundle, Deputy President. I am now working in hard copy so I thank you, Deputy President, for asking that we bring a hard copy. It's been used for a purpose, other than the one that it was anticipated.

PN393

We've provided to you, at tab 2 of the respondent's list of authorities, *Re Australian and International Pilots Association* [2007] 162 IR 121. The relevant passage is found at 17, Deputy President, and it is there said:

PN394

> *It is well established that a significant factor is the objectively ascertained mutual intention of the parties at the time the agreement was made.*

PN395

Emphasise 'significant factor'.

PN396

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 parties, usually without any arbitrated content or independently determined standards of industrial fairness.

PN397

Emphasise 'independently determined standards of industrial fairness', which, as I apprehended, my learned friend's submission this morning is precisely what you to vary the agreement to give effect to.

PN398

At 36 of that same decision, Deputy President, again reference to 'mutual intention of the parties' is made, and it is said:

PN399

In my view, this is a significant factor and a variation which is not consistent with the mutual intention of the parties is more in the nature of the addition of something upon which the parties are not agreed. Such a consequence should be awarded.

PN400

Next, Deputy President, there is *Public Transport Corporation of Victoria v The Australian Rail, Tram and Bus Industry Union*, [1995] 140 IR 388, at tab 1 of the respondent's list of authorities.

PN401

THE DEPUTY PRESIDENT: Sorry, just before we move on from Watson VP's decision; what do you say means by, and I'm looking at paragraph 17 and 18, 'The task of the objectively ascertained mutual intention of the parties'? Because what Watson VP then goes on to talk about is by direct reference to Codelfa, it's just one of these things that is exercising my mind as to the difference between that and what looks awfully like construction.

PN402

MS KELLY: Yes, it is wider, Deputy President, than the notion of construction. That is, for a reason that is consistent with the view that I think my learned friend put to you, which is the two - I withdraw that. It's wider than 'construction' because section 217 is akin to a rectification power, and I'll develop that point in a moment. But we look to, 'What did the parties actually intend to do?', but we make that assessment objectively We look at what they said, we look at what they did, we look at the words that were used. We look at any other extrinsic materials that bear on the question.

PN403

We might be able to determine that question, and in this case, we can't. But it looks to a wider - there is a wider range of indicators that are admissible, on the question of objective intention, for the purposes of 217, than there would be in a

construction case, because it will include the circumstance where the clause is capable of being construed but, on its proper construction, it does not reflect the mutual intention of the parties, the actual mutual intention of the parties, objectively determined.

PN404

THE DEPUTY PRESIDENT: Subjective intention?

PN405

MS KELLY: Yes, the subjective actual mutual intention, but assessed objectively.

PN406

THE DEPUTY PRESIDENT: Yes. That conceptually raises other issues. Is that just a question then of assessing evidence, because I mean - - -

PN407

MS KELLY: Yes, it is, Deputy President. And, in this case, whatever complexities might arise about that task, they don't arise here. Because one thing my learned friend and I do agree on is that your Honour has before you two things. One is the words and, on my learned friend's case, they're ambiguous or uncertain, or both, and the inconsistent application of the clause across Monash University.

PN408

So, for that reason, it's ultimately not - in the application of those principles, in the circumstances of this case, it's not complex but the lack of complexity arises from the absence of any evidence about those matters.

PN409

We then have, Deputy President, Public Transport Corporation, at tab 1. Dealing with a slightly different point, but relevant to this first proposition that mutual intention is, at least, relevant and significant, at 392 there's consideration of the question of whether or not ambiguity was intended and that is said to be relevant to the exercise of the Commission's discretion.

PN410

Then it is said that:

PN411

In the decision below, the reason advanced for not exercising discretion to vary was that the variation would not have been within the contemplation of other parties to the agreement at the time they entered into it and that is said to be a factor that a decision maker is entitled to take account, in the exercise of the discretion.

PN412

All of that is speaking to mutual intention being relevant and, in my submission, at the minimum, a significant factor.

PN413

There are also, Deputy President, in the next category, is very strong indicators that mutual intention is a mandatory consideration.

PN414

Now, true it is that it's not found in the express words of section 217, but wherever we have a discretion it's never unbounded, it's bounded by the context and purpose of the statute and 217 takes its place, as part of a wider scheme for how an enterprise agreement can be varied. Those circumstances are limited: democratically, by agreement with the employees; by the Commission to remove ambiguity or uncertainty; or by the Commission to remove discriminatory terms, on application of the Human Rights Commission.

PN415

It takes it place within that framework, inside the objects of the Act, both section 3 and the object of part 24, specifically, with are about, among other things, simple and flexible and fair frameworks, with an emphasis on enterprise bargaining.

PN416

Those processes within which the variation provisions take their place, emphasise the agreement between employers and employees, and they do so including, by requiring among other things, that reasonable steps are taken to ensure that employees understand the terms of agreement, that there's been a proper process of explanation and that there are arrangements for the making of agreements, by way of ballots, they ensure that that emphasis on enterprise bargaining is given effect, through those processes.

PN417

So when we look at where 217 takes its place within the whole of the statutory scheme, we see that it provides an exception, one of very few exceptions, to the democratic process by which an enterprise agreement is made, varied and terminated. That is a powerful indicator that when section 217 is engaged, given the presence of a mechanism for a democratic variation of the agreement, that the mutual intention of the parties is not just an important consideration but a mandatory one.

PN418

There is some support for that proposition, Deputy President, found in earlier decisions of this Commission and its predecessor bodies.

PN419

Tenix, Deputy President, which is found at tab 5 of the respondent's bundle, at paragraph 32, what is said is that:

PN420

> *In exercising the discretion the Commission is to have regard to the mutual intention of the parties at the time the agreement is made.*

PN421

'Is to have regard'.

PN422

Then, again, Public Transport Corporation, which is tab 1 of the bundle, again at page 392, it's said there:

PN423

In exercising such a discretion the factors to which the court should have regard would include the intention of the parties at the time the agreement was made. Such an intention may be discerned from the circumstances at the time and subsequent conduct.

PN424

Now, I accept, Deputy President, that, in terms, none of those decisions use the words 'mandatory consideration', but, in my submission, that's what this is saying, that's what these authorities are telling us, that mutual intention is a mandatory consideration. The Commission is to have regard to it.

PN425

In my submission, though, Deputy President, layer 1 and layer 2 are, ultimately, succeeded by layer 3, which is that the only circumstance in which the Commission can exercise it's power, under 217, lawfully, is where it can determine the mutual intention of the parties. That is because the power, under 217, is to remove the ambiguity or the uncertainty. That is the limit of the power conferred on the Commission.

PN426

What is said in the relevant authorities, Deputy President, and for this purpose I need to take you to the applicant's authorities, in part B, I don't have a tab number I'm afraid, but they've provided your Honour with *Construction, Forestry, Maritime, Mining and Energy Union v Specialist People Pty Ltd* [2019] FWCFB 6307, a decision of Hatcher VP, Coleman DP and Lee C.

PN427

At paragraph 41, Deputy President, what is there said is that:

PN428

The ambiguity or uncertainty variation procedure is not to be used for giving effect to a new and substantive change to the agreement.

PN429

Then, the Tenix decision, to which I took you to a moment ago, at paragraph 56, that's tab 6 of the respondent's bundle, this is said:

PN430

The above extract -

PN431

Not relevant for our purposes, Deputy President:

PN432

discloses that in considering the exercise of his discretion the Commissioner considered himself limited to considering whether or not he should give effect to Tenix's primary or alternative variation proposals. Having identified an

ambiguity or uncertainty, the Commission was empowered to remove it by varying the agreement in a manner which gave effect to the neutral intention of the parties, at the time the agreement was made. In that regard the Commission was not limited by the form of the application before him.

PN433

Then Public Transport Corporation, Deputy President, tab 1 of the respondent's bundle, again at page 392, it is said that:

PN434

If you cannot determine the objective mutual intentions of the parties -

PN435

Or the proposition is that:

PN436

If you cannot determine the objective mutual intention of the parties, any variation imposes on those to whom the agreement applies an outcome to which they did not consent.

PN437

Again, I accept, Deputy President, that none of those decisions, in terms, says that unless you can discern the mutual intention, the Commission cannot lawfully exercise discretion. But, in my submission, that's what they mean.

PN438

The jurisdiction conferred by section 217 is to remove ambiguity or uncertainty to give effect to the mutual intention of the parties at the time the agreement was made. That is the limit of the power that 217 gives this Commission.

PN439

Were it otherwise, we are in the territory that I think my learned friend urges on you, Deputy President, which is that this is a broad, wide-ranging discretion that allows the Commission to amend the parties bargain, 'parties' used loosely, in terms to which they did not themselves agree.

PN440

THE DEPUTY PRESIDENT: On the question of 'parties' being used loosely, whose intention - I know I keep coming back to this, but I find it conceptually challenging. I mean, in *CFMMEU v Specialist People*, the decision we were just looking at, I think the Full Bench identifies that's not free from challenges, at paragraph 49 in the last - - -

PN441

MS KELLY: Yes.

PN442

THE DEPUTY PRESIDENT: I think it's the last sentence:

PN443

Although there are no parties, per se, to an enterprise agreement, 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 section 182.

