TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT GOSTENCNIK

C2023/1515

s.604 - Appeal of decisions

Appeal by Qube Ports Pty Ltd T/A Qube Ports
(C2023/1515)

Melbourne

2.00 PM, WEDNESDAY, 24 MAY 2023

PN1

VICE PRESIDENT CATANZARITI: We'll take the appearances.

PN2

MR R DALTON: If the Commission pleases, I appear with my learned friend Mr Follett for the appellant.

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VICE PRESIDENT CATANZARITI: Thank you, Mr Dalton.

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MR M IRVING: If the Commission pleases, my name is Irving. I appear with Mr Crostwaite for the respondent.

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VICE PRESIDENT CATANZARITI: Thank you. We have had the opportunity of reading the written submissions. We will now invite some short oral submissions. Thank you, Mr Dalton.

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MR DALTON: Thank you, Vice President. You will see from the written submissions that the fate of the appeal depends upon the question of construction; there being two competing and available constructions of section 217(1).

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DEPUTY PRESIDENT GOSTENCNIK: That's a confident start.

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MR DALTON: It is, and as acknowledged by the Deputy President below those constructions are both available - - -

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DEPUTY PRESIDENT GOSTENCNIK: Just kidding, Mr Dalton. Keep going.

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MR DALTON: They revolve around the word 'covered' having regard to the text of section 217(1) and its broader surrounding textual context, and the legislative purpose. The competing constructions: the union's construction attaches a specific temporal element to the word 'covered', such that it's confined to the present tense only and specifically present tense referable to the time at which the application happens to be filed.

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On Qube's construction section 217(1) is, grammatically speaking, not confined in that sense. That being so, it's capable of yielding a meaning 'is or was covered' or 'covered at any relevant time when the agreement was in operation'. We submit that's the preferable construction having regard to the context and the purpose. Members of the Bench, you will appreciate that our construction argument is based on the premise that section 217(2) confers a power on the Commission and a discretion to make a variation order to resolve an ambiguity or uncertainty in an enterprise agreement retrospectively.

PN12

Now, the union accepted this in its submissions below - that's clear from the transcript – but it has moved its position such that on the appeal a considerable portion of its written appeal submissions are devoted to an argument that section 217(2) does not in fact confer any power or discretion on the Commission to make a variation order that is retrospective. Now, we obviously need to deal with that in an effort to - - -

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VICE PRESIDENT CATANZARITI: Probably not in great detail. I mean, you have put on a written submission. The case is not going to turn on that issue and obviously what the union might think.

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MR DALTON: Yes, because as I said, Vice President, it's an essential premise of our argument; so if our argument is accepted, it does turn on it. The Commission needs to accept that and we're approaching - - -

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DEPUTY PRESIDENT GOSTENCNIK: Although Colman DP determined it on the basis of standing. Although he has expressed a view about that issue in another case, he hasn't determined that issue to finality in your case, has he?

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MR DALTON: To pick up the Vice President's comment, it wouldn't need to be dealt with if our construction argument is rejected. It does need to be dealt with if our construction argument is accepted, because it's an essential premise of our construction that covered, adheres to the interest of the applicant in securing a variation order that is capable of having retrospective operation. Hence, in the interest of an applicant referable to past coverage. That's our whole point. Now, we have put a written submission in. We've provided that to our learned friends this morning.

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VICE PRESIDENT CATANZARITI: Yes, we have that.

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MR DALTON: I beg your pardon?

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VICE PRESIDENT CATANZARITI: The Bench has that.

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MR DALTON: Thank you. Could I just add one additional note to paragraph 8 of that submission.

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VICE PRESIDENT CATANZARITI: Yes.

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MR DALTON: Could we cite a Full Bench decision of the Australian Industrial Relations Commission in Colonial Mutual [2004] 133 IR 149 at 57 where Munro J, O'Callaghan SDP and Cargill C made the observation that they regarded section 270MD(6) of the Workplace Relations Act as providing no barrier for an order for a variation of a certified agreement being given a date of effect from the date on which it's certified.

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The submissions this afternoon and our written submissions in this appeal, as they were below, are premised on the acceptance of that proposition. You will see in our written submissions there on that issue we point to a number of Full Benches since Colonial Mutual that have accepted the availability of that retrospective power. It makes sense that that be so when we're dealing with a power that is in the nature of rectification; restoring the words of an agreement to reflect the mutual intention of the parties.

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VICE PRESIDENT CATANZARITI: I'm unlikely to say that I was plainly wrong on this appeal on that point given the authorities you've cited.

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MR DALTON: Yes, thanks, Vice President. Specialist People is a Full Bench decision of the Commission. It's at tab 8 of our bundle of authorities. At paragraphs 41 and 42 of that decision it says things about the nature of the variation power under section 217 that we say are relevant for the Full Bench to consider here, particularly in dealing with a number of the arguments that are raised by the union about so-called incoherence of our construction with the scheme and of the mechanical provisions from sections 51 through to 58.

PN26

At paragraphs 41 and 42 in Specialist People the Full Bench makes it clear that the whole purpose of this power and this discretion to remove ambiguity or uncertainty is to rectify and restore the meaning of the agreement to reflect the mutual intention of the parties, and that it's not to give effect to a new and substantive change to the agreement. That's expressly stated at paragraph 42 of that decision. Understood in that light – and we say that that's echoed in the Full Bench judgment in Bianco Walling - you will see that an applicant, being a party to an enterprise agreement either in a current or former sense, can have a direct interest in varying the terms of the enterprise agreement, including on a retrospective basis.

PN27

To consider these three scenarios, for an applicant who is covered by the agreement at the time of the application under section 217 being filed, that interest can be referable to the past. It's not just the present and the future. The second scenario, if the agreement is fully replaced after the section 217 application is brought, the applicant still has an interest in the variation order referable to the past at least up to the day the agreement ceased to operate. That's the scenario that the Commission dealt with in the MSS Security case where retrospective orders were made and that decision was upheld by a Full Bench, and that Full Bench decision is at tab 17 of our cases folder.

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The third scenario is, like in this case, where you're dealing with an applicant who was but is no longer covered by the enterprise agreement at the time of filing the section 217 application. Such parties, such applicants, can have a direct interest in a retrospective order to reflect the mutual intention of the parties as and when that agreement covered them. The facts of this case put into sharp focus how that direct interest can arise. I don't need to repeat those facts. They are summarised by Colman DP at paragraphs 2 to 9 of his decision.

PN29

I now deal with the text of section 217(1). The language in that subsection indicates that it's doing two things at the one time. First, it's conferring a power and a discretion on the Fair Work Commission where that power is activated by application. The second thing it does is confer standing on the persons who can make that application.

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You will see the opening words, 'The Fair Work Commission may vary an enterprise agreement' - that's the conferral of the power and the discretion – 'to remove an ambiguity or uncertainty' – that's the purpose of the power – 'on application' – that's the triggering event – 'by any of the following' – and the language there is concerned with who can bring an application, listed by description of a class or cohort with the equivalent characteristic covered by the agreement.

PN31

So who are those people, who are those cohorts; employer, employee and the union, in each case covered by the agreement. That's the universe of those who can ever be covered by an enterprise agreement. As I've stated, the interest of those persons in the terms of the enterprise agreement and any variation to the terms includes the past. Now, this provision in the nature of defining power and standing at the same time, if there is a live controversy in which the applicant has a direct interest then unless there is an indication otherwise one would not exclude standing for that applicant or consequently exclude the Commission from considering the merits of the application.

PN32

Now, on the union's construction section 217(1), in effect, does three things at the time, not two things. So it confers power on the Commission; secondly, it defines who can bring the application; and, thirdly, it prescribes by when any such application is to be brought. We ask rhetorically, where is that indication in section 217(1)? Just starting with the text dealing with the language there, where is that indication?

PN33

So the union's construction and the Deputy President's preferred construction is based on a grammatical premise that the words 'by application' in section 217(1) imply that 'covered' is used in the present perfect verb tense only. That is, 'is covered' and referable to the time at which the application is brought. You will see paragraph 6 of the union's appeal submissions they are essentially adopting the reasoning of the Deputy President below at paragraphs 30 to 34 of the decision.

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In our submission, that grammatical premise is misplaced. We have addressed this directly in our written appeal submissions at paragraphs 13 to 14. The Deputy President, at paragraph 31 of the decision, implicitly accepts that the word 'covered' is not confined to the present perfect tense and that the question of any specific temporal element is going to depend on the context, including any tense or time that's used in the surrounding text.