PN444

MS KELLY: That's so. 'The intention' is the intention of those who make the agreement, and those who make the agreement are the employer and the employees who vote in favour of doing so.

PN445

THE DEPUTY PRESIDENT: Does that, potentially, leave us in a circumstance - it might be almost impossible to ascertain, at least subjectively, the - whatever it might mean, the intention of the employees who vote, by secret ballot often, and with different motives and views.

PN446

MS KELLY: It is not practical, Deputy President, to enquire into the subjective states of mind of any of the persons who made the agreement. That's equally true of a body corporate, such as the university. In whose mind would the intention of the university lie? That's not the way this task is approached. We look at any extrinsic material that's capable of bearing on the question, which could include, for example, materials provided to the affected employees that outline to them the terms of the agreement, or what they're intended to mean. It could be bargaining minutes. There are a whole raft of extrinsic materials that might bear on this question.

PN447

'That is difficult' doesn't mean that that's not the task that's before the Commission.

PN448

THE DEPUTY PRESIDENT: So, at least on a point of principle, I don't think there's any difference between what Mr Bourke was indicating earlier there, is that correct?

PN449

MS KELLY: On how we determine mutual intention? Yes.

PN450

THE DEPUTY PRESIDENT: Not the outcome, in this case, but the - - -

PN451

MS KELLY: I think that's correct, Deputy President.

PN452

So we move from that proposition, Deputy President, it is not practical to determine it based on states of mind of any particular individual.

PN453

Public Transport Corporation, at page 391, tells us we look at the text of the circumstances at the time the agreement was made and the subsequent conduct of the parties.

PN454

Then we can, in my submission, Deputy President, look to rectification cases, because, in my submission, the section 217 power is akin to a rectification power. I've provided, for that purpose, Deputy President, the decision in *Simic v The NSW Land and Housing Corporation* [2016] 260 CLR 85, page 102, paragraphs 41 to 42. This is the High Court dealing with a rectification case and considering how mutual intention is determined. Of course, in those cases it is actual mutual intention. They say:

PN455

> *It must be objectively apparent, from the words or actions of those who made the agreement.*

PN456

And that's not different here. It's objective, albeit we're looking at actual intention. So we look to the types of material that I have described and, of course, we can also look to the text.

PN457

THE DEPUTY PRESIDENT: I mean, as I read that paragraph 42, that's really just saying - I mean the reference to the evidence - I'll take a back step, 'A court, in determining whether the burden of proof is discharged', so it's a burden of proof question, 'may be said to view the evidence of intention objectively', I mean that's got to be correct, not just because the High Court said it. That's dealing with an obvious scenario where a respondent to a rectification argument might put the actual decision maker in the box and say, 'That wasn't my intention'. But just because they get into the witness box and say that, that doesn't mean they're going to be believed by the judge.

PN458

MS KELLY: Of course. Yes, of course.

PN459

There's also then - we round out that proposition, Deputy President, with the reality that perhaps you were adverting to in some dialogue you had with my learned friend, that there are many categories between established common intention and absence of common intention.

PN460

It might be common inadvertence is one of the categories that is often referred to, or it might be mutual mistake. It might be that there is no common intention because both parties understood the clause to mean something differently. There's also the category I earlier took you to, in one of the authorities, which is lived ambiguity, where the parties have chosen the ambiguity that inheres in the agreement. I don't put that proposition here, Deputy President, but that is a factor that the Commission would be entitled to take into account.

PN461

THE DEPUTY PRESIDENT: I suppose deliberate ambiguity might include not necessarily embraced ambiguity but a party views a clause as being ambiguous but, for various reasons at bargaining, it stays put.

PN462

MS KELLY: That's so. And that industrial reality is a powerful factor that weighs against a proposition my learned friend has put. The legislature did not contemplate, in my submission, that parties could leave their agreements deliberately ambiguous, put them to a vote and then come to this tribunal and say, for reasons purely of industrial convenience, or I think industrial reasonableness might have been the phrase used by my learned friend, 'Please vary the agreement to deal with this ambiguity, in a way that this tribunal considers to be industrially reasonable or fair'. That is not what was contemplated by the legislature.

PN463

We've dealt, Deputy President, with the proposition I put about the goal of common intention and that most recent submission was about how we prove common intention. I want to then say something about what type of proof is required.

PN464

For that purpose we again call in the decision in Simic, Deputy President. I do so, in the context of the Southgate decision, which we have provided at tab 3 of the respondent's bundle. There, at paragraph 35, is the description of cases of this kind as being akin to rectification cases, a description that I embrace.

PN465

In those cases, of which Simic is a recent and relevant example, the High Court endorses the proposition that the type of evidence that is required to demonstrate that mutual intention, that common intention, must - I withdraw that. The High Court tells us that the mutual intention or common intention, 'Must be proved in the clearest and most satisfactory manner'. That's paragraphs 41 to 42 again, Deputy President. And that, in my submission, also ought to apply here.

PN466

I appreciate that my learned friend is not putting his case this way, but it's the way the case is being defended, that not only do you have to have the common intention, but you must prove it, in the clearest and most satisfactory way and if you can't do that, this tribunal cannot or, at least, should not exercise the discretion in section 217.

PN467

Can I turn then, Deputy President, to the evidence? I want to do this at this stage, so that it's clear what all this material in the court books is, and the propositions which it supports. There's four categories, Deputy President. Statements from the affected teaching associates, filed by the NTEU; statements from the industrial staff of the NTEU; the submissions from the non parties and then some admissions and a number of business records.

PN468

Starting with the submissions filed by the affected teaching associates, they're found in the court book, Deputy President, at tabs 24, 25, 26, 29, 30, 31 and 32. In broad terms, they deal with the following categories of evidence. They identify themselves and where they work. They explain whether, where and how they were required to perform student consultation. They identify the work they do, generally, as teaching associates. They identify the work they perform in student consultations and then they provide you, Deputy President, with their views about the variation.

PN469

The evidence about what they do, where they do it and how they do it, is relevant on construction. It's relevant on the question of whether the variation, in the terms proposed by Monash, ought to be made. Separately, their views as to the variation is evidence that goes to the exercise of your Honour's discretion because, in my submission, you're entitled to take into account the views of those who are affected by the proposed variation.

PN470

There is then the statements from the industrial employees of the NTEU. The first of those is a statement of Ms Thomas, court book volume 1, tab 27, at page 853. Ms Thomas provides evidence about the history of the matter and then details some matters relevant to the exercise of your Honour's discretion, which is the extant Federal Court proceeding, presently adjourned. The differential rights that the NTEU says would arise, if the variation was made, and also some information about the sectoral context. Again, all said to be relevant to the exercise of discretion.

PN471

The second industrial statement is from Ms Linda Gale, court book volume 1, tab 28, page 1122. It, again, deals with matters that, in my submission, are relevant to the exercise of the discretion. The sectorial context, other underpayments at Monash of casual employees, the extant bargaining process, the issues relating to the BOOT to which I will come, and then this question of inconsistent practice.

PN472

Then we have, Deputy President, in the supplementary court book, at page 297 to 327, some highlighted material from the non party submissions, which was the subject of the recent case management hearing. Those highlighted paragraphs do two things. Firstly, the again to go this question of what do teaching do, how do they do it, when do they do it, what do they do in student consultation. And then they go to the question of inconsistent practice, which is not the subject of an admission, but it's an important point and we've called the totality of the evidence on it.

PN473

Then we have, Deputy President, the non party submissions generally, found in court book 1, volume 2, which, again, go to the question of the opinion of those affected by the variation and the exercise of the discretion.

PN474

We then have three further things, Deputy President. You will find, in the supplementary court book, at tabs 1 to 3, a bundle of policies and procedures. This is all about the - it's all about two things, Deputy President. One is the inconsistent practice question. Again, the subject of an admission, but we've given you the bundle of material. It's also relevant to the question of 'required' or 'directed', which I'll come to, in the context of the proper construction of the clause, and what those policies and procedures don't say about the right of Monash to direct its teaching associates.

PN475

There's then the admission from Monash, on the payment of teaching associates, which has two limbs. The first is that some teaching associates have not been directed to perform student consultation and the second is that some teaching associates have been directed to perform student consultation and have been paid at the rate proscribed by clause 7 of Schedule 3. You will find that at supplementary court book, page 329.

PN476

Then, finally, Deputy President, there are some extracts from the award, which are relevant on the question of the better off overall test, and they're found at supplementary court book 330 to 331.

PN477

That's all a bit tedious, sorry, Deputy President, but that's - there's a lot of material before you, I thought it was helpful to identify, as clearly as I could, to what relevance - to what use my client seeks to put that material.

PN478

THE DEPUTY PRESIDENT: You touched on some of the categories, you didn't say, and you might be going to say in the future, are the extracts of the award, or the awards. Is that something you're going to come back to?

PN479

MS KELLY: I am.

PN480

THE DEPUTY PRESIDENT: I'll wait.

PN481

MS KELLY: Thank you, Deputy President.

PN482

I'm going to turn now, Deputy President, to the question of why there's no ambiguity or uncertainty.

PN483

I accept, as I, of course, must, what the Full Court told us, in Bianco, about how ambiguity or uncertainty is to be found and the circumstances in which it can be found. But the mere fact that lawyers or counsel standing here can place different constructions on words to create an appearance of ambiguity is no reason to find it.

PN484

I think my learned friend said, with reference to my client's submissions, in relation to Monash's proposed amendment, it's easy to stand here and take shots at a set of words. That, in my submission, is what Monash is doing because when we look at these provisions, read as a whole and read together, there is, in fact, no ambiguity or uncertainty. The vice in the approach of Monash is to take the word 'contemporaneous' and read it without the other criterion that govern the application of the relevant clauses.

PN485

It is useful, I think, to go back to the clause, Deputy President, which is at court book 113. In fact it's useful to start at Schedule 2, on page 112.

PN486

What's important about Schedule 2, Deputy President, is two things. One is that it is a flat weight that is proscribed for these activities. The circumstances in which the rate becomes payable is for the performance of the lecture or the tutorial or the other activity set out in Schedule 2.

PN487

For lectures, Schedule 2 tells us the number of hours of delivery and the relevant allocation of associated work. Fur tutoring we find that in Schedule 3.

PN488

So if we then turn to Schedule 3, can I pause there to add this, Deputy President, in each iteration of the agreement, and you have them all in the court book, the structure has been the same. It has always been the case that there is a rolled up rate for the provision of a lecture or a tutorial that has included a specified allocation of time for the activity, one hour, and then a specified number of time for associated duties. That's been the structure of the agreement since 2000 and you'll find it reflected in each iteration of the agreements that are in the court book.

PN489

Schedule 3 then sets out the descriptors. It's self-evident that the agreement contemplates that some types of activities might be performed as an activity associated to a tutorial or a lecture, or might be performed on a standalone basis, as directed by Monash. Student consultation is one of those concepts and the clauses tell us, in terms, when that activity will fall within clauses 1 and 2 or whether it will fall within clause 7.

PN490

Clause 1, dealing with tutorials, explains that the rates proscribed are paid per hour of tutorial delivered. They're paid per hour of tutorial delivered. That is the qualifying criterion for payment of the rolled up rate. You don't have to perform the other two hours. You perform the tutorial, that is the qualifying criterion for payment.

PN491

It then assumes, and it tells us in terms, it's an assumption that, 'There will be two hours associated work, as defined below'. Entitlement to payment, coupled with

an assumption. It's critical, your Honour, that the entitlement to payment arises on the performance of the tutorial, not on the performance of the associated work.

PN492

Then it tells us that, 'For the purposes of payment of a tutorial, or a peak tutorial rate, the associated work', the two hours of assumed associated work, 'may encompass the following activities', and we have the list. One of them, of course, is 'contemporaneous consultation with students', set out in dot point 4.

PN493

What we don't see, Deputy President, in this clause, or anywhere in the body of the agreement is Monash directing the tutor or the lecturer, so the same for clause 2, about which of the associated activities are to be performed in any given work and what proportion of the assumed time is to be allocated to these associated activities.

PN494

It is an arrangement that benefits both sides, Deputy President. Monash pays a flat, rolled up rate, and assumes two hours work for the teaching associate. The teaching associate has the benefit of the guaranteed payment for the tutorial and the freedom to decide which of the associated activities will be performed in any given week, having regard to the need of the lecture, or the tutorial or the students, or their own preparation.

PN495

It is within the teaching associate's discretion which of those activities will be performed, the amount of time that will be allocated to those activities, for the purposes of performing the tutorial.

PN496

So that is the first two important points; payment, entitlement arises on performance of the tutorial or the lecture. The associated activities are within the discretion of the teaching associate. And then there is the delimitation of the type of work that may form part of the associated work but not must.

PN497

That's not to say, Deputy President, that a teaching associate can simply not do the work, but that falls within the performance management framework that sits elsewhere. It's an assumption that work has been performed and it falls, at the discretion of the employee, what aspects of that work and when and how it's performed.

PN498

The final qualifying criterion for clauses 1 and 2 is that it is associated with the delivery of the tutorial. The rates proscribed are paid per hour of tutorial delivered and assume the associated work. So this is a qualified criterion. The associated work is work associated with the delivery of the tutorial or the delivery of the lecture.

PN499

In that context it's easy to see that contemporaneous consultation, associated with the delivery of the tutorial or the delivery of the lecture, is about that specific activity. Consulting with students about the delivery of that tutorial, the content of that tutorial. Speaking to them about it, explaining it to them, whatever it might be.

PN500

So clauses 1 and 2 have a range of qualifying criterion well beyond contemporaneous. Well beyond contemporaneous. Is there a tutorial being delivered. Is the consultation associated with the delivery of that tutorial and then, and only then, do we come to, 'Is it contemporaneous? Does it involve the students? Is it face-to-face or email consultation? Is it happening prior to or following the tutorial?'. All of those criterion have to be met for it to fall within clause 1, for a tutorial, or clause 2, for a lecture.

PN501

Entirely independently of that, Deputy President, we have clause 7. Clause 7 is of a very different kind. It is 'Other required academic activities' and, of course, the work in clauses 1 and 2 is required by Monash, in the sense that a teaching associate is employed to deliver lectures or deliver tutorials. The question is whether there is a requirement to perform those duties in a particular way.

PN502

Clause 7 tells us that this is work the university requires the associate to perform and that is performed as required. So we have a direction to perform work and an obligation to perform it in a way required by Monash. That is, in terms, a very different proposition to a requirement to provide a tutorial and to do associated work, with the associated work is within the discretion of the teaching associate. Here, not only are we requiring you to do the work, you must perform it in the way that we require. Where that happens, including consultation with students, it's clause 7 that governs it.

PN503

So when we look at the totality of these clauses, Deputy President, they don't overlap. They have multiple qualifying criterion and they are capable of being read entirely harmoniously and without any ambiguity or uncertainty.

PN504

Can I add to - - -

PN505

THE DEPUTY PRESIDENT: Just on that, so where then is - on the NTEU's case, which I understand where there's a requirement or a direction, and I'm not too hung up on what word is used, you say that can only be clause 7 and it can never be clause 1, for a consultation activity?

PN506

Putting aside, and I'm sort of glossing over when things might occur because there's allied issues about that,
but - - -

PN507

MS KELLY: I might have not put it as clearly as I could have, in writing, Deputy President. I accept that clauses 1 and 2 are a requirement.

PN508

THE DEPUTY PRESIDENT: Yes.

PN509

MS KELLY: You perform the tutorial and we assume you will do two hours of associated work, and there's a requirement to do that work, in the broadest sense, to properly discharge your job of delivering a tutorial you have to prepare for it, you have to do the student admin, you have to answer the emails, you have to have the chats. That's required, in a broader sense. But it's not directed, other than the time and place of the tutorial, as to when and how the associated work is performed, in what quantum, at what time and what place. That's the discretionary element.

PN510

That is quite different to what we see in clause 7, where there is a specific direction to perform particular work, 'We require you to do this and your entitlement to payment arises when you perform it, as required'. Conduct student consultation in this room, at this time for this period. If you do those things that's when you're entitlement to payment arises.

PN511

THE DEPUTY PRESIDENT: Do you say clauses 1 and 2 have that meaning because they stand on their own two feet, or they have that meaning because of the presence of clause 7?

PN512

MS KELLY: They stand on their own two feet in the sense, Deputy President, that one of the qualifying criterion for clauses 1 and 2 is that the work is associated with a specific task. It is associated with the delivery of a tutorial. It is associated with the delivery of a lecture. Not associated with the delivery of the course. Not associated with the delivery of the provision of education generally. It is work associated with the specific task upon which the entitlement to payment crystallises; the delivery of that specific tutorial, that specific lecture.

PN513

THE DEPUTY PRESIDENT: So why would it cease to be associated because Monash has directed, for example, that 15 minutes be spent, at some point, possibly immediate adjacent to a tutorial, for consultation?

PN514

MS KELLY: It arises because the consultation, in that example, isn't associated with that tutorial. If you are a TA who is directed to provide one hour of consultation time, not linked to a specific subject matter, not linked to the delivery of a particular tutorial or a particular lecture, but, 'For students in this course you will consult for one hour', that's not directly associated with the delivery of a specific tutorial or a specific lecture upon which the entitlement to payment arises. It's broader and that takes you outside - - -

PN515

THE DEPUTY PRESIDENT: If the direction put on the words at the end of it, 'For that particular tutorial', would that be sufficient? Is that the vice that's missing?

PN516

MS KELLY: It's part of the vice. I withdraw that. No, because there is nothing, and I'll come to this when we talk about the BOOT, but the rolled up payment assumes work. There's no entitlement for Monash to direct a teaching associate about how they perform that associated work or even what parts of that associated work will be performed as part of the allocation for any given tutorial or any given lecture. It's completely absent.

PN517

I'll come back to that at the end, Deputy President, because it's one of the reasons why, in my submission, the proposed variation introduces new rights. It grants to Monash a right it doesn't currently have, which is to direct a teaching associate about how that person allocates their associated work and when and how they would perform it. That's the essential difference.

PN518

There are multiple qualifying criteria for clauses 1 and 2, but a central difference is the right to direct when and how the work is performed. It is entirely absent from clauses 1 and 2, it is specific in clause 7.