PN35

The surrounding text, being the words 'by application', do not confine the verb tense of the word 'covered' to the present perfect tense only. It leaves that question open as to what is the relevant time. Hence, we say in paragraph 13(b) of our appeal submissions the answer to what is the relevant time in section 217(1) can only be answered by having regard to the broader statutory context and the purpose.

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That analysis of the broader purpose and context must proceed on the basis that this appeal phrase 'covered by the agreement' is grammatically agnostic as to tense. That's the base from which we approach the broader textual context in the Fair Work Act and its legislative purposes. We do not approach that broader analysis coming from a standpoint that the natural meaning of the word 'covered' in section 217(1) is confined to the present perfect verb tense only.

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If we're right about that - that is, that the grammatical premise of the union's construction is not to be found in section 217(1) – then the union's argument that the so-called scheme created by the mechanical provisions in sections 51 to 58 can be grafted onto section 217(1) to resolve the construction question can't be accepted. The Deputy President below appears to have acknowledged as much in the second sentence of paragraph 36, putting to one side section 53(5) which the Deputy President regarded as having schematic significance. I will deal with that provision and the Deputy President's analysis in that regard separately. I'll deal with that after the purpose argument.

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Just sticking with the union's construction argument that you work from the grammatical premise in section 217(1) and then you can graft on the scheme of these mechanical provisions QED, that is not an argument that has any substance in the absence of the grammatical premise. To put it differently, the so-called scheme created by these provisions – sections 51 through 58 – do not of themselves indicate that section 217(1) imports a present tense only. We make that point at paragraph 26(c) of our appeal submissions.

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The specific tense meaning that is to be attributed to the word 'covered' and any associated adjectival participial phrase is going to depend on the context and purpose of that particular provision. You don't find it in a boot straps fashion working off sections 51 through to 58. The nature of the variation power in section 217, even when it's in retrospective operation, is not inharmonious with those mechanical provisions.

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We deal with this at paragraph 20 of our written submissions in the hearing below. You'll find our submissions in that regard at page 25 of the appeal book. I just make that reference. I don't need to take you to it at this point, but picking up on Specialist People, the paragraphs 41 and 42 analysis that I took you to earlier, the power to vary to remove ambiguity or uncertainty in an enterprise agreement is not there to effect the substantive change to the enterprise agreement.

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That being the case, there is no lack of harmony with the exercise of that power even retrospectively with the scheme of these mechanical provisions in sections 51 through to 58. So, in our submission, it's simplistic and unhelpful to characterise the section 217 variation power as one that creates new rights and obligations, at least in the sense that would offend this scheme of these provisions 51 through to 58 if a retrospective variation were made to an enterprise agreement that had been replaced.

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Finally, in relation to this grafting onto the scheme and the so-called lack of harmony of our construction with that scheme, we would say that many of the union's points and scenarios that they paint really would go to discretion and are not a reason to construe section 217(1) as confining the Commission's jurisdiction to make variations to remove ambiguity or to confine the standing of applicants.

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Next could I deal with legislative purpose. We address this in particular in our written submissions below at paragraph 25. You will find at on page 26 of the appeal book, if I could take you to that. We make the submission:

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> *There isn't any sound reason why such temporal limitations would be introduced for standing to enforce enterprise agreement, nor equally standing to vary such agreements including retrospective variations in the context of enforcement proceedings as is the case here. Logic, purpose and policy would suggest that in relation to present controversies about rights and obligations arising under enterprise agreements or awards at a time when they did apply, they should be able to be fully ventilated and prosecuted at any subsequent time whilst the controversy remains live, subject of course to any express time limitation provisions.*

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Standing and consequently power of the Commission to vary an enterprise agreement to remove ambiguity or uncertainty should not depend on happenstance of when an enterprise agreement is replaced. We would adopt the observation made by Sams DP, one of the most experienced members of the Commission, in the MSS case at paragraph 93 where he had to deal with this issue. He posed a question as to whether any of the terms of the Fair Work Act and section 58 in particular prevented a person from pursuing rights such as unpaid entitlements which may have arisen under an expired and/or replaced agreement. After noting that the answer to that question was no, the Deputy President then said this:

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Viewed from this perspective it seems to me that there is a certain inconsistency with the Union's submissions and its own actions, remembering that the Union has an adjourned application before the court to do precisely what it says MSS cannot do in this case. Put another way, the Union relies on the terms of the expired 2011 Agreement to pursue claims for underpayment for its members, while arguing in this case that the 2011 Agreement cannot be varied to remove an ambiguity or uncertainty.

PN47

The same purposive consideration was referred to by Finkelstein J in the Warramunda case at paragraph 61, where his Honour in that case was dealing with an award provision and grappling with this concept of retrospectivity. He says that usually retrospective variations of awards would be –

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confined to cases such as fraud, mistake or some other type of overreaching.

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Then his Honour says this:

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In the context of consent awards –

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and I just interpose here, I note the analogy with an enterprise agreement that's made by the parties to the instrument -

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the problem will usually arise where the award contains a provision that does not express the true intention of the consenting parties. So, if it appears that the Commission may rectify an award, it would be proper to afford the parties, or any one of the parties, the opportunity to seek a variation before disposing of a claim under the award.

PN53

This is particularly so where, having regard to the circumstances of the case, there is relative certainty that the award will be rectified. One reason for this is that it would be unjust if the court were to determine the rights of the parties based upon an instrument which it knows, or suspects, does not reflect their actual intention, or was otherwise inappropriately procured.

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That is the sort of purpose and policy issue that we draw upon in particular in support of our construction. To read section 217(1) in the way that the union contends, closes out any ability for the Commission to evaluate and exercise its discretion as to whether an order should be made to rectify the agreement and avoid the injustice. Before I move on to the purposive arguments against, the Deputy President acknowledged the merit in these considerations. He dealt with that at paragraph 46 and also more fully in paragraph 50; what are the purposive arguments against Qube's construction and in support of the union's construction.

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Dealing with the first point that the union raises which essentially picks up the only purposive point identified and relied upon by the Deputy President below - at paragraph 47 of the decision below - there the Deputy President said:

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> *There is an evident legislative purpose in confining standing to those who are presently covered by the agreement at the time of the application being filed as it is only those persons who have 'an ongoing interest in the agreement that governs their relationship' and a 'continuing interest in the integrity of the text'.*

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With respect to the Deputy President, that is a particularly weak argument. It's a particularly weak purposive indicator in support of a construction that closes out power and standing in section 217(1). Of course parties to a currently operative agreement have such an interest, but as I said at the outset the integrity of the text of the agreement is obviously not limited to its ongoing or future operation.

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At the heart of section 217 is the function and purpose of rectification; restoring text to accord with mutual intention. Logically, doing so would correspond to when the agreement was made in the first place. Logically, power and discretion would be available to decide whether or not an order should be made to correspond to when the agreement was made in the first place given that the removal of the ambiguity is designed to accord with mutual intention of the parties.

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> *Parties to an enterprise agreement can have an interest in the integrity of the text referable to the past whether or not the enterprise agreement still operates.*

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So, interest in text integrity is not a basis for regarding those who are not presently covered by the enterprise agreement at the time they bring their application as so-called strangers to the agreement.

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DEPUTY PRESIDENT GOSTENCNIK: Considering your argument about purpose in relation to agreements, what explanation then is there for the different standing rule as it applies to an award?

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MR DALTON: We deal with this at paragraph 29 of our appeal submission and we would add to those matters under section 160 the Commission can vary of its own application. That's not something that is available in section 217(1), Deputy President. Also the nature of a modern award is that it's an instrument made by the Commission as part of its arbitral function.

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DEPUTY PRESIDENT GOSTENCNIK: I suppose on that analysis an employer who is not then covered by a modern award could, nonetheless, approach the Commission and ask the Commission to move of its own motion to vary the award.

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MR DALTON: It could attempt to do so. Of course it would be up to the Commission to decide that - - -

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DEPUTY PRESIDENT GOSTENCNIK: Sure.

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MR DALTON: - - - but there is that - - -

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DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. Thank you.

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MR DALTON: Yes, I was just going to add an additional point that even on the union's construction there could be applicants who are covered by the agreement at the time they bring the section 217 application, but they have no direct interest in the integrity of the text of the agreement because the agreement no longer applies to them. We have made that point further in our written outline at paragraph 27.

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Again, like a lot of the union's arguments, the stranger scenarios only illustrate circumstances in which the Commission as a matter of discretion might decline to make a variation order with retrospective effect. That's an example of where the power might not be exercised, but they're not reasons for construing section 217(1) as confining standing and, therefore, power of the Commission to make variation orders.

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The second point that the union hasn't picked up expressly in its written submissions, but it's raised in the decision below at paragraph 48 is, well, the line has to be drawn somewhere. Maybe so, but that line doesn't have to be by reference to the happenstance of when an enterprise agreement is replaced. Any potential scenarios where the applicant might be said to be a stranger or too late can be dealt with in the exercise of the discretion.

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If a line is to be drawn, it would be where coverage coincides with the period of operation of the retrospective variation sought. The line is drawn by reference to interest; relevant interest. The line being drawn by the time of application ties it to happenstance, external factors, that can produce illogical results and we say for that reason that's not a persuasive purposive point either.

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Thirdly, the union's appeal submissions raise a range of points as to enterprise agreement being about the relationship between the employer and employees, not past relationship. All of those points can be dealt with simply by remembering the nature of the section 217 power; rectification. It's not changing substantive right and obligations. The same can be said for the analogue of section 217 being the relatively new provision, section 218A, which clarifies that the power to vary or revoke an instrument includes enterprise agreements consistent with the High Court judgment in Esso.

PN73

Now I need to deal with the significance of section 53(5). To do that, I need to take you to the decision below and paragraph 36 in particular. That is at page 13 of the appeal book. As I said, the first two sentences deal with this at a more general level, the second sentence acknowledging that if Qube is right about cover extending to the past, then –

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it would not matter that Qube had ceased to be covered by the agreements.

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The Deputy President goes on to say 53 – that's a typographical there in the fifth line of paragraph 36; that should be a reference to 53(5) –

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is of schematic significance for the interpretation of section 217(1).

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You will see the next two sentences explain why the Deputy President thinks it is of schematic significance, referable to the purpose, but again as I've addressed the Commission the purposive arguments and in particular the one purpose relied upon by the Deputy President at paragraph 47 of the decision below is weak. So, if you're approaching the significance of 53(5) based on the standpoint of your view about what the legislative purpose is, that detracts from the force of that analysis.

PN78

The Deputy President seems to place weight on the notion that there isn't any evident legislative purpose attaching to section 53(5) other than to close out standing to bring applications to vary enterprise agreements and awards. With respect, we disagree. We would say the most likely and evident purpose of that provision is to close out coverage of enterprise agreements in a way that corresponds with other provisions which have the effect of ceasing application.

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As the members of the Bench know, there are three concepts circling in this scheme; there is operation, there is coverage and there is application. Application of an enterprise agreement under the Fair Work is governed by section 52(1) and (a) provides that the application can turn on the operation, and (b) says that application can turn on coverage. Section 54(2), ceasing operation of the enterprise agreement will have the effect that the application of the enterprise agreement ceases.

PN80

Without section 53(5), the cessation of the operation of an enterprise agreement does not affect or alter its coverage. Absent something like section 53(5) employers and unions would be covered by successive enterprise agreements and every such enterprise agreement, despite their replacement and cessation of operation, for all time. So, in our submission, it's a belts and braces approach to close out the coverage by reference to operation in a manner that corresponds and mirrors the equivalent provisions in respect of application of an agreement closing out on the cessation of operation of the enterprise agreement.

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The Deputy President also placed reliance on paragraph 203 of the explanatory memorandum as supporting his view of the purpose of section 53(5). We acknowledge that the statement in that paragraph is to that effect. We deal with the significance of the explanatory memorandum at paragraph 39 of our submissions in the hearing below. In a nutshell, if you look at paragraph 36 you will see that the Deputy President acknowledges our point that the explanatory memorandum statement is not a direct statement as to the intended meaning of the participial phrase in section 217(1).

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The Deputy President accepts what we said, that it was rather a conclusory statement, something that might be described as a shorthand legal conclusion. Now, a shorthand legal conclusion is the example of a statement of subject legislative intent that the High Court dealt with in Saeed's case, which we have quoted at paragraph 39 of our written submissions below and cited. It's at tab 15 of our bundle of cases for this appeal and we have made pinpoint references in the list of contents there; in particular, paragraphs 32 to 33 and I think 74.

PN83

There are limitations to an explanatory memorandum, particularly where they contain conclusory statements about the ultimate legal outcome that is subjectively intended. The task of construction is directed to what parliament actually did by reference to the words 'in the Act' and of course the significance of it is ultimately to be tested by the force of the purposive rationale that the Deputy President relied on.

PN84

As I've already endeavoured to explain, that purposive rationale is weak. You will see that particularly in the fourth and fifth sentences in paragraph 36. The Deputy President is attaching significance to the explanatory memorandum because he thinks it's consistent with his view as to the apparent purpose of section 53(5) having regard to his analysis earlier on in the paragraph. I again make the submission that the ultimate purposive approach referred to by the Deputy President is to be found at 46 and 47 in particular, and it's a weak basis for approaching the construction of section 217(1).

PN85

Can I deal with the argument that we put in our appeal submission around the asymmetry with the enforcement regime. We have drawn analogy to similarly

worded standing provisions in the table in section 539. In particular, item 4(c) for a section 50 contravention and item 14(c) for a section 417 contravention. If we deal with item 4(c) of section 539, in the table, it's for a section 50 contravention.

PN86

Standing is conferred on a union 'to which the enterprise agreement applies', present tense. In contrast, no such limitation in item 4 to employer or employee. If you go to item 14, you'll see standing is conferred on a union 'covered by the enterprise agreement' and again contrast that with no limitation in item 14 as to employer and employee standing.

PN87

The union's position is that those provisions are not confined to the present tense. The union can bring enforcement proceedings alleging a contravention of section 50 involving the enterprise agreements which have ceased to operate, so, on their construction the union in that scenario would be a stranger to the non-operational enterprise agreement for the purposes of section 217, but it can bring the enforcement proceeding suing on the terms of an agreement that don't reflect mutual intention of the parties going back up to six years, potentially involving thousands of employees. That's their position.

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They say it's different because the union wasn't a stranger at the time of the contravention. Does that sound familiar? That's our argument for section 217(1). There is a live controversy here about the meaning of the claw-back provision as its applied years back, where on Qube's application, grounds in support, that had a notorious mutually understood meaning consistent with a practice that had been applied over 20 years and, if Qube is right about that, there would be no liability.

PN89

The union raised the issue on Qube's case for the first time in 2020 and is now suing, going back six years, in relation to a thousand employees at ports across the country arguing that the words don't accord to that practice. Qube's interest coincides with its exposure to the enforcement proceedings and in both senses - section 217 variation and an enforcement proceeding under section 539 – in the capacity of an employer at the relevant time. In our written submissions in the hearing below, in particular at paragraphs 25 to 27, we asked rhetorically why the differential treatment. Go back to paragraph 93 of MSS Security, Sams DP; commonsense, it's a legitimate question.

PN90

Next I want to deal with Miller. Miller's case is at tab 12 of our bundle of materials. That case concerned the standing provision in section 179 of the Workplace Relations Act, an analogous predecessor to section 539 item 4 that I've just taken you to. The applicant was a former employee of the university. He had been dismissed and in his view that dismissal was unlawful, contrary to the disciplinary procedure in the applicable enterprise agreement. The university objected to his standing to bring interpretation and enforcement proceedings in the Federal Court.

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If you go to paragraph 13 of the judgment, which you will find on page 353 of the .pdf, you will see section 178(5A)(b) quoted and the bold text is set out there:

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A penalty for a breach of a term of a certified agreement may be sued for and recovered by ... (b) an employee whose employment is subject to the agreement.

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So there we have a clear indication of the present tense. At paragraph 15, her Honour Branson J quotes and notes the contrast of that expression 'whose employment is subject to the agreement' with section 178(5)(ca). You will see that again quoted at paragraph 15:

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A penalty for a breach of a term of an award or order may be sued for and recovered by ... (ca) a person –

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and then you will see the highlighted text -

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(i) whose employment is, or at the time of the breach was, subject to the award.

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Her Honour Branson J in paragraph 15 also noted the fact that that provision, section 178(5A), the provision that I read out first, was introduced by amending legislation after section 178(5)(ca). So there is a striking contrast in language there, notwithstanding that her Honour Branson J adopted a purposive approach to the construction and she concluded that this was not confined to an employee whose employment is subject to the agreement at the time of the application being brought.

PN98

We address the proper reading of her Honour's reasons at paragraph 24 of our appeal submissions. If you start at paragraph 19 of Branson J's analysis in the decision, she says:

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In my view, the reference in par 178(5A)(b) of the Act to "an employee whose employment is subject to the agreement" is, as a matter of language, open to at least two constructions.