PN519

THE DEPUTY PRESIDENT: But in clause 7 you've got to carve out the contemporaneous consultation for a tutorial or a lecture. It actually doesn't specifically say clauses 1 or 2 but I think it's clear that it does. But doesn't that, by implication, suggest that contemporaneous consultation could otherwise fit within this clause, which is a required activity, otherwise the words, on one view, have no work to do.

PN520

MS KELLY: In my submission, Deputy President, is doing nothing other than putting the question beyond doubt.

PN521

THE DEPUTY PRESIDENT: For avoidance of doubt, I understand.

PN522

MS KELLY: That's what it's about.

PN523

It's a device that we also see in terms of marking, the distinction between marking that can be performed in the course of a lecture or a tutorial or reasonably there performed, and marking that can't.

PN524

This schedule contemplates certain types of activities can be performed in different ways and, for the avoidance of doubt, it makes clear that one - it operates to the exclusion of the other. That's all, it does nothing more than that.

PN525

The vice, in the submission put by Monash, Deputy President, is that it fixates on the word 'contemporaneous', and you read the clauses as a whole. Once they're read as a whole, and the different circumstances in which they apply is understood, the ambiguity or uncertainty about which clause applies falls away.

PN526

There's a different question, Deputy President, which is, 'When is consultation, within the meaning of clauses 1 and 2, contemporaneous?', but that's an entirely separate question that's not resolved by the proposed variation here and it's not an ambiguity or uncertainty in the clauses, it's an ambiguity or uncertainty in the application.

PN527

In any clause there is going to be marginal cases, at the outer limit, in the penumbra, where the application isn't entirely clear. That doesn't mean there is an ambiguity or uncertainty in the clause. And, in this case, it certainly doesn't mean that the ambiguity or uncertainty, contended for by Monash, arises. It is clear, on the face of the clauses, the circumstances to which they apply.

PN528

THE DEPUTY PRESIDENT: I thought the court, in Bianco, indicated that there doesn't have to be an ambiguity or uncertainty in the clause but it's in its application.

PN529

MS KELLY: They did, and I don't cavil with that proposition, Deputy President. I'm putting the reverse proposition which is, merely because you can point to an extreme example and say, 'How would it apply here?', that isn't enough to make good the ambiguity or uncertainty. In my submission, that is what Monash is doing, in the search for ambiguity or uncertainty where none exists.

PN530

THE DEPUTY PRESIDENT: Just on that final point though, the focus, in Monash's first submissions, on the temporal aspect of contemporaneous, I've read as, primarily, anticipating what he'd understood the NTEU's position was going to be, based on what, in fairness, the NTEU had published, although I think Mr Bourke, also in fairness, has recognised that what you were saying, when your submissions have come in here, on the point about whether something's required or not. That doesn't necessarily go to whether the contemporaneous aspect of it, as such, but I thought Mr Bourke addressed that, in any event.

PN531

MS KELLY: Yes. I was coming immediately to that point, Deputy President. It's not the NTEU's case that contemporaneous means immediate. That's not put.

PN532

On the question of what the NTEU has published, if that's a reference to what was published by the branch present, we've addressed that in writing, Deputy President. The characterisation given by my learned friend is quite wrong. If that's the document that your Honour is referring to.

PN533

THE DEPUTY PRESIDENT: I think it was in their submissions, but I had a feeling there was other material in there, but I could have been wrong. I thought there was something in correspondence as well, to similar effect, not just what was on the website. In any event, what I'm just trying to nail down, that we're not two ships passing in the night, that we're actually - or colliding in the night, perhaps, we're engaging in the issues.

PN534

I should also just make - it's only a couple of minutes to 1, so whenever is a convenient time for you we might take a break.

PN535

MS KELLY: Yes, Deputy President. If I could have two more minutes I would complete this topic.

PN536

THE DEPUTY PRESIDENT: Yes. Take five, if you need five.

PN537

MS KELLY: Thank you, Deputy President, I've already taken quite a bit of time.

PN538

I think I've dealt with this point, but my learned friend also said that, as he apprehended it, the NTEU position was that the question is whether work is required, and hopefully I've clarified that, Deputy President. That is an important distinction about whether the particular way that work is performed is directed, but that's not the only criteria that my client says governs whether or not clauses 1 and 2 are engaged or whether clause 7 is engaged.

PN539

My learned friend also made the submission that it's difficult to determine whether or not Monash has required an employee to perform particular work. That this would lead to an inquiry about who had required the work, when the work had been required and it would be very difficult to determine when and how an employee ought to be paid for the performance of particular work.

PN540

Three propositions in response to that. One, we don't construe an agreement by reference to whether or not payroll would have trouble determining whether or not clauses 1 and 2 apply, or clause 7 applies. We don't reason in that way, Deputy President.

PN541

Two, it is entirely orthodox that employees are paid for work performed as directed. It's not novel to say that your entitlement to payment crystallises when your employer requires you to do something and, indeed, this is point 3, it's embedded in clause 7 that you're entitlement to payment arises when the university requires you to do something and you perform that work as you are required to.

PN542

So it's inherent, in the terms of the agreement, that Monash needs to know when it has directed somebody to do something and whether, in fact, they have done it. I don't understand how it could be said that we ought to consider there is some ambiguity or uncertainty that arises because Monash doesn't know when it's requiring its employees to perform particular work.

PN543

Two final points before we might - before I conclude this section, Deputy President.

PN544

My learned friend went to the statement of claim filed by my client, in the Federal Court, and he took your Honour to a number of paragraphs which deal with what he described as criteria for the proper construction of the clause. Whether something was scheduled, whether it was published, whether it was advertised.

PN545

Those paragraphs define the class of persons in respect of whom compensation is claimed. They say nothing whatever about my client's construction of the clause. They are pleaded for that purpose, 'The class of persons on behalf of whom compensation is claimed are people who are directed to perform work in the following way'. That work is then said to be work falling within clause 7. But the paragraphs to which you were taken do nothing more than delineate the criterion for class of persons on behalf of whom compensation is claimed and to describe the type of work that is said to have fallen within clause 7. They do not reflect criteria or elements of proper construction of that clause, on my client's case.

PN546

Finally, I want to deal with what my learned friend said about the judgment of his Honour Snaden J, in the Federal court. You were taken to it, Deputy President, in a lot of detail, but all I need to say about it is two things.

PN547

One, it has no bearing, whatever, on your exercise of the discretion, under section 217. It does not create an issue estoppel. It is not even - there's no comity issue that arises and it's not even persuasive, Deputy President, because his Honour Snaden J made clear, in terms, that all he had to do and all he was going to do was form an impressionistic view, he says that at paragraph 27, and then on the question of ambiguity or uncertainty he says, at paragraph 32:

PN548

I am satisfied that there is at least some prospect that Monash will be able to establish relevant latent, possibly patent, ambiguity, solely on the strength of the words the provisions employ.

PN549

He's not forming a view. He's simply forming a view that something might be possible, or something might be likely. Those types of conclusions are of no utility in this proceeding at all and they certainly don't have any precedential value and they don't even have any probative value, in my submission.

PN550

All of that means, Deputy President, that, in my submission, we don't have ambiguity or uncertainty. The clauses sit together. They sit together by a clearly defined criterion and any issue about the application of a particular clause doesn't have the consequence that ambiguity or uncertainty arises, or it doesn't otherwise arise on the face of the schedule.

PN551

After the break, Deputy President, I'll move on to mutual intention and then finally deal with discretion.

PN552

THE DEPUTY PRESIDENT: Thank you. We'll adjourn.

LUNCHEON ADJOURNMENT [1.04 PM]

RESUMED [2.16 PM]

PN553

THE DEPUTY PRESIDENT: Ms Kelly, just before you start, I think I overlooked, actually exhibiting or marking any of the exhibits and it's probably best that I do so before we actually conclude the case. Unless anyone's got a different view, I was going to more or less take up what Mr Bourke suggested, on a slightly modified format, exhibit 1 is what I would call the application book of 1618 pages, filed by Monash. Exhibit 2 would be the second pdf volume, which is emails from non parties, I think there's about 470 pages. Exhibit 3 would be the NTEU's supplementary court book, about 336 pages, and I think, for present purposes, that it is.

EXHIBIT #1 APPLICATION BOOK FILED BY MONASH

EXHIBIT #2 PDF VOLUME OF EMAILS FROM NON PARTIES

EXHIBIT #3 NTEU'S SUPPLEMENTARY COURT BOOK

PN554

THE DEPUTY PRESIDENT: I do acknowledge I've received an email over lunch. I've got it but I'm not intending to say anything on that, until I hear from someone at the appropriate time.

PN555

MS KELLY: Thank you, Deputy President. There's no difficulty, from my perspective, of that course. I might, perhaps, note now, while it's fresh in my mind, that the transcript of the directions hearing before you has been made available to us and that, of course, includes the admission Mr Bourke made, on behalf of Monash, which has also been confirmed in writing. But for completeness we would rely on that if we needed to.

PN556

THE DEPUTY PRESIDENT: Yes, I understand. Yes, thank you.

PN557

MS KELLY: Deputy President, can I now deal with mutual intention? I had intended to say quite a bit about mutual intention but perhaps I can shortcut it because, as I understand the submission put by my learned friend this morning, Monash does not put its case on the basis that there can be a mutual intention found, either by reference to text alone or the text with extrinsic material, such that what this Commission is being asked to do is to give effect to the agreement that was reached between the parties, but reduced to writing in a way that was ambiguous or uncertain. I apprehend that that's what was put this morning.

PN558

For completeness, can I deal with it then at a high level of generality, in case that I'm wrong about that. There are two issues that arise in the context of the principles to which I earlier took you, Deputy President. The first is the question of whose mutual intention and when. The second is, mutual intention as to what.

PN559

The first of that was dealt with, at a level of principle, earlier in time but there's this additional question, Deputy President, which is that features of Schedules 2 and 3, and their constituent clauses, have existed since the 2000 agreement was made and that, of course, was made under a different statutory regime. But there are common features to Schedules 2 and 3 that have persisted over time.

PN560

The first is that there has been a distinction between tutorials and lectures, on the one hand, and other required academic activity, on the other. The second consistent feature is the concept of associated duties.

PN561

Now, can I pause there to say that, at paragraph 32 of Monash's outline of submissions it's said that the concept of associated time does not appear in the 2000 agreement, that is wrong, Deputy President, it does. Court book reference 514 identifies where, in the 2000 agreement it appears. So that question of associated work is common since 2000.

PN562

The assumed time allocation, Deputy President, is also common. Since the 2000 agreement was in place there has always been a notional allocation of one hour for the relevant lecture or tutorial and then a certain number of hours for associated time. That is a common feature.

PN563

The types of work that can fall within associated duties have remained in place, though sometimes with a greater or lesser degree of specificity.

PN564

The absence of any right, by Monash, to direct a teaching associate about how to allocate their assumed associated time is common. As is the notion of contemporaneity, in connection with consultation.

PN565

Those aspects of the clauses, Deputy President, remain common between 2000 and 2019.

PN566

THE DEPUTY PRESIDENT: Sorry, going back to court book 514, and I've gone to the court book, I haven't seen which one this is. So this is 2000?

PN567

MS KELLY: Indeed it is.

PN568

THE DEPUTY PRESIDENT: So I can see the third paragraph down, roughly speaking, about point 3 on the page:

PN569

Except for repeat tutorials the rates paid per hour of a tutorial delivered and assumed two hours associated work time, such as preparation and marking.

PN570

MS KELLY: Yes.

PN571

THE DEPUTY PRESIDENT: I see. So is that the point that you're making?

PN572

MS KELLY: That's my point, yes. It's put, from Monash, in writing, that associated time isn't a concept that finds expression in the 2000 agreement, it does. 'Associated work, in terms of preparation and marking.'

PN573

My point, for present purposes, Deputy President, is that these core concepts, within Schedule 3, have been consistent since 2000.

PN574

So, Deputy President, when we look to intentions, the question is, whose intention, in circumstances where there are common aspects to Schedule 3 that have existed since 2000, including the five that I have just identified.

PN575

We have also, Deputy President, the change made in 2009, which was to remove the qualifier 'reasonably', from the word 'contemporaneous', which is a narrowing

of that temporal requirement. That change is then carried over into the agreements that there follow.

PN576

Now, to some extent, this becomes otiose because, as I apprehend it, Monash isn't saying that we can identify a common intention. But if that task were to be engaged in, the common intention would need, in my submission, to look back to the common intention of those who first framed these clauses and to those who then varied them, in 2009, to narrow the concept of contemporaneous, in the way that I have just described.

PN577

As to the second of the questions, mutual intention as to what? In my submission, building on what I've earlier said, it's the mutual intention of the persons who made the agreements about the meaning of the clauses as a whole, not about the meaning of a specific term considered in isolation of the context in which it finds itself.

PN578

Now, on the question of common intention, can we find one? In my submission, no. It's common ground that there are no extrinsic materials from bargaining that assist, no minutes, publications or bulletins that explain the mutual intention, so we're left with two indicia, Deputy President. We're left with the text from which no common intention can be discerned, not least because if it's accepted that it's ambiguous or uncertain it's very hard to determine then what the intention was, and past payment practices.

PN579

Now, as to the first of those two things, the text, there's an evolution to these clauses. There's an evident intention to structure them, in the way that they've been structured. There's an evident intention to have them on one type of student consultation. There's an evident intention to continue to distinguish between them, based on the indicia that I've just described. There's an evident intention to distinguish between directed work and assumed work. And then there's an evident intention to narrow the notion of contemporaneous from reasonably contemporaneous to contemporaneous.

PN580

But outside of that, the text and the evolution of the clauses does not permit a finding that there is a common intention that Monash may direct a teaching associate to provide scheduled consultation at a directed time and a directed place and for a directed duration and that that falls within the assumed work that is described in clauses 1 and 2.

PN581

THE DEPUTY PRESIDENT: Clause 2 actually doesn't, I think, use the word 'assumed'. Is there any significance in that?

PN582

MS KELLY: No, Deputy President. 'Assumed' attaches - sorry. It does use it, at least in some of the agreements. I can't tell you, as I stand here, whether it's used in - - -

PN583

THE DEPUTY PRESIDENT: I'm still looking at court book page 514, so it did in 2000.

PN584

MS KELLY: Yes, it did then. Yes, I can't, as I stand here, tell you, Deputy President, whether it's used in each iteration of the agreement. I'll have Mr Debets answer that question for us.

PN585

I think the difference is, Deputy President, that in Schedule 2 'lecture', for reasons not clear to me - if, perhaps we turn back to the current agreement, at pages 112 and 113 of the court book.

PN586

THE DEPUTY PRESIDENT: This is Schedule 2?

PN587

MS KELLY: It is.

PN588

THE DEPUTY PRESIDENT: Yes.

PN589

MS KELLY: If you notice, under 'lecture', Deputy President, the hour delivery and the assumed associated work is actually built in to the table. You see one hour of delivery and two hours of associated work. It's not for tutoring. For tutoring, those hour allocations are found then in what's clause 1 of Schedule 3. I doubt very much there's art to why it's been done in that way, Deputy President, but I think that explains why we find the word 'assumed' in clause 1 but not in clause 2 of the current agreement. But the hours are, nonetheless, allocated in the same way. And they both have, in my submission, a right to direct.

PN590

I will get you an answer, Deputy President, on whether the term - - -

PN591

THE DEPUTY PRESIDENT: You might not be able to have an answer, other than - the answer of when it disappeared?

PN592

MS KELLY: Yes, when it's there.

PN593

THE DEPUTY PRESIDENT: Yes.

PN594

MS KELLY: The second aspect of that is the payment practices, Deputy President, and you've got evidence of this by way of the admissions and also by way of the evidence from various individuals and also the documentation issued by Monash, about the conduct of lectures and tutorials. But there is no consistency of payment practice, and we have three categories.

PN595

We have the first, which is some teaching associates in some parts of the university have been directed to provide scheduled consultation and have been paid for it, at the rate proscribed for other required activity. The second category is teaching associates who have never been required to provide scheduled consultation. And the third is those who have been required to perform it and not paid separately for it, who are the contested category in the Federal Court proceeding.

PN596

For present purposes, there is no consistency of payment practice that would allow this Commission to infer a common intention, based on a consistent custom and practice, or a consistent application of the agreement over time.

PN597

Monash submits, in its written submissions in reply, that it believes that the cohort who have been paid, at the other required academic activity rate, for scheduled consultation have been wrongly paid. It says that by way of submission, it does not call an officer to - whose state of mind on that question can be tested. In my submission, this tribunal cannot proceed on the basis of that submission.

PN598

So what all of that means, Deputy President, in my submission, is that the Commission is not in a position, on the evidence before it, to ascertain the common intention of the parties who made the agreement. That has a significant impact on the next question, which is discretion, irrespective of whether the question of common intention is a relevant but significant factor, a mandatory consideration or, in fact, a jurisdictional fact.

PN599

On the question of discretion, Deputy President, can I first say this? It might seem an unusual result if you find that there is ambiguity or uncertainty to then not vary the agreement to remove it. But that is, firstly, an outcome that is contemplated by the legislation itself. Section 217 does not mandate that the Commission must remove an ambiguity or uncertainty that exists. So the legislature has expressly contemplated that circumstances will arise when it's not appropriate to vary, notwithstanding that there is some ambiguity or uncertainty.

PN600

Here this is an exemplar case of circumstances in which that conclusion might be reached, because there are at least three ways in which the ambiguity or uncertainty might be dealt with.

PN601

The first is that the Federal Court proceeding will continue on and the court will construe the clause. That will determine the question in a different way.

PN602

The second is that the parties will bargain for a new agreement and that will result in a variation to the clause, through the ordinary bargaining process. I note my learned friend used the term 'impasse' earlier, there's no evidence of any impasse before you, Deputy President, but perhaps that's immaterial because what is before you is the history of agreement making by these parties, as evidenced by the various iterations of enterprise agreements that are before you. So what history tells us is that these parties have always reached an agreement.

PN603

There is then also, Deputy President, the prospect that the parties will bargain and not change these clauses. In which case, the parties will be agreeing to leave them in their current form. That falls into the earlier category that I described at the beginning of my submissions, that where parties have allowed or adopted an ambiguous clause, and done so deliberately, that is a factor that weighs against the tribunal exercising discretion.

PN604

There is then, perhaps, a different category, which is that Monash can simply elect not to schedule student consultation or to use full-time employees to do it.