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I don't read out what those to constructions are, but you'll see equivalent to the case that we're dealing with here in this appeal, there are two available competing constructions by reference to the tense; the present tense at the time of the application and (indistinct) at the relevant time. Of course the words that she was dealing with in paragraph 178(5A)(b) were more explicit as to the use of the present tense than what we're dealing with in section 217(1).

PN101

It's clear at the end of paragraph 19 that when her Honour says 'as a matter of language' she is referring to, in abstract, what the expression is capable of yielding in terms of the competing constructions. Her observation as to the matter of language is one made before her Honour descends into an analysis of the broader text and purpose of the Act.

PN102

As she goes through, she refers to a number of different considerations including the legislative objects, an explanation of why it might be that the two differently worded standing provisions on the one hand for certified agreements and on the other for awards and orders might be so. She refers to section 170M and she also refers to consequences.

PN103

Just dealing with consequences first, you will see that at paragraph 25. There her Honour poses scenarios and in essence says, 'Well, look, it would be passing strange if standing were available to an employee who had been disciplined under the procedure in the agreement but had not been dismissed, but standing would not be available for an employee who had in fact suffered a more severe disciplinary sanction and been dismissed.' We would say that the same consequence based considerations here in terms of illogical, unfair outcomes apply.

PN104

Consider the scenario even close to home to that analysis where you're dealing with a situation where an employee before they want to bring breach proceedings or an unfair dismissal claim want to clarify the wording of a disciplinary procedure in the enterprise agreement. In that scenario the dismissed employee would not have standing, yet an employee who was not dismissed would have standing. That consequence based consideration rings loudly in the context of section 217(1).

PN105

In relation to section 170M, the Deputy President regarded that as, in effect, being a reason why you would regard Millar as materially distinguishable from this case. To the contrary, in our respectful submission, the words in 170M are clearer but our whole point is that the word 'covered' read into the rest of section 217(1) and understood in light of the statutory context and purpose, naturally captures the very same meaning.

PN106

As Branson J found at paragraph 24, her preferred construction was that 'is subject to' means a person whose employment was – and I emphasise these words – at any relevant time when the agreement was in operation subject to the agreement. The same thing here as I said at the outset for section 217(1); employer covered at any relevant time when the enterprise agreement was in operation.

PN107

So, in our respectful submission, Millar's case is analogous for a section 539 standing in the Fair Work Act and so we get back to this asymmetry point why the different treatment. The purposive approach of her Honour Branson J in Millar is instructive and it supports our construction. Those are the submissions that I intended to make orally this afternoon. We otherwise rely on our written submissions, if the Commission pleases.

PN108

VICE PRESIDENT CATANZARITI: Thank you. Over to you, Mr Irving.

PN109

MR IRVING: Thank you. I intend to proceed by the following course: making some observations about the grammatical construction, moving to the purpose, the context, the asymmetry enforcement issue and then dealing with retrospectivity. That follows the outline of the course of how we played that out in our submissions. Our case as to the retrospectivity point, as Mr Dalton made clear, doesn't depend upon establishing our contention about retrospectivity, whereas their case does. It went on simply the construction of sub 1 without necessarily going all the way with sub 2.

PN110

In relation to the grammatical construction that was adopted by his Honour at paragraphs 30 to 34, we wish to say four things. First, when one talks about the natural and ordinary meaning of a phrase, the ordinary meaning is the meaning which is not the trade meaning, which is not the defined meaning, which is not the technical meaning. That's what the ordinary meaning of the phrase means in terms of statutory construction and, in terms of the natural meaning, it's simply the grammatical meaning.

PN111

We do not say – and the trial judge below did not say – that once one figures out what the grammatical meaning is, one stops. Nor did he take the approach of adopting a position that once he had reached a tentative conclusion about grammatical meaning, he imposed some sort of burden on the employer here to dislodge his tentative view about the grammatical meaning. Rather, the correct approach is to start with the text, figure out the ordinary and natural meaning – the grammatical meaning – and then proceed to examine the purpose, the context, the history and then of course ultimately we turn to the text.

PN112

As the Deputy President said at paragraph 32, the reference to 'covered' is a description of the employer covered by the agreement; it's a description of the employer. It's a grammatical device that is used for that purpose. He says in paragraph 32:

PN113

The participial phrase is being used to describe the employer that may make an application. The relevant temporal context of the sentence is the time of the application –

PN114

which is to say there is a temporal phrase which is used already in the section, which is referring to the time the application is made. It's not agnostic as to temporality. My friend seeks – I think you embrace a sort of polytheistic approach that there is the time of the application, then the employer or others is or were covered by the agreement referring to different time periods.

PN115

There is no need, we say, to import an additional temporal element over and above what is already referred to in subsection (1) of section 217. We say that the conclusions reached by the trial judge as to merely the grammatical construction are correct. As to the purpose, if I take the Commission - - -

PN116

DEPUTY PRESIDENT GOSTENCNIK: On the union's construction of the provision what is the position of an application that is made at a time when an employer is covered, but before determination of the matter the agreement no longer applies because it has been replaced by another agreement? At the time the application was made the employer was covered. They continue to have standing on your construction?

PN117

MR IRVING: Then the right conferred under the legislation to make the application has been exercised and what the consequences are for any subsequent order, that's going to be another question. If it is the case that one has made an application to say, 'The enterprise agreement covering this group of workers means X', and then subsequently a new enterprise agreement is created, the question is, well - - -

PN118

DEPUTY PRESIDENT GOSTENCNIK: The consequence depends, does it not, on whether or not there is power to retrospectively amend, because if the agreement is no longer in operation - - -

PN119

MR IRVING: Yes.

PN120

DEPUTY PRESIDENT GOSTENCNIK: - - - there is nothing to amend.

PN121

MR IRVING: Indeed, so we say obviously there is nothing to amend. I don't understand how that issue relates to the timing of coverage and who can make application - - -

PN122

DEPUTY PRESIDENT GOSTENCNIK: Well, I guess I'm just exploring Mr Dalton's point which is essentially that one is tied to the other; that the capacity to retrospectively vary is tied to standing.

PN123

MR IRVING: Yes.

PN124

DEPUTY PRESIDENT GOSTENCNIK: At least insofar as it concerns an employer who isn't covered at the time of the agreement – sorry, at the time the application is made.

PN125

MR IRVING: Yes. The way I see the temporal elements is essentially this: one figures out whether or not you can make an application if you're covered at the time, okay? The purpose of the provision is to operate prospectively to resolve concerns that you have got in terms of your future rights and obligations. It is not intended to reach back and to adjust former rights and obligations under the current enterprise agreement, whether replaced or not.

PN126

The function or the method by which past rights are ascertained and enforced is through enforcement proceedings, through seeking a declaration in the court as to what the meaning and effect of these provisions are. As to fixing up the problems that the parties have in their continuing relationship under the current EA, one goes to the Commission under 217, the Commission makes the adjustment, it operates prospectively to adjust relationship for the future. That is how those two aspects of our case piece together.

PN127

DEPUTY PRESIDENT GOSTENCNIK: Yes, I do understand that, Mr Irving. It's just that I'm trying to understand how it is that if on application – putting to one side for a moment satisfaction about whether there's an ambiguity or uncertainty and putting aside discretionary considerations as to whether or not one should vary, but if on application subject to being otherwise satisfied about ambiguity and uncertainty the Commission is empowered, at what point does it lose its power?

PN128

MR IRVING: When making that order would have no operative effect. When a new enterprise agreement is entered into which – or, rather, when one of the circumstances occurs that ceases to mean that the old enterprise agreement operates and that might be a replacement enterprise agreement, that might be the termination of the former enterprise agreement, but once it's dead, it's dead. Once the old enterprise agreement is no longer operative, then it is no longer the source of rights.

PN129

DEPUTY PRESIDENT GOSTENCNIK: And if an employee were an applicant and is covered when they apply but they cease to be employed, there's no impact on the agreement. What is the position of the Commission's power then?

PN130

MR IRVING: If the employee has – then the Commission can deal with the application because the employee was covered at the time they made the application.

PN131

DEPUTY PRESIDENT GOSTENCNIK: Even though the employee has no ongoing interest in the agreement, only a past interest?

PN132

MR IRVING: Well, there would have been an interest at the time the application was made. They don't lose that interest as a result of delay. Their interest is – so it reflects and respects that interest.

PN133

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. Thank you.

PN134

MR IRVING: Could I just go to what we say is the purpose, which we say the Deputy President correctly found at paragraph 47 where he said:

PN135

In my opinion, the reason why s 217(1) confines standing to persons who are presently covered by the agreement is that identified by the union: those persons have an ongoing interest in the agreement that governs their relationship. They have a continuing interest in the integrity of the text.