PN605

So it is not the case that leaving the clause, in its current terms, visits any particular consequence upon anybody. There are a variety of other ways in which it could be dealt with and it's always within Monash's power not to use casual teaching associates for the provision of scheduled consultation, until such time as one of those other outcomes comes to pass.

PN606

So that is all to say that the legislature has contemplated that ambiguous or uncertain clauses might be allowed to remain, in certain circumstances. And even if you are against me, on the balance of the submissions, Deputy President, this is a case in which that outcome ought to endure.

PN607

Assuming we reach the question of discretion, Deputy President, there are two limbs to what the NTEU says about this. The first is that take everything I've said about common intention, Deputy President, and apply it to the discretion aspect. So take, from what I have said, that without finding common intention your Honour has no power to make the variation, adopt those same principles and apply it to the question of discretion. In the absence of common intention, your Honour should not vary the agreement because common intention is a highly relevant consideration and evidence of it is absent here.

PN608

In any event, there are, in the second limb of this contention, multiple factors that have to be taken into account individually but also cumulatively, Deputy President.

PN609

The first of those is the question of whether or not the variation proposed by Monash is consistent with the better off overall test. We have provided, Deputy President, in the supplementary court book at page 330, some extracts from the award. What those extracts do, Deputy President, is identify that, as with the agreements, the award does not authorise Monash to direct teaching associates about when and how they are to perform associated work.

PN610

So you will see, at page 330 of the supplementary court book, which I think is at the pdf page 333 - - -

PN611

THE DEPUTY PRESIDENT: I've got the print off so mine says 330. This is the one with clause 13.2 on the top?

PN612

MS KELLY: Indeed.

PN613

Identifying the minimum engagement, including incorporated time and payment for preparation or associated working time, as provided for in clause 18.2.

PN614

THE DEPUTY PRESIDENT: Doesn't the word 'required' cause a problem for you there?

PN615

MS KELLY: 'Required to attend work'.

PN616

THE DEPUTY PRESIDENT: I see.

PN617

MS KELLY: That's the limit of the requirement.

PN618

THE DEPUTY PRESIDENT: Just not a scheduled consultation?

PN619

MS KELLY: Not for the purposes of this clause. Then, in clause 18.2, we then see the same structure, Deputy President, as finds itself in the agreements, where lecturing and tutoring have a specific number of hours allocated to them.

PN620

Now, there is nothing in there - the point, Deputy President, for our purposes, is, there is nothing in the award that authorises Monash to direct a teaching associate about how that associated time is to be spent and that introducing a requirement of that kind into the agreement, after the fact, would have the result that this term of the agreement is less favourable than the award. That is a matter that ought properly to be assessed at the time an agreement is approved and is a powerful

reason why a variation, of the kind proposed by Monash ought not to be made here.

PN621

Next, Deputy President, is that the variation proposed by Monash is inconsistent with the way in which the clause is applied in practice. So this proposed variation is not neutral, it has a differential effect on Monash's employees depending on the practice that is currently applied to them. But for the undertaking in respect of some of them, it would result in them losing a benefit which they presently enjoy and it is not, Deputy President, resolved by the undertaking.

PN622

The undertaking doesn't change the legal reality that the rights of those employees have been changed under the industrial instrument. It does not change the reality that the variation would, if it changes the proper construction of the clause, deprive them of the rights under the Act that they have for enforcing the terms of the agreement. I'm not referring there to the Federal Court proceedings specifically, your Honour, I'm referring to the fact that the variation operates outside the terms of the enterprise agreement.

PN623

It applies only to teaching associates who currently at an individual level have the benefit of clause 7. It would, therefore, result in some teaching associates in the same department, performing the same work, in the same tutorial, same lectures, having differential rights.

PN624

THE DEPUTY PRESIDENT: Does that require me to make an assumption though about that cohort being paid under clause 7 being otherwise capable for that particular work being paid under clauses 1 or 2? I mean, it is in one circumstance where it just could be – and I don't know – that the two hours had been taken up through other activities and if Monash wanted consultation done, then they had to fund it separately because there was no more time left.

PN625

MS KELLY: There is no evidence before you, Deputy President, about any of that.

PN626

THE DEPUTY PRESIDENT: No, I accept that scenario, there's no evidence to conclude that's it, but there's not really evidence of why people were paid at the higher rate that sheds light on what was going on for the clause 1 and 2 work, the associated work.

PN627

MS KELLY: I accept that, Deputy President. All you have before you is the fact that some were paid and some were not.

PN628

THE DEPUTY PRESIDENT: All right.

PN629

MS KELLY: But it highlights the constructional point that I developed earlier, which is there is no inquiry, Deputy President, into how the two hours are spent or how it is spent, it's assumed. No one records it and goes back and looks and examines how a teaching associate actually occupied those two hours. Everyone assumes that it will be two hours' work. Whether it's one or whether it's 11 hours that are spent, the rate paid is the rate described.

PN630

The undertaking also overlooks that Monash has not proved the mutual intention of the parties and, therefore, the variation would, in effect – if given effect by reason of the undertaking or for reasons that it took into account the undertaking - allow the Commission to become a vehicle by which an employer such as Monash can gain a commercial advantage for itself simply by reason of providing an undertaking that a particular cohort presently being in receipt of the benefit won't suffer disadvantage. In my submission, that is quite inappropriate because we look to the agreement as it applies to anyone who might fall within its coverage and not those who happen to presently be in receipt of a particular benefit underneath it.

PN631

Fourth, Deputy President – we've dealt with this in writing and I'm not going to go into these in detail, but commend the written submissions to you – bargaining is on foot. It is under way. You have evidence before you that this clause is subject to those negotiations and that submission is made in the context of the Act which identifies that bargaining at an enterprise level is the policy choice of the legislature as to how industrial rights ought to be determined between the parties.

PN632

There is the reality that this clause can be construed, Deputy President. Now, you don't need to engage in that task for the purpose of finding ambiguity or uncertainty, but it is something you're entitled to take into account in the exercise of discretion that it is a clause inherently capable of being construed and in those circumstances it is not the case that the parties are without alternative rights to resolve the dispute between them; and in fact those rights have been exercised.

PN633

There is the differential right that this would create for those to whom the current agreement applies as against those to whom an earlier agreement applied and that is a matter that is inherently productive of industrial disputation. There is the opposition of which your Honour has ample evidence, both through the statements provided to you, Deputy President, by the NTEU, but also by those individuals who have contacted your chambers and notified you of their opposition to the change.

PN634

Now, my learned friend says 4000 people are apparently fine – I think was the expression used. We can draw no inference whatever from the fact that a large number of people did not contact the tribunal. That is a fact that is neutral, save to say this: at an earlier directions hearing I said to your Honour that if the NTEU didn't have the opportunity to contact those people directly, I would make a

submission that that means the absence of contact from those people can be given less weight than it otherwise would because a union is a party that is inherently likely to make communications that are likely to be read and understood and responded to by individuals.

PN635

My client has been deprived of that opportunity and so the fact that some 4000 people did not contact the Commission is of less weight than it would have been if my client had been afforded that opportunity. More importantly, Deputy President, we cannot say that because those people did not contact the tribunal they support the variation. At best we can say we don't know what their position is.

PN636

It is particularly telling that even though Monash makes something of the 4000 that didn't contact your chambers, it is equally true that not one of them contacted your chambers to say they support the action taken by Monash. Of course I note that if Monash was as confident about the position as it appears to be, it could have used the democratic process under section 210 of the Act to ask the employees to approve the variation and we can infer why that course hasn't been taken.

PN637

We set this out in detail, Deputy President, but I emphasise it: the proposed variation creates more ambiguity and uncertainty than it resolves. It introduces, among other things, a third temporal element contemporaneous before and after, and also proximate. 'Proximate' means 'next in time to'. It's an equivalent, in effect, of immediate, a submission that has been disavowed all round.

PN638

THE DEPUTY PRESIDENT: On a drafter point, that could just be easily fixed by omission of the words 'proximate in time to the tutorial,' for example, so it would just read 'associated with a tutorial that occurs within a week before or after'.

PN639

MS KELLY: Yes, those words could come out, Deputy President. It wouldn't resolve the ambiguity or uncertainty though because of the requirement that it be associated, which is at the heart of the submission that I put to you earlier about the proper construction of the clause. 'Associated with a tutorial or lecture', it wouldn't resolve the contention that work – student consultation about a broader range of issues related to a unit of study is not work associated with a particular lecture or tutorial. It would not resolve that ambiguity or uncertainty. My client's submission is that there isn't any, but - - -

PN640

THE DEPUTY PRESIDENT: Is Monash asserting an ambiguity on that issue? I'm not sure. There was the temporal aspect and then there was the 'who could make the request'. Both of those topics are aimed at, as I see it, by the text of the proposed variation, not necessarily the subject matter of the work which

might cause it to fall within or without clauses 1 or 2. Maybe it's a Mr Bourke question.

PN641

MS KELLY: It's perhaps a question for Mr Bourke, but it would not resolve the debate we have been having before your Honour for the reason that I've just described. It's the additional criteria that conditioned clauses 1 and 2, which explains why there is actually no ambiguity, but it wouldn't resolve those issues. The dispute would still be live.

PN642

My client's position would still be that scheduled student consultation of the kind that teaching associates have been required to do doesn't fall within clauses 1 and 2 for the reason I have identified. It's not sufficiently associated with the delivery of a particular lecture or a particular tutorial.

PN643

THE DEPUTY PRESIDENT: Yes. I don't want to nit-pick, but is that part of your case; your Federal Court case? I don't want to get into the Federal Court case. Let's perhaps avoid topics I shouldn't be touching on there.

PN644

MS KELLY: Yes. The answer is yes, if that's the proper construction of the clause, but I've tried to avoid - - -

PN645

THE DEPUTY PRESIDENT: All right.

PN646

MS KELLY: - - - dealing with the proper construction of the clause, Deputy President.

PN647

THE DEPUTY PRESIDENT: Let's not have a collateral pleading dispute.

PN648

MS KELLY: Yes, indeed. There is also the difficulty with the uncertainty created by the use of the words 'and may be scheduled by either the teaching associate or the university'. Then there is this reality, Deputy President, which is the discretion that is given to teaching associates about how they perform their associated time is significantly undermined by the variation which allows Monash to do that which it has never been able to do before and to schedule the associated time for a teaching associate.

PN649

It leads to significant difficulties about what is to be done where the time scheduled occupies more of the teaching associate's time than reasonably allows them to do the other associated work that Monash assumes they are to perform.

PN650

THE DEPUTY PRESIDENT: Isn't that a different issue? It's not to say it's an unimportant issue and I understand what you're saying, but that's really just are they doing more work than they're being paid on any clause of schedule 3, not necessarily which clause.

PN651

MS KELLY: In my submission, Deputy President, it's clauses 1 or 2 because work associated with a tutorial is defined by those clauses. We know what that work is and it creates significant uncertainty about the position of a teaching associate who is directly to do one hour's worth of student consultation in a repeat tutorial week, which is the whole of their associated time. What does that person then do if they have other associated work that is necessary for them to perform to properly discharge their function in delivering a tutorial or a lecture? Do they not do it? Does it become other required academic activity?

PN652

It interferes with the structure of the clauses in a way that creates uncertainty that has never previously existed and it does so by introducing the right of Monash to direct a teaching associate about when and how they perform a component of their associated work.

PN653

THE DEPUTY PRESIDENT: Does that submission require me to come to a landed position then on the construction of the clauses if I accept that?

PN654

MS KELLY: No, Deputy President. I think it follows from the description of the types of duties and the time limitation, both of which are apparent on the face of the clause. You have the ingredients without the proper construction, you have the time it's allocated – take a repeat tutorial; one hour for the tutorial, one hour for associated time. You have the fact of it being assumed and then you have the list of duties.

PN655

Deputy President, that last point is also of particular significance. It's one of the last two things I wish to submit. This is a significant change and it's significant for the reason I have just described. It introduces a right for Monash that has never previously existed. Your Honour will not find it in the pre-reform award, your Honour will not find it in the modern award, you will not find it in any iteration of clauses 2 and 3 from 2000 onwards.

PN656

In the five agreements that are in evidence before you, you will not see one word about how Monash can direct a teaching associate about how to perform the associated work, when it is to be performed, what proportion of it is to be allocated to the various duties that make up associated time. Your Honour will not find it anywhere and your Honour won't find it in the policies that were put into evidence by way of a supplementary court book that describe for tutors and lecturers the way in which they are to go about their work. You will not find any guidance, any direction about how they allocate their time and that's because it hasn't existed.

PN657

So this is not a neutral change that gives effect to common intention. It's not a neutral change that gives effect to existing and subsisting practice. It is a significant change to the way in which the relationship has been conducted both under the awards and since 2000 under the agreement. That is a change of the very kind that the authorities tell us this Commission ought not to make. The jurisdiction is to remove ambiguity or uncertainty. It is not to alter the parties' bargain by introducing substantive new rights.

PN658

In my submission, Deputy President, what we have is this: we don't have Monash saying, 'Please exercise the discretion to give effect to a common intention.' We don't have Monash saying, 'Please give effect to the proper construction.' We have Monash saying that this Commission can use the jurisdiction in section 217 to impose on workers, through an undemocratic process, a change that was not agreed by the persons who made the agreement to suit the commercial convenience of Monash. That is a radical proposition.

PN659

Your Honour will not find in any authority under section 217 or its predecessors a situation in which the Commission has intervened based not on common intention, but based on what I think my learned friend described as an outcome that was industrially reasonable as chosen by the employer. He said those words, 'We chose one week.' This is a step that, in my submission, your Honour will not find the Commission having taken at any point in its history and that's because it's not what is authorised by section 217.

PN660

It's inconsistent with notions of equity and good conscience, and it's simply beyond power. Even if it is not beyond power, because of the significance of the change that this amendment, this variation, would create, it is not a variation that your Honour ought to make in a proper exercise of discretion under section 217.

PN661

THE DEPUTY PRESIDENT: Thank you, Ms Kelly.

PN662

MS KELLY: Unless I can assist you further, Deputy President - - -

PN663

THE DEPUTY PRESIDENT: No, thank you. You have been of assistance. Mr Bourke?

PN664

MR BOURKE: If your Honour pleases. Can I deal up-front with two things: (1) when it comes to ambiguity or uncertainty, you would expect if there is none there would be an explanation why the word 'contemporaneous' is in schedule 3. We have waited and waited and waited; we haven't heard one. All we know is it doesn't mean immediate. That itself, where we got a conception throughout of contemporaneous consultation and we're not told what the temporal aspect is, that equals ambiguity or uncertainty, front and square, exactly what Snaden J said.

PN665

Secondly, we come common intention. We have not heard a clear articulation what the common intention is. We're not hiding behind common intention. My learned friend is 100 per cent wrong in saying that common intention is some type of search for the subjective intention of the parties and we heard going back years to when the clause was first created, that is heresy contrary to Codelfa, contrary to Telstra. It's an objective task and unless there is extrinsic material you concentrate on a textual exercise to arrive at that, and we have done that.

PN666

We took you to the schedule and we demonstrated that there is no requirement or no bifurcation of schedule 3 to suggest that if the scheduling is required in the sense of you're told to schedule it, then it's clause 7; if you're not told, it's clause 1. You simply cannot get that structure from the clause.

PN667

When your Honour, with respect, put to my learned friend who was suggesting that if it's any element of a requirement you're in clause 7 space - asked for an explanation for why the carve-out. If contemporaneous consultation does not have a requirement element, why the carve-out is necessary in clause 7 talking about other requirement academic activity and her answer was, just to put it beyond doubt, that is equivalent to an answer of it has no work to do at all.

PN668

The parties, bound by what they agreed to, chose for a specific carve-out and that is consistent with the fact that contemporary consultation also involves a requirement. That is reflected in the word 'assumes' in relation to a bundle of work associated with delivery of a tutorial under clause 1. You're not being paid for one hour, you're being paid three hours and it's assumed you're going to do the other associated work. Give that meaning, associated work, that means the tutorial is effective as an educational outcome. You'll do the preparation, marking incidental administration, contemporary consultation.

PN669

Now, to understand the NTEU's position, that is all optional, not required. On their case you could have a teaching associate say, 'I'm not going to do any of the associate work, but I want to be paid for three hours.'

PN670

MS KELLY: Your Honour, that was not put. My client does not take that position. I didn't say that. I didn't make that submission and I absolutely disavow it. That is not what my client has said.

PN671

MR BOURKE: Well, I would prefer if I'm not interrupted. If you want to say something at the end, that would be fine.

PN672

THE DEPUTY PRESIDENT: In fairness, I think she is correct. I think her point was more that there is an expectation that they would have to do the two hours'

work, but the work would be at, as I still understand it, the discretion of the teaching associate and solely the teaching associate.

PN673

MR BOURKE: But the point is it still required work – there might be flexibility in how much preparation you do, how much incidental administration, et cetera, et cetera, but it doesn't rule out there is a requirement element and there's nothing to suggest once that requirement involves, for example, 'Can you have some scheduled hours to do the associated work,' that you suddenly shift to clause 7 where that already contemplates a requirement for contemporary consultation.

PN674

We are not seeking to create new rights. If we are correct that there is not this bifurcation as to whether the consultation time is scheduled by the academic or the university, then we are not creating new rights there. Otherwise, our amendment is just giving, we say, a sensible boundary to give some meaning to the word 'contemporary'. They won't even dare guess what it is. They're prepared to accept it's not immediate. Why not, having regard to equity, good conscience and the merits of the matter recognise the consultation one week either before or after a tutorial is a reasonable basis to say, yes, that's contemporaneous. If it's outside that then it's not, and it's a workable way to go forward in the future.

PN675

It's intuitively understandable that within a week of a tutorial students would be preparing for the tutorial, the academic would be preparing for the tutorial and after the matter will be fresh in people's minds. As we have said, we say we have taken a conservative approach. We're not creating new rights. We're not changing some sudden landscape. As demonstrated by the NTEU's statement of claim, they are alleging that for a period of six years we have been asking teaching associates to schedule consultation times and they have said, 'You can't do that.' Now, if we are correct that there isn't any division in the way it is suggested, why should the amendment not be made?