PN136

Now, we rely upon that purpose not just from the words but rather from the scheme of the Act and from the nature of what enterprise agreements are, what enterprise agreements do. What enterprise agreements are is that they are instruments that regulate employment. They're not instruments that regulate relationships between creditors and debtors, they're instruments that regulate employment and that is apparent from section 50 and the heading of Subdivision D of Division 2 of Part 2-1.

PN137

Terms and conditions provided by an enterprise agreement is the subject matter of the phrase and in section 52 it refers to:

PN138

An enterprise agreement applies to an employee, employer or organisation.

PN139

The meaning of 'employee' is a defined phrase. A former employee – not a prospective employee, but a former employee – is no longer an employee. I used to be employed by Domino's Pizza some time ago, but I would not be an employee for the purpose of this provision for making an application for I have ceased to be an employee and nor would they be my employer. What enterprise agreements do is defined in section 51, which is:

PN140

An enterprise agreement does not impose obligations –

PN141

unless it applies.

PN142

PN143

unless it applies. That's what enterprise agreements do; they impose obligations, they give entitlements. They are the rights that it regulates and the duties that it regulates. Of course there are markings on the page such as the heading of the document and that sort of thing which might be used in some sort of – which do not themselves create obligations and do not themselves create entitlements, but the operative parts of enterprise agreements are the things that create obligations and give entitlements.

PN144

A person who is not an employee or an employer any more does not have rights, does not have obligations created for them by the enterprise agreement and the enterprise agreement does not give them entitlements any more. It might have done so in the past when the enterprise agreement applied to them, when it was operative, but it no longer does. The purpose of the provision is also drawn from - - -

PN145

DEPUTY PRESIDENT GOSTENCNIK: But if the provisions are intended to operate only whilst an agreement is in operation, why didn't parliament use 'applies', because these provisions can be engaged when the agreement is made but not in operation, i.e., before it commences operation. Once the Commission approves an agreement it could vary it to remove ambiguity or uncertainty even before the agreement comes into operation under 217.

PN146

MR IRVING: So long as it was expressed to cover, is that - - -

PN147

DEPUTY PRESIDENT GOSTENCNIK: Yes, yes.

PN148

MR IRVING: Okay.

PN149

DEPUTY PRESIDENT GOSTENCNIK: Because the agreement doesn't commence operating immediately. It commences operating seven days after the Commission approves it or at such point in time as the agreement specifies – such later point in time.

PN150

MR IRVING: Yes. I mean, that is a pretty unusual circumstance in that the parties are there before the Commission seeking - - -

PN151

DEPUTY PRESIDENT GOSTENCNIK: You might be surprised. It's actually not that unusual that an application to approve an agreement is accompanied by an application under 217 to vary or remove an ambiguity. It's not an uncommon thing in this place, believe it or not.

PN152

MR IRVING: Even before the thing kicks off the parties are unclear about what it all means, okay.

PN153

DEPUTY PRESIDENT GOSTENCNIK: Or they're clear about what it means, but they didn't clearly express themselves is the more common reason for the application.

PN154

MR IRVING: Okay.

PN155

DEPUTY PRESIDENT GOSTENCNIK: But, in any event, if your contention is that the provision is engaged only in respect of agreements that are in operation, it just seems to me that the more appropriate language of the scheme given that the consequence of an agreement being in operation is reflected in the reference to an agreement applying, that 'applies' wouldn't have been used. An application by an employer to whom the agreement applies, for example, instead of coverage.

PN156

MR IRVING: Yes, though of course we've got the termination of the coverage provision that's linked to the operation, which is linked to the application ultimately. At the termination end there is a concurrence of timing of where the death is - - -

PN157

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN158

MR IRVING: - - - and what we're dealing with here is how section 217 applies to the death of an enterprise agreement as opposed to whether or not 217 – how 217 operates in relation to, sort of, the prenatal stage where the agreement hasn't kicked off yet. I must say, you know, my friend suggested there were two possible interpretations; it means 'is' or it means 'is and was'. The third is 'is, was or will be' kind of thing.

PN159

DEPUTY PRESIDENT GOSTENCNIK: Well, no. If using 'covered' means in the present tense, then on approval a person is covered but the agreement is not in operation - - -

PN160

MR IRVING: It's not in operation.

PN161

DEPUTY PRESIDENT GOSTENCNIK: - - - and, therefore, doesn't apply.

PN162

MR IRVING: Yes.

PN163

DEPUTY PRESIDENT GOSTENCNIK: But a person is covered, so that's the point I'm making. Agreements can be varied by a person – or on application by a person covered even though the agreement is yet to be in operation.

PN164

MR IRVING: True. Yes, I accept that, Deputy President. By reference to the purpose that was identified by the Deputy President, those persons will have an ongoing interest in the integrity of the text in the enterprise agreement although it has not commenced operation as yet. In terms of the purpose of the enterprise agreement paths, the purpose of Part 2-4 is defined in section 171 to refer to providing a framework for collective bargaining in good faith.

PN165

Of course one can't bargain collectively in good faith when there is no relationship of employment in existence any more and is a prospective relationship of employment. The purpose is to enable the Commission –

PN166

to facilitate good faith bargaining and the making of enterprise agreements –

PN167

sorry, I should also mention and to 'deliver productivity benefits'. Well, one can't deliver productivity benefits by retrospectively varying agreements other than by changing entitlements or lessening obligations, because all these objects look prospectively as to what can be achieved in the future by enterprise agreements rather than looking at the adjustments of rights in the past.

PN168

The purpose of the provision is also to be understood by reference to the fact that the Act confines the intervention of the Commission in quite narrowing ways in enterprise agreements. The powers to arbitrate, terminate and vary are sharply defined and the purpose of the provision is also to be understood by reference to section 217 that allows the 'parties' themselves to rectify, to fix up their own problem.

PN169

You know, one of the things that arises out of the construction proposed by Qube is that it does not permit the parties to fix the problem themselves. You know, like, say, all right, the 2012 enterprise agreement should be varied in this way to reflect the intent and of course following the Commission's decision the parties can't get together and say, 'Okay, we will vote to vary the former enterprise agreement.' That power to fix and govern their own affairs is taken out of their hands on Qube's construction. On the union's construction it remains in the hands of the parties to be able to fix problems with their own agreement by consent.

PN170

My friend has asked the question, well, why does one draw the line there? Why does section 217 draw the line with coverage; that once coverage has ceased then you can no longer make an application? The reason is that the end of coverage is linked to the end of operation, which is linked to the end of application, which is linked to the end of the creation of obligation to the entitlements.

PN171

There is a change of legal position of the parties once the agreement ceases operation. It is inevitable that when you move from either one instrument - one EA to another EA - there is going to be a change in the legal position of the parties. When you move from one EA to no EA, there is going to be a change in the legal position of the parties.

PN172

It is a sensible point at which to draw the line between permitting variations. It's not as if there's no difference whatsoever between what happens on Monday when the old EA finishes and what happens on Tuesday when the new EA commences. There is inevitably a change in legal position. It is not by pure happenstance, it is a point at which legal obligations alter.

PN173

The interest. My learned friend said, well, employers have an interest in the terms and the integrity of the text of the old EA. That is true, but their interest is different. Their interest is now no longer as someone whose legal obligations in the future are covered by the EA which no longer covers them, but their interest is that of a litigant, their interest is that of a creditor. The reason the line is drawn there is because of the status change and the interest change.

PN174

I should say a couple more points about the purpose of these provisions in a broader context. This is a case purely about statutory construction and so the opportunity to reach to high ground is pretty limited. When one thinks about it as a former employee, one of the differences between slavery and employment is the ability to resign. You can free yourself of obligations, new obligations, to your former master by resignation. It is, as they said in notes, you know, one of the principal differences between a servant and serf, and, you know, in Page the New South Wales Court of Appeal spoke about unless there is power to resign, then employees have only got hope of death or manumission.

PN175

So what is the position of the former employee here on the Qube construction? They left employment in 2007 or 2012 or 2016 and Qube can come along and say, 'We want to amend, we want to vary the enterprise agreement in such a way that you owe us money', or 'you didn't meet your obligations' or 'on the true intent of the agreement, you know, we overpaid you', and so on termination it can be called back.

PN176

How does one free oneself as an employee from the prospect of such an application on the Qube construction? Where is the freedom to carry on with one's life, because if the difference between a serf and a servant is the ability to resign – that is, to rid oneself of obligations, ongoing obligations – the Qube construction allows the employer to come back and say, 'There are additional obligations which have now been clarified by the Commission which you haven't met.' That is what enterprise agreements do; they give entitlements, they impose obligations.

PN177

The characterisation of my friends saying, 'Well, all that's happening in a section 217 application is, you know, one is figuring out the true intent.' Nothing changes, no obligations change - - -

PN178

DEPUTY PRESIDENT GOSTENCNIK: That would be true whether or not the employer had standing or not. If the employer was covered by the agreement and had a proceeding pending in the Federal Court, the outcome would potentially affect the pending Federal Court proceedings, but the only difference is in one case the employer is covered and in the other the employer was covered.

PN179

MR IRVING: Well, one thing one knows when the employee - - -

PN180

DEPUTY PRESIDENT GOSTENCNIK: Sorry, my point for essentially your argument seems to me to be one about whether or not there can be retrospective variation, not standing as such.

PN181

MR IRVING: It certainly goes to that, but it also – you know as an employee that whilst the enterprise agreement is on foot there is capacity to change. I mean, look at these employees here. We are literally talking about changing the entitlements of employees from 2016 who might have not worked for seven years, who might be dead, and it seems an odd power to give to the Commission to amend the obligations and entitlements of those in relation to an agreement that is no longer in existence and has been replaced long ago; two rounds of EB since. It is a strange power to give to permit someone to go back that far in time.

PN182

DEPUTY PRESIDENT GOSTENCNIK: But the same might be true in relation to an agreement that continues in operation, at least in part, so that the next round of an agreement an employer might have made a new agreement with some of the employees covered by the old agreement and those are excised, but there are others who are still covered by the agreement and the employer is still covered by the agreement.

PN183

That employer could use that vehicle to vary to remove an ambiguity in respect of matters that don't affect the employees that are covered by it, but those that are now covered by the new agreement.

PN184

MR IRVING: The legislature has specifically addressed that issue by rather than using the words 'some' and 'all' and dealing with them in a different scheme, they have simply said 'all' and they have made that legislative choice in section 54, I think it is.

PN185

DEPUTY PRESIDENT GOSTENCNIK: That's about whether or not the agreement is in operation, but on your analysis as far as I understand it you would say that there's no power to vary retrospectively, anyway.

PN186

MR IRVING: No.

PN187

DEPUTY PRESIDENT GOSTENCNIK: So the issue doesn't arise, which gets back to my earlier point that it really doesn't matter whether the agreement is in operation or not in relation to extant Federal Court proceedings because in order to effect those the variation would have to be retrospective.

PN188

MR IRVING: Yes, and, you know - - -

PN189

DEPUTY PRESIDENT GOSTENCNIK: So I'm not sure that the scenario adds anything to context or purpose because your principal position is that the agreement can't be varied retrospectively to remove ambiguity. It can only be done so prospectively.

PN190

MR IRVING: And it is far weaker, as per (indistinct), we acknowledge that. And before I leave off from this point and, again, it's a point which is more salient as to retrospectively, perhaps, the purpose exists, there are proceedings on foot by the FWO about underpayments to, in certain employers, underpayments to Woollies employees, underpayments to Coles employees, underpayments to – there were 7-Eleven proceedings, and there's a huge number of proceedings on foot by the FWO in relation to past award, sure, but enterprise agreements, as well.

PN191

Now, if it were the case that one could come here and seek a retrospective variation, then the first step for any respondent employer would be to come here. In a significant number of these cases, the principal position of the employer is, we did not understand it to operate that way. We understood it to mean something else.

PN192

The employees and us, we shared this common understanding reflected in the practice that we have engaged in for the last five years. Of course, the FWO can't come here to seek a variation to clarify things, for it does not have standing under the Section 217. Employers on the Qube Construction get two bits of the cherry, but the FWO is regulated with naught.

PN193

Could I move onto the next point about the operations sections, 51 through to 58, and this is addressed in paragraph 9 of our submissions. As I have previously taken you to it: 'An enterprise agreement imposes obligations to give entitlements, and then only does so when it applies. It applies when it's in operation.

PN194

It's in operation from defined commencement and cessation date, and when it's ceased to operate it can never operate again. Only one EA can apply to an employee at any one time; when the later EA replaces the earlier EA it ceases to apply in relation to that employment, and can never so apply, again.'

PN195

When an enterprise agreement becomes inoperative under Section 54, and inapplicable, it can no longer impose, and can never again, be the source of obligations and entitlements. The Qube construction permits its persons to apply to vary inoperative and inapplicable enterprise agreements. The scheme established by those provisions is that an enterprise agreement, it bites during its life, it imposes obligations during its life. It creates entitlements during its life, its life being when it applies and operates.

PN196

And once it has ceased to operate once it has ceased to apply, it no longer creates obligations, it no longer gives entitlements. What the - - -

PN197

VICE PRESIDENT CATANZARITI: I don't want to – you need to be careful about how wide this case is becoming, right? This case is about Section 217 and the variation power.

PN198

MR IRVING: Yes.

PN199

VICE PRESIDENT CATANZARITI: There is a different view on other aspects of enterprise agreements, and whether a dispute, for example, is started in relation to an enterprise agreement, and whether, if that enterprise agreement ceases - and there's a mixed view in the Bench, and the Full Bench goes one way - I would not want to see this decision going beyond the remit of Section 217.

PN200

MR IRVING: All right.

PN201

VICE PRESIDENT CATANZARITI: Speaking for myself. And any attempt to do that, I would certainly vigorously oppose happening, because it is really limited to this case, the variation point and how the variation works.

PN202

MR IRVING: Yes.

PN203

VICE PRESIDENT CATANZARITI: And the submissions are now moving way beyond that. The differing views being represented by the Vice President and I, sitting here.

PN204

DEPUTY PRESIDENT GOSTENCNIK: Yes, so this case is only going to be able to deal Section 217 when this is decided.

PN205

MR IRVING: Well, focussing on Section 217, Section 217 is, we say, understood in the context of the provisions which regulate when agreements operate and apply, and cover, including subsection 5, section 53. That provision states, if I could take you to the terms of it, titled, 'When an enterprise agreement covers' – and it sets out a series of circumstances when it does cover, and when it does not cover, and then in subsection 5 it provides that, 'Despite subsections 1, 2 or 3, an enterprise agreement that has ceased to operate does not cover an employee.'

PN206

It does not cover an employee when it has ceased to operate. We say that employers are not covered by an enterprise agreement under Section 217, when the enterprise agreement does not cover them under Section 53 subsection 5. It deals precisely with the issue of Section 217 in dispute here. What it needs to construe that subsection in a harmonious way with Section 218. The reference, 'it does not cover', and 'covered', need to be read together, for all provisions in the Act, need to be read together.

PN207

It's got to be read in a way that enables that subsection to be given its purpose and effect. As we set out in paragraph 10 of our submissions, the very issue that was the subject of the litigation before the Deputy President, and the relationship between this section and Section 217, was addressed in the explanatory memorandum.

PN208

The explanatory memorandum, which we quoted in paragraph 10, says that coverage means that from the time the award is made or the agreement is proved by the FWO, until the time the award or agreement ceases to operate, persons covered by the award or agreement can apply to vary the instrument.

PN209

That's when you can apply to vary the instrument, up until the time the agreement ceases to operate. And that's the commentary on Section 53 in the explanatory memorandum.

PN210

DEPUTY PRESIDENT GOSTENCNIK: Mr Irving, can I ask you this. This application to vary was made some time before 8 September, in any event, last year and at that stage the amendments, or at least some of the amendments or reforms made by the current government, had not come into operation. In December, some of them had including amendments to Section 225 and 226 of the Act.

PN211

My question really is, what, in looking at the statutory context in which these provisions are to be construed, do we take into account as we sit here today, the new terms of 226, for example? And I'll be as plain as I can about it. It seems to

me, at least, that 225 is framed in terms of who can make an application, in very much the same language as 217 is. That is, one or more employees covered by the agreement can apply.

PN212

The criteria for termination, that is, when the Commission must terminate, seem to me, all to hang on there being an actual agreement in operation. For example, paragraph (a), 'the Commission is satisfied that the continued operation of the agreement', et cetera; paragraph (b), 'the Commission is satisfied the agreement does not, and is not likely to cover', or 'an agreement cannot likely cover in the future if it's not in operation;' and paragraph (c), 'all of the following apply:- the Commission is satisfied that the continued operation of enterprise agreement would pose', et cetera.

PN213

So, in other words, the context, at least for interpreting standing in respect of 225 is, or appears to be, at least on its face, referable to an agreement that is in operation. And that wasn't necessarily the case in relation to the predecessor at 226.

PN214

MR IRVING: Okay.

PN215

DEPUTY PRESIDENT GOSTENCNIK: So, that's really my question.

PN216

MR IRVING: Okay.

PN217

DEPUTY PRESIDENT GOSTENCNIK: Given that this application was made before 226, it was framed – and I didn't like that copy anyway – it was framed in its present terms.

PN218

MR IRVING: Okay. I'll deal with the amendments principle, then I'll deal with the particulars.

PN219

DEPUTY PRESIDENT GOSTENCNIK: Thank you.

PN220

MR IRVING: I haven't gone through the amendments 226 and how they've played out in this case. But the general principles are these. There are a number of aspects to temporality and statutory construction. Many of them are discussed by an article by Steven Gaglier(?) in the University of Newcastle, or if you – he goes into some detail about various aspects.

PN221

Other than the fact that he was in the minority in Kinneen(?) about this very issue, I commend his approach about temporality and statutory construction. One

construes the Act in its current form, and when an amendment has occurred you construe the whole new instrument, okay, first.

PN222

Second, when you look at the unamended provisions, one does not construe by implication, arising from the new provisions which have been created. So, if on its proper construction under the old Act, there is power or no power, then unless that issue is being dealt with directly, or by necessary implication by the new provisions, then you're stuck with the old power or no power conclusion.

PN223

DEPUTY PRESIDENT GOSTENCNIK: I don't – two - 217 hasn't been fiddled with.

PN224

MR IRVING: Yes.

PN225

VICE PRESIDENT CATANZARITI: But the surrounding provisions have.

PN226

MR IRVING: And our points about 227 in its initial form, still hold good for 217 in its initial form, as well. And one shouldn't ignore the points about 227 because it's now been fiddled with and adjusted, and made clear in this way, that way, or the other.

PN227

The other aspect about temporality is this. One doesn't construe the new Act to say, well, that was the intention of the legislature, all along. And nor does one look at the explanatory memorandum in 2022, to consider. I hope that - - -

PN228

VICE PRESIDENT CATANZARITI: No, I understand.

PN229

MR IRVING: All right. Just getting back to the explanatory memorandum here, like the Deputy President, we don't go to it as a first resort, we don't go to it as belt and braces. We've taken the Commission to half a dozen different statutory provisions that fortify the purpose that we say the provisions has. We don't say the words in the explanatory memorandum gazump in some way, the grammatical meaning. It confirms it in the clearest terms.

PN230

Could I now move to the final two points, which are the asymmetry point, and the enforcement regime, and the retrospectivity. First, the asymmetry point. True it is, true it is that like in Miller, we've got a scheme in Section 539 that refers to certain people enforcing enterprise agreements, including an employee and employer, and employee organisation to whom the enterprise agreement applies.

PN231

As we set out in paragraph 11 of our submissions, the whole purpose enforcement mechanisms are different from the purpose of 215. Just because 'employee', for example, entitled under Item 4A of Section 539, 'employee', does not mean, 'a current employee', or, 'is an employee.' Because otherwise if you are sacked, you couldn't run a general protections claim.

PN232

The temporal element in 539 is, what was the state of play at the time the contravention - - -

PN233

DEPUTY PRESIDENT GOSTENCNIK: Well, a person who wants to make a general protections claim involving a dismissal must come here first.

PN234

MR IRVING: Indeed.

PN235

DEPUTY PRESIDENT GOSTENCNIK: And is described as a 'person', not an 'employee', so that's the answer to the question.

PN236

MR IRVING: For those general protections claims, not involving dismissal.

PN237

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN238

MR IRVING: Involving any form of enforcement of enterprise agreements or awards. Just because you have ceased to be an employee does not mean you can't sue for your underpayments. And that's because, 'employee', in that phrase, is by reference to what occurred at the time of the contravention.

PN239

Now, if that was your status then, then that's the end of it. One doesn't need – you know, Miller was dealing with similar circumstances, the same standing to sue provisions, and the context in which one was trying to figure out the temporal aspect in that context, is just going to be very different to the temporal aspect in relation to variations.

PN240

It is said in the submissions that there needs to be some sort of balance, which is disrupted by not allowing people who are formally covered to pursue variations, contrasted with those who are currently covered, who can pursue variations. The balance is dealt with in Barclay & Robertson, and my case is that the Fair Work Act strikes a balance between the interests of employers, and the interests of employees.

PN241

It is not trying to strike a balance between those who were formally covered, and those who are currently covered. They're two sets of interests that aren't explicitly

regulated by the enterprise agreement, or the enterprise agreement scheme. The interest of the employer in any enforcement proceedings is going to be as a creditor, not as an employer, per se. It's someone who owes a deb; it's someone who seeks to enforce an obligation; it's someone who owes a penalty.

PN242

Could I then move to the retrospectivity point, which is a fundamental aspect of my friend's case, and an additional aspect to ours. We say that there are six reasons why it is, that the Commission does not have power under Section 2 of subsection – of Section 217, to make a retrospective order.

PN243

The first arises from, what I might call, the penalty problem, which was discussed in re Kelly, which is this. An obvious problem when dealing with a retrospective variation on any incident that creates obligations, is that people have engaged in prior conduct, prior to the variation occurring, which was lawful in circumstances where the same conduct after the variation becomes unlawful.

PN244

So, true it is that the Commission in any resolution of ambiguity, is seeking to divine true intent, and that might be a starting point though it's not even necessary to find what the legal meaning of the phrase is before you remove any ambiguity or uncertainty under (indistinct).

PN245

And true it is that it is unlikely that the Commission, as a matter of discretion, will throw the baby out with the bath water and require the employer to double the pay rates in the resolution of any ambiguity. However, the point of principle is this, that in the course of resolving any ambiguity, the Commission is, almost of necessity, either increasing or decreasing obligations, either increasing or decreasing entitlements.

PN246

Because any clarification will depart from the legal meaning of that set of words. The only circumstance in which it will not depart, is if this Commission is making a declaration, if this Commission is stating in the exercise of the power what the legal meaning currently is. Now that's the role of the court.

PN247

That's what courts do. They make declarations about what the legal meaning of the power is. This Commission's job is to remove, and to remove will change, change one or the other, up or down of necessity. In those circumstances, what the Commission is doing is changing what was lawful, to that which is unlawful, if the obligations on the employer are being increased, or if the entitlements of the employee are being increased.

PN248

Now, it won't change it from lawful to unlawful if the entitlements go down, or if the obligations are lessened. But it cannot be the case that this Commission, that one would construe 217(2), to give the power only to impose more obligations for employees and decrease entitlements, rather than to release them of them. That

change in obligations means that employers are going to be exposed to penalties for past previous lawful conduct, and the exposure to penalties is expressly dealt with each time in the Fair Work Act, each time that is a power to vary the relevant instrument to remove an ambiguity or uncertainty.

PN249

That is, for example, in the modern awards in Section 160, there is a power to remove ambiguities and uncertainties. 165 sets the date of effect of that; 165 subsection (2) provides for retrospective changes to that, and because there's going to be a retrospective change to the modern award, it may well mean that the employer has to pay amounts, retrospectively.

PN250

That is, that what occurred two months ago, is now going to be in contravention, because they didn't pay the full amount that the Commission is now awarding retrospectively.

PN251

And so, what they did two months ago, changes from lawful conduct to unlawful conduct, and so they're exposed to a penalty.

PN252

And hence Section 167 subsection (3), sets up a scheme to protect them from that penalty. It protects them from that obvious consequence of having a retrospective change of entitlements arising from the resolution of an ambiguity or uncertainty. Now, that protection for employers, and indeed for employees contained in the scheme of modern awards, is absent from the scheme in 217.

PN253

It was not the intention of parliament when we say, to expose employers to penalties for conduct that was lawful at the time. It was not intended that these provisions of 217 allows orders to be made retrospectively that would expose employers to that.

PN254

Similarly, with the scheme relating to the removal of ambiguities and uncertainties in National Minimum Wage Orders in 296. There's a power to remove an ambiguity in 296; there is a date of effect in 297; there is a retrospective effect in 297 subsection (2); and there is a protection for employers in 298 subsection (2) from penalties being imposed in the same sort of way.

PN255

Again, it is a clear indication, we say, that when parliament intended that this commission in the resolution of ambiguities that was going create new obligations, impose – grant new entitlements, that the employers were free of any possibility of a penalty, whereas under 217, that protection doesn't exist.

PN256

In relation to transferrable instruments, there's power to remove ambiguities and uncertainties, but under 320 subsection (5) they only operate prospectively. As is discussed in paragraph 38 and 40 of Kelly, whenever a power is granted by this

Act to allow the removal of ambiguities with retrospective effect, the Act clearly confers that power. Here, into 217, there is no clear conferral.

PN257

Further, whenever such a power exists to make orders with retrospective effect, there is a careful scheme that protects employers and employees from facing penalties arising from past contraventions, and it is absent from 217 because there is no power to make a retrospective order under Section 217. To construe Section 217 to grant that retrospective power, is to permit the exposure of people to penalties after the event, for lawful conduct.

PN258

That's the first point in relation to Section to retrospective activity.

PN259

VICE PRESIDENT CATANZARITI: How long are you going to continue?

PN260

MR IRVING: How long?

PN261

VICE PRESIDENT CATANZARITI: Yes.

PN262

MR IRVING: About eight, ten minutes.

PN263

VICE PRESIDENT CATANZARITI: Yes, because we are getting a bit of repetition in this, so it's - - -

PN264

MR IRVING: Sorry.

PN265

VICE PRESIDENT CATANZARITI: Keep going.

PN266

MR IRVING: I'll move more promptly.

PN267

VICE PRESIDENT CATANZARITI: Because you do have detailed written submissions on these points.

PN268

MR IRVING: Right. The second point, same terms, same meanings in paragraph 15. We don't need to expand on that. The third point, principle of legality, which we've set out in paragraph 16 of our submissions, the principle of legality, we don't say operates as some sort of bar. It is simply a principle which is taken into account in the construction of the Act, including the construction of a power.

PN269

It gives way to the unambiguous language which one finds in 167 and 298, but doesn't find in 217. The rights which we have identified set out in paragraph 17, we have read our friends submissions in reply and they don't take issue, as we understand it, with any of the rights that we've identified.

PN270

The fifth and sixth points about the retrospectivity of these, the nature of the instrument itself militates against retrospectivity. You cannot retrospectively impose a new obligation and have it complied with. A retrospective obligation is something that needs to be done in the past.

PN271

If you create an entitlement arising from an ambiguity, the entitlement must have been given in the past. It is not an order that it is possible that the parties can then adjust themselves, prospectively and avoid a contravention.

PN272

The subject matter of the enterprise agreement dealing with current relationships, dealing with employees as defined, and employers as defined, not including past relationships, not governing the credit or debtor relationship, also militate against that conclusion.

PN273

One final point arising out of my friend's submissions about the precedent in the Aged Care and HSU case, there are observations here and there in previous Commission decisions that there is power for retrospectivity, and Aged Care and HSU was one of them. My friends say, look, it's a matter of precedent and unless it's plainly wrong, it's got to be followed.

PN274

That's not correct. As a matter of precedent, when a proposition is not argued then the decision of the earlier court does not bind, and that's what the High Court has said about precedent in CSR v Eddy, at 226 CLR, page 4 and at paragraph 13. In that case, which is the high water mark for my friends, neither the ANMF or the HSU argued the point about retrospectivity, and that is clear at paragraphs 15 and 16 of the decision which was made below.

PN275

The Commission did not have the benefit of any argument. Perhaps, 'benefit', is putting it too highly sometimes, but - - -

PN276

VICE PRESIDENT CATANZARITI: Yes, 'benefit', is certainly putting – my recollection of what actually happened is slightly different, but anyway - - -

PN277

MR IRVING: Well, you may have an advantage over me in that you - - -

PN278

VICE PRESIDENT CATANZARITI: I heard the oral argument.

PN279

MR IRVING: You did hear oral argument.

PN280

VICE PRESIDENT CATANZARITI: Yes. Anyway - - -

PN281

MR IRVING: Anyway. Unless there is anything further from the Commission. If you'll bear with me. There is one further matter arising, very quickly, which is this. When one goes to the court about these matters, the court ascertains the legal meaning. And when it ascertains the legal meaning, is it finding the meaning of the words, 'objectively ascertained', as to reflect what the reflection of the parties are.

PN282

And my friend has made submissions to say, well, we should be able to come here to the Fair Work Commission to tell the Commission about what the meaning of those words actually are, what the mutual intention was. But that is exactly what the court is doing in the objective construction of the document. The thing which is different about here is, you can change, you can remove. So, it is not as if mutual intention is going to be irrelevant to the court.

PN283

Second, if it is the case that the parties have adopted a particular construction of an instrument which is wildly different to what the words actually legally mean, then not only are the court going to take that into account in any construction argument, but they have a discretionary remedy under 545. They can grant relief. They may grant relief.

PN284

And in circumstances in which one party has led the other about the proper meaning about the clause, then the court is not without tools in that respect. It can also impose no penalty. It's got a discretion about that. And as well as that, it can rectify documents.

PN285

The equitable doctrine of rectification is not about the rectification of contracts, it's about the rectification of documents. And if a document needs to be rectified to reflect certain intentions, then courts have power to do so. So, it is not as if employees in these circumstances have no hope or relief, rather, the question is, should they get two bits of the cherry. Unless there is anything further?

PN286

VICE PRESIDENT CATANZARITI: Thank you.

PN287

MR IRVING: Thank you.

PN288

VICE PRESIDENT CATANZARITI: Yes, Mr Dalton?

PN289

MR DALTON: Thank you, Vice President. First, could I deal with my learned friend's submission in support of the union's construction that links standing to operation with the enterprise agreement, and by putting it on the basis that the obligations under that enterprise agreement need to be in play at the time the application is brought.

PN290

With respect, it can't be put in those absolute terms. That's incorrect. It is unsustainable, having regard to the provisions, particularly the provisions in Section 53 that make it clear that the concept of coverage is not dependent on operation, as Deputy President Gostencnik raised.

PN291

So, Specialist People, the Full Bench decision that I took you to, is an example of where the Full Bench was dealing with a case where there was an application for approval of an agreement. BOOT issues arise, application for Section 217 to vary the agreement to remove ambiguity. The agreement obviously has not commenced operation at that point in time.

PN292

Can I take this point further. Consider a Greenfields Enterprise Agreement. Now, the employer and any union covered, in that sense that I've just mentioned, they'll be covered by the Greenfields Agreement when that agreement is made. There could be a situation where a Section 217 application is brought by the employer, without any employees having been employed.

PN293

So, not only is the operation premise unsound, but further argument was put by my learned friend that there have to be legal obligations in play at the time that application is brought, is also unsound.

PN294

Picking up Deputy President Gostencnik's question in relation to the amendments that have been made to Section 226, we would adopt and agree with my learned friend's submission in that regard, that those amendments were made subsequent to the point in time under consideration here.

PN295

The third matter I want to deal with is this argument that an application to vary an enterprise agreement to remove ambiguity or uncertainty where its retrospective effect will remove entitlements, or can change something from unlawful to lawful and vice versa, with the greatest respect to my learned friend, that sort of submission is tendentious.

PN296

It is loaded with perceived legal entitlement, perceived and contested legal entitlement. Ultimately, it is going to depend on what was the mutually intended meaning. That can be determined judicially. It can also be assessed by the Commission under Section 217. The scenarios that my learned friend paints, of course, can be raised on both sides of the equation.

PN297

Now, that might go to discretionary factors as to why the Tribunal might not award a variation retrospectively, particularly where the ambiguity is found but the Commission is not satisfied that a variation to remove it necessarily reflects the mutually intended position of the parties, for example. That would be a strong consideration against making that retrospective.

PN298

But we have to get back to recognising the fact that since 1920, the high court has repeatedly recognised the power of the Tribunal to make variations retrospective in circumstance, in circumstances where the statutory conferral of the variation power was cast broadly. It was not limited to removing ambiguity, and it wasn't limited to (indistinct). So, it could be merit-based variation.

PN299

So, re Bracks is an example where a variation was made by the Tribunal to reflect what the Tribunal considered to be the intending meaning of a particular allowance provision, and that was done in circumstances after the court had decided its objective meaning.

PN300

So, we're dealing with a history of cases that have recognised that this variation power can operate retrospectively. We have referred to various cases on this at footnote 11 of our written submissions in the hearing below. The citation for Bracks is included in that footnote reference.

PN301

Just one last point. Of course, historically, decades ago the exposure for breaches of award was actually a criminal liability. Those are the submissions in reply.

PN302

VICE PRESIDENT CATANZARITI: Thank you, decision reserved, the Commission is adjourned.

ADJOURNED INDEFINITELY **[4.18 PM]**