PN676

It's not a situation where section 217 is only exercised in a perfect world where there may not be any possible downside or possible contrary arguments. It's a matter of weighing up the competing arguments and we're then left - if there is ambiguity having regard to section 578, equity, good conscience of the matter, are we best to just leave it as it is which is a total mess, no one can agree on anything, or we have attempted to come up with an amendment to try and reduce, if not remove, disputation. What do we do?

PN677

Now, I come back to another matter and that is the suggestion that Bianco is not the road map for dealing with these cases. Yes, it is. It was suggested that it did not deal with the discretionary aspect of how 217 is exercised. I won't take you back to the case, but paragraph 68 makes clear they discuss the discharge of the function. It's not simply dealing with the jurisdictional stage, it's the ambiguity or uncertainty, and they discuss you discharge that function under the rubric of 587, equity, good conscience and the merits of the matter.

PN678

There is no suggestion in the judgment that common intention must dominate that or be given substantial weight, let alone be mandatory. They make it clear that it's one of the matters you assess through the prism of equity, good conscience and merits. We say because common intention you must go back to the objective language; the textual analysis supports us in the amendment we are seeking.

PN679

Just to make it clear, there was some suggestion that we are simply asking people or creating a right to ask people simply to consult. No, our amendment makes it clear that the consultation must be associated with a tutorial. We are not seeking an amendment which would give Monash the entitlement simply to say, 'You must consult at this hour.' It must be related to the tutorial.

PN680

The other thing in suggesting that Bianco is of limited assistance is the confirmation of Bianco in being the guiding light as to how you conduct these cases and we provided at tab 7 of our bundle of cases the decision of President Hatcher J in the Monash decision. If I can just quickly take you to that. It's tab 7, paragraph 11. This is in a context, your Honour – we provided an email which set out the submissions put to the President regarding whether this case should be moved to the Full Bench.

PN681

There is a number 1 in the NTEU's letter which says that they are going to submit that common intention is mandatory. Monash, at our paragraph 9, we say no, no, no, everything is covered by Bianco and then you look at what his Honour the President said at paragraph 11:

PN682

I do not accept that the principles applicable to the determination of the 217 application are other than well established. As Monash submits, the principles concerning the proper construction –

PN683

and this is important –

PN684

and application of section 217 were comprehensively stated by a Full Court –

PN685

and there is the reference to Bianco –

PN686

in part by reference to previous decisions of this Commission.

PN687

So they refer in part to previous decisions, but it doesn't mean they are carte blanch endorsing previous decisions. They have sketched out the road map of how you conduct these cases and they confirm that it's unlikely to arise any novel question of law. The concept of a subjective intention is expressly also

dealt with in Telstra where they clearly adopt an objective approach based on the text of the enterprise agreement itself.

PN688

Now, there was some discussion about the use of 217, in particular in some type of un-democratic way. We're not trying to, you know, re-jig the enterprise agreement. The purpose of 217, it does contemplate a variation, but clearly the purpose is to ensure the preservation of the industrial peace as struck by the enterprise agreement to ensure that during the life of that enterprise agreement there will be a reduction in future disputation and in this case by what schedule 3 means.

PN689

If my learned friend is correct, the common intention - you've got to search for what people meant in the past, let alone if it is objective and by way of interpretation and that you must prove this common intention otherwise you can't invoke the power under 217, that is putting a massive straitjacket around 217 and how it works, and clearly Bianco – it is broad discretion based on broad principles.

PN690

There was some raising of if 217 could be used in particular ways, be careful because someone could deliberately agree on an ambiguous clause and then make an application under section 217. No one is suggesting that and that should be put to one side. Your Honour was taken to a rectification case, a High Court case. Of course rectification is a very high standard because at common law it's where you have a signed agreement and then you have one party saying, 'That doesn't reflect the common intention of the parties. I'm going to prove that,' and of course that sets a high standard, but 217 is not about simply a rectification-type mechanism.

PN691

Could I just come back – although the NTEU are not prepared to put a temporal boundary around the meaning of 'contemporaneous', they make the concession about 'not immediate' but they have not disputed that a reasonable boundary might be one week either side. There is nothing to suggest that they say that somehow is just unacceptable. There's no basis for that, as we've put, just applying principles of the education environment. There's no reason why one week would not be a reasonable approach as to contemporaneous.

PN692

It's suggested because there was an earlier enterprise agreement which talked about 'reasonably contemporaneous', the clause is narrow. In fact the clause has expanded because there were two aspects - reasonableness and contemporaneous – and now there's one. On any view the clause has expanded over time in terms of its work and latitude. Coming back to the concept of 'required', the very nature of those assumed duties, the fact they are required, is reflected in the fact that that's what they're getting paid for.

PN693

Now, it's said to us don't construe an agreement based on how difficult payroll will be placed in a position to navigate it, but what we are saying is if you have to

demonstrate some particular direction and it's only in those circumstances you know when you're under clause 1 or clause 7, then the operation of schedule 3 is becoming very factually intensive and it would be improbable to objectively assess that the parties intended schedule 3 to work in that way.

PN694

There was an attempt to sideline Snaden J's judgment. In our submission, there was no medical analysis of the judgment and no reason why you wouldn't say Snaden J's observations, although at interlocutory level, were not apposite in terms of there being an ambiguity or uncertainty. The reference to the fact demonstrated on the

PN695

NTEU of a moving case as to why there is no ambiguity, we set out in our submissions in-chief, paragraph 48, .pdf 14, and the document is at tab 22 of our application book. You have the branch president on 31 March 2022, only a bit over a year ago, saying the requirement was only triggered if the consultation was immediately before or after the tutorial. That is now entirely rejected by the NTEU. Even they must recognise internally there is an ambiguity.

PN696

There is a suggestion don't do anything because bargaining is on foot. Well, firstly, that doesn't remove the problems under the 2019 agreement. If you look at the history of bargaining, there is often a big gap between one agreement to pass it's nominal expiry date and a new agreement. The 2000 agreement was a two-year agreement; the 2005 agreement, the next one, was a two and a half year agreement;, then you had to wait until 2009 which was a two-year agreement; 2019 appears to be a two-year agreement or a two and a half year agreement. We only started bargaining on 25 October 2022, so we could be still years down the track.

PN697

We have said already in-chief about the BOOT point, demonstrating that it never had any legs. You won't find any submission in the NTEU's submissions in writing about the BOOT test knocking us out of the ring. It came through from a statement of Linda Gale and it has got no place – you won't find it analysed in any section 217 case and you can't simply isolate clauses, and try and do some BOOT test. It's entirely inappropriate. As we say, we're not creating new rights. We are simply removing an ambiguity.

PN698

If your Honour considers that it's unhelpful to use the word 'proximate' consent, could that be removed from the proposed amendment. As we've said, the bottom line is you want to put a temporal framework otherwise it's impossible to know where it is, so we have suggested one week either side. As we've said, we have confirmed that it has got to be associated with the tutorial, but we have also confirmed that issues as to at whose instigation it was scheduled is not to the point. Unless there are any other matters - - -

PN699

THE DEPUTY PRESIDENT: One minor procedural – did you want to tender the email with the correspondence?

PN700

MR BOURKE: Yes, it might be convenient.

PN701

THE DEPUTY PRESIDENT: Ms Kelly, is there any objection to that just being marked as exhibit 4?

PN702

MS KELLY: No.

PN703

THE DEPUTY PRESIDENT: All right. I'll mark that; that will be exhibit 4.

EXHIBIT #4 EMAIL

PN704

THE DEPUTY PRESIDENT: I think tentatively that is - Ms Kelly, I know Mr Bourke was to have the last say there, but is there - - -

PN705

MS KELLY: One very minor point, Deputy President.

PN706

THE DEPUTY PRESIDENT: One very minor point.

PN707

MS KELLY: Which is related to the material that was sent to you, Deputy President, over the lunch break.

PN708

THE DEPUTY PRESIDENT: Yes, okay.

PN709

MS KELLY: I think my learned friend was attempting to make something of the decision of President Hatcher, I think for the purposes of construing Bianco. Of course that decision was published without a hearing, which of course the Commission is entitled to do, but without notice to the NTEU that there was to be a published decision. All his Honour had before him were my client's letter, the responsive letter from Monash and a decision was published. No argument was heard on the point.

PN710

My client didn't have the opportunity to develop for the President how it says that Bianco doesn't deal with the question that arises here, but, more importantly, Deputy President, we don't construe Bianco based on a decision of this tribunal. Bianco stands on its own and when proper regard is had to it, your Honour will see that the point we make is good; it does not deal with the exercise of the discretion element of the power under section 217.

PN711

THE DEPUTY PRESIDENT: I understand that point you make, yes.

PN712

MS KELLY: Thank you, Deputy President.

PN713

THE DEPUTY PRESIDENT: I think that's it then, everyone. Firstly, thank you, everyone, for assistance in allowing the matter to be dealt with as efficiently as it has, given the potential for inefficiencies to have been introduced by many non-parties submitting material. Firstly, thanks to the parties and their cooperation in letting that go through smoothly.

PN714

The other part in the next step is with me. I'll endeavour to get a decision out as soon as possible because I'm mindful that there is wider industrial cogs turning there and it's in the interest that that be delivered to you as soon as possible. Other than that though, I thank everyone and we can adjourn.

ADJOURNED INDEFINITELY **[3.19 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs