DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Qube Ports Pty Ltd T/A Qube Ports
v
Construction, Forestry and Maritime Employees Union
(C2024/4330)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT EASTON
DEPUTY PRESIDENT GRAYSON

SYDNEY, 13 SEPTEMBER 2024

Appeal against decision [2024] FWC 1646 of Deputy President Slevin at Sydney on 24 June 2024 in matter number B2024/690 – challenge to jurisdiction of the Commission to deal with a dispute under s 240 of Fair Work Act 2009 (Cth) – what is a dispute "about the agreement" – whether limited to dispute about content of proposed agreement and not relating to the bargaining process – characterisation of the dispute – whether the present dispute related to the content of the proposed agreements as well as the bargaining process – whether the parties were "unable to resolve the dispute" – permission to appeal granted – appeal dismissed.

Introduction

[1] Qube Ports Pty Ltd T/A Qube Ports (**Qube** or the **appellant**) is presently engaged in bargaining with respect to 19 proposed enterprise agreements to cover and apply to it and its employees engaged to perform stevedoring functions at port facilities across Australia. The Construction, Forestry and Maritime Employees Union, Maritime Union of Australia Division (**MUA** or the **respondent**) is a bargaining representative for employees who will be covered by the proposed agreements.

[2] On 25 May 2024, the MUA applied to the Fair Work Commission (the **Commission**) under s 240 of the *Fair Work Act* 2009 (Cth) (the **Act**) to deal with a bargaining dispute. The dispute was said to relate to the 19 proposed enterprise agreements. The existing agreements that apply to Qube's employees at the various ports are composed of two parts. Part A contains terms and conditions that are common across all the agreements. Part B contains terms and conditions that are specific to the port to which the particular agreement applies.

[3] The application indicated that bargaining meetings had been held at certain ports. The MUA complained that, at the bargaining meetings which had been conducted to date, Qube expressed the view that the purpose of each meeting was to discuss the agreement for that particular port only even though the Part A proposals were common across all ports. The "main matters in dispute" were described in the application in the following terms:

> 1. The MUA notes the composition of the current agreements and, in particular, the commonality of those agreements as a consequence of the structure of those agreements. The MUA further notes the parties purpose (sic) the same structure for the new, prospective agreements.
>
> 2. The MUA contends the current "port-by-port" method of bargaining is inefficient and expensive and is essentially duplicating the same discussions over and over again.
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> 3. The MUA seeks the bargaining proceed by way of a meeting of the MUA Bargaining Committee and Qube meeting to discuss and resolve part A for each of the proposed agreements before moving to port-by-port meetings for part B discussions. Qube refuse to meet to resolve part A and insist on individual meetings in each port.

[4] Qube contended that the Commission lacked jurisdiction to deal with the dispute and objected to participating in a conference in relation to the dispute. Qube contended that there was no dispute "about the agreement" for the purposes of s 240(1) of the Act because the dispute concerned the process of bargaining rather than the content of the proposed agreements. In addition, Qube contended that the evidence did not demonstrate that the bargaining representatives were "unable to resolve the dispute".

[5] Deputy President Slevin received submissions in relation to the jurisdictional objection and, in a decision handed down on 24 June 2024, found that the Commission did have jurisdiction to deal with the dispute and that the scheduled conference would proceed.[1] The Deputy President concluded that a dispute over the manner in which the bargaining for the proposed agreements is to occur is a dispute about the proposed agreements within the contemplation of s 240 of the Act:[2]

[6] In any event, the Deputy President found that the dispute is otherwise within jurisdiction because, properly characterised, the dispute is a dispute going to the content of the proposed agreements.[3] Finally, the Deputy President rejected Qube's contention that it had not been demonstrated that the bargaining representatives are unable to resolve the dispute.[4]

[7] Having concluded that the dispute was within jurisdiction, the Deputy President listed the dispute for a further conference and made directions to facilitate the conduct of the conference. Qube did not seek a stay of the decision.

[8] Qube seeks permission to appeal and to appeal from that decision. The proposed grounds of appeal are as follows:

> 1. The Deputy President erred in concluding (at [42]) that the dispute between the MUA and Qube Ports, properly characterised, was one that was "about the agreement", including by misconstruing s 240(1) of the FW Act (at [37]-[40]).
>
> 2. Further or alternatively to ground 1, the Deputy President erred (at [43]-[47]) by mischaracterising the nature of the "dispute" between the MUA and Qube Ports as being one that was about the "content" of the proposed enterprise agreements, and therefore one that was "about the agreement[s]" within the meaning of s 240(1) of the FW Act.

3. Further or alternatively to grounds 1-2, the Deputy President erred in concluding (at [49]-[50]) that any dispute between the MUA and Qube Ports, properly characterised, was one that the MUA and Qube Ports are/were "unable to resolve".

[9] For the reasons that follow, permission to appeal is granted but the appeal dismissed.

Permission to appeal

[10] Qube requires permission to appeal in accordance with s 604(1) of the Act. There are considerations which suggest that permission to appeal should be refused. In particular, we do not accept that the decision causes Qube substantial injustice. The Commission is only able to arbitrate a bargaining dispute if the bargaining representatives agree.[5] Absent agreement of the bargaining representatives, the Commission can only deal with the dispute by means other than arbitration (such as mediation or conciliation or by making a recommendation or expressing an opinion).[6] Although it may involve the investment of some resources by Qube, we do not believe that the requirement to participate in those processes before the Commission gives rise to substantial injustice.

[11] However, Qube's appeal raises novel questions in relation to the jurisdiction of the Commission to deal with a dispute under s 240 of the Act. There is relatively little existing authority, certainly at a Full Bench level, in relation to the type of dispute that is capable of being dealt with by the Commission under s 240 or the phrases "dispute about the agreement" and "unable to resolve the dispute". Qube's grounds of appeal raise questions of potential general application. Permission to appeal should be granted to permit consideration of those questions and to provide guidance to members of the Commission and industrial parties generally.

Statutory context

[12] Part 2-4 of the Act deals with enterprise agreements. The objects of the Part are set out in s 171 in the following terms:

> **171 Objects of this Part**
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
>
> (ii) dealing with disputes where the bargaining representatives request assistance; and
>
> (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

[13] Although collective bargaining focuses on the parties reaching agreement by themselves, Part 2-4 of the Act allows the Commission to facilitate that bargaining in several ways. Of most relevance to the present matter, Division 8 of Part 2-4 enables the Commission to make certain types of orders or declarations to facilitate or promote bargaining. *First*, the Commission may make bargaining orders if it is satisfied, among other things, that a bargaining representative has not met the good faith bargaining requirements or the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives.[7] *Second*, the Commission can make an intractable bargaining declaration if, again amongst other things, it is satisfied that there is no reasonable prospect of agreement being reached.[8] *Third*, the Commission can make a majority support determination or a scope order if a majority of the employees want to bargain or to promote the fair and efficient conduct of bargaining respectively.[9] *Fourth*, the Commission is able to deal with bargaining disputes on application by a bargaining representative.[10]

[14] The central provision at issue between Qube and the MUA is s 240, which is within Division 8. Section 240 is in the following terms:

> **240 Application for the FWC to deal with a bargaining dispute**
>
> *Bargaining representative may apply for the FWC to deal with a dispute*
>
> (1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for the FWC to deal with a dispute about the agreement if the bargaining representatives for the agreement are unable to resolve the dispute.
>
> Note: See also section 255A (limitations relating to greenfields agreements).
>
> (2) If the proposed enterprise agreement is:
>
> (a) a single-enterprise agreement; or
>
> (b) a supported bargaining agreement; or
>
> (c) a multi-enterprise agreement in relation to which a single interest employer authorisation is in operation;
>
> the application may be made by one bargaining representative, whether or not the other bargaining representatives for the agreement have agreed to the making of the application.
>
> (3) If subsection (2) does not apply, a bargaining representative may only make the application if all of the bargaining representatives for the agreement have agreed to the making of the application.
>
> (4) If the bargaining representatives have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

[15] There is no dispute that the MUA is a bargaining representative for the proposed agreements and applied to the Commission to deal with a dispute as contemplated by s 240(1) of the Act. The question is whether the dispute is of a type that can be dealt with by the Commission under the section.

Was the dispute "about the agreement"?

[16] The primary submission advanced by Qube is that the Deputy President was wrong to conclude that a "dispute about the agreement" for the purposes of s 240(1) of the Act includes a dispute that is only about the bargaining process. Qube submits that the Act draws a distinction between a dispute concerning the process of bargaining and a dispute as to the content of an agreement, and argues that s 240 only permits the Commission to deal with a dispute relating to the substance or content of a proposed agreement.

[17] The submission raises a question of statutory interpretation. A statutory provision is to be construed by considering the words themselves read in their context and having regard to their purpose.[11] Words, whether used in a statute or more generally, always exist in and take their meaning from the particular context in which they are used.[12] "Context" can include surrounding statutory provisions, the mischief that the statutory provision in question is intended to remedy, the provision's purpose or policy, and extrinsic materials and legislative history.[13]

[18] Context should be considered at the outset of the construction task, and consideration of contextual materials is not contingent on the prior discernment of an ambiguity or uncertainty.[14] The existing state of the law and mischief which the provision was intended to remedy may also be significant in illuminating its purpose.[15] Section 15AA of the *Acts Interpretation Act 1901* (Cth)[16] requires that a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not do so.[17]

[19] The purpose of a statute or statutory provision will not always be easy to ascertain. It is important to bear in mind that the purpose of a statute is to be primarily derived from what the legislation says, rather than from any *a priori* assumption about the desired reach or operation of the provision.[18] A statute may, of course, have multiple purposes and give effect to political and policy compromises such that the legislative purposes are obscured or conflicting.[19]

[20] Qube accepted that the language of s 240(1) of the Act did not itself dictate the outcome of the constructional question raised by its submissions. That is, Qube accepted that the phrase "dispute about the agreement" in s 240(1) is broad enough to be a reference to a dispute about the content of a proposed agreement and/or a dispute about the manner in which bargaining for the proposed agreement is or should be conducted. However, Qube contended that various features of the text and context supported a narrower construction such that s 240(1) encompasses only a dispute concerning the content of a proposed agreement.

[21] We agree that the language of s 240(1) of the Act, considered in isolation, could accommodate either construction. The word "about" is a word of connection.[20] Dictionary definitions of the word "about" include "of; concerning; in regard to" and "connected with".[21] The dispute in this matter, even if narrowly characterised in the manner Qube contends, can sensibly be described as being "connected with" the proposed agreements, in that the existence of proposed new agreements gave rise to the dispute.

[22] The section permits a bargaining representative for "a proposed enterprise agreement" to apply for the Commission to deal with a dispute about the agreement. It is readily apparent that the "agreement" about which there is a dispute is the "proposed enterprise agreement" that is the subject of bargaining. In this context, the proposed enterprise agreement is not likely to be a complete, formulated document. Depending on the stage that the bargaining has reached,

the "proposed enterprise agreement" may include matters documented in draft clauses, claims and counter-claims. The "proposed enterprise agreement" could even include issues or topics that have been raised for discussion and not documented in any way.

[23] The breadth and imprecision of what a proposed enterprise agreement might encompass at the time a dispute arises supports the broader interpretation of the phrase "about an agreement" that was adopted by the Deputy President. It is entirely consistent with the language of the section to refer to a dispute about the way bargaining for a proposed agreement is being conducted as being "about" the proposed agreement that is the subject of the bargaining process.

[24] Where two constructions are open, consideration of the purpose and objects of a provision will be significant. If it is open to construe a provision in more than one way, the construction which will best promote the purpose of the provision is generally to be adopted. In *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [20], for example, the plurality said:

> Where the text read in context permits of more than one potential meaning, the choice between those meanings may ultimately turn on an evaluation of the relative coherence of each with the scheme of the statute and its identified objects or policies.

[25] Consideration of the purpose and objects of the relevant provisions tell against acceptance of Qube's narrow construction of the phrase "about the agreement". The purpose of the provision is not difficult to discern. Section 171(b)(ii) of the Act makes clear that the objects of Part 2-4 include enabling the Commission to "facilitate good faith bargaining *and the making of enterprise agreements*, including through … dealing with disputes where the bargaining representatives request assistance." Section 240 is the provision that enables the Commission to facilitate bargaining by dealing with bargaining disputes on request.

[26] It is inevitable that disputes will arise from time to time about the manner in which bargaining is being conducted. The good faith bargaining obligations described in s 228 are directed at the conduct of bargaining representative during the bargaining. Bargaining orders can be made, among other things, if the good faith bargaining requirements are not being met. On Qube's construction, the Commission has no capacity to deal with disputes about the bargaining process, even by way of mediation or conciliation, unless a bargaining representative is not meeting the good faith bargaining obligations.

[27] In our view, construing s 240(1) narrowly to exclude certain kinds of disputes would not be consistent with the object of Part 2-4. We can detect no rational reason why Parliament would have intended that the Commission not be permitted to assist the parties to overcome procedural disputes that would otherwise impede the progress of bargaining.

[28] It is a relevant contextual consideration that s 240 only allows for the Commission to provide assistance to bargaining representatives by way of arbitration with the consent of all of bargaining representatives. It is difficult to accept that Parliament intended to allow the Commission to deal with disputes about the terms of a proposed agreement by way of mediation, conciliation or making a recommendation or expressing an opinion, but not allow the Commission to use the same capacity to deal with a dispute about the conduct or process of bargaining. On Qube's construction, the Commission would be prevented from assisting bargaining representatives with process-based disputes in conciliation even if all bargaining representatives agree to seek the Commission's assistance.

[29] The construction proposed by Qube would also be inconvenient and complicate the Commission's role in assisting parties to bargaining to resolve bargaining disputes. These difficulties cannot be reconciled with the statutory objects. The Commission may only deal with a dispute if expressly authorised to do so.[22] If Qube is correct, to satisfy itself that jurisdiction exists, the Commission would likely be called upon to conduct a preliminary hearing as to jurisdiction to determine whether a dispute was "about the agreement" prior to even assisting the parties by way of mediation or conciliation. That would inevitably hamper the Commission in endeavouring to provide timely and effective assistance to the parties to progress bargaining, further hindering the achievement of the objects of Part 2-4.

[30] In addition, disputes arising in bargaining will frequently involve both disagreement in relation to the content of a proposed agreement as well as disagreement about the manner in which bargaining is being conducted. If Qube is correct, the Commission would be permitted to deal with one aspect of a dispute, but not the other. Presumably, if one bargaining representative raised a matter going to the bargaining process during conciliation, another bargaining representative could object to even discussing the matter because the Commission is jurisdictionally barred from dealing with that aspect of the dispute. Parliament is unlikely to have intended such an impractical outcome.

[31] The explanatory memorandum to the *Fair Work Bill 2008* (Cth) supports a broad reading of s 240(1) of the Act. The explanatory memorandum describes the operation of s 240 as follows:[23]

> A bargaining representative for a proposed enterprise agreement may apply to FWA for assistance if there is a dispute about the making of an enterprise agreement and it cannot be resolved by the bargaining representatives (subclause 240(1)).

[32] The reference to bargaining representatives being able to seek assistance if there is a dispute "about the making of an enterprise agreement" supports a broader construction of the section. Extrinsic material cannot displace the meaning of the statutory text.[24] However, the explanatory memorandum is a legitimate source to assist in identifying the statutory purpose and, in this instance, is entirely consistent with the purpose discernible from the statute itself.

[33] The heading of s 240, in referring to the Commission dealing with a "bargaining dispute", also supports the construction adopted by the Deputy President. The phrase "bargaining dispute", on its ordinary meaning, encompasses a dispute as to the manner in which bargaining is being conducted. Section 13(3) of the *Acts Interpretation Act 1901* (Cth), as it existed on 25 June 2009, provided that headings to sections are not taken to be part of an Act. Nonetheless, a heading may be considered in resolving any uncertainty in the legislation.[25]

[34] The textual and contextual considerations relied upon by Qube are unpersuasive. It is necessary to refer to three aspects of Qube's submissions. *First*, Qube submitted that the Deputy President's construction deprived the words "about the agreement" of any meaning. We disagree. Read literally, without the words "about the agreement", s 240(1) might be read as permitting a bargaining representative to seek the assistance of the Commission in relation to any dispute whether or not it was connected to the proposed agreement or the bargaining. The words "about the agreement" require a connection to the proposed agreement, but do not compel acceptance of the narrow construction proposed by Qube.

[35] *Second*, Qube submitted that the context and structure of the Act supported its construction because the Act draws a distinction between the bargaining process and the substantive content of an enterprise agreement. In particular, Qube contended that the provisions dealing with bargaining orders (ss 228-233) and with the making of scope orders (ss 238-239) are concerned with the bargaining process whereas s 240 is not. We do not accept that the fact that the conduct of bargaining representatives is capable of being the subject of bargaining orders provides a sufficient basis to confine the type of dispute capable of being the subject of an application under s 240(1).

[36] The Commission can make coercive orders in relation to the conduct of bargaining representatives under s 230. However, the Act does not evince an intention that disputes about the process of bargaining can only be considered under the bargaining order provisions. The existence of the power under s 230 is too slender a basis to infer that the Act intends that the Commission is unable to also deal with a dispute going to the conduct of bargaining under s 240. The two provisions are capable of being read as a coherent whole. The Commission can assist parties in dispute under s 240, including in relation to disputes concerning the bargaining process, using consensual mechanisms. Coercive orders are then available only if the conduct of a bargaining representative meets the threshold of, relevantly, breaching the good faith bargaining requirements.

[37] *Third*, Qube placed particular emphasis on the capacity of the Commission to make an intractable bargaining declaration under ss 234-235A of the Act as a contextual feature that was said to support its construction. Those submissions raise an immediate issue in relation to the task of statutory interpretation. The intractable bargaining declaration provisions were introduced into the Act by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) with effect from 6 June 2023. Section 240 of the Act has been in substantially the same form since 2009 and was not amended by the 2022 amendments.

[38] There is perhaps a logical difficulty with using subsequent amendments to discern the intention of the legislature in enacting an existing statutory provision. Nonetheless, authority suggests that, in an appropriate case, regard may be had to subsequent amendments in the interpretation of an existing provision at least to ensure the amendment is not rendered nugatory.[26] Other cases have suggested that, in construing a provision in a statute, it is legitimate to have regard to any subsequent amendments provided the provision under consideration is ambiguous.[27] In *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348, however, Gummow J (with whom Black CJ and Lockhart J agreed) expressed the view that caution should be exercised in the use of later amendments to construe an existing provision. His Honour said (at 382):

> There is a line of authority that an amendment may be taken into account in determining the scope of the prior legislation, at least to avoid a result which would render the amendment unnecessary, or futile or deficient: see especially *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85-86; *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255. But in doing so caution should be exercised: see D C Pearce and R S Geddes, Statutory Interpretation in Australia (3rd ed, 1988), §3.26. It is, after all, a curious way of revealing parliamentary intention at the time of passing the earlier provision. As was observed by Viscount Haldane LC in *Re Samuel* [1913] AC 514 at 526:

> "It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way a later enactment would be surplusage. The later Act may have been designed, ex abundante cautela, to remove possible doubts."

[39] In any event, the introduction of the intractable bargaining declaration provisions in the Act does not support Qube's construction. Qube points to the fact that, before such a declaration can be made, s 235(2) requires, among other things, that the Commission has dealt with the dispute about the agreement under s 240 and that there is no reasonable prospect of agreement being reached absent a declaration. Qube suggests it is unlikely the Commission would be satisfied that there is no reasonable prospect of agreement being reached if it has only dealt with a dispute concerning the process of bargaining. This feature of the legislation is said to support the proposition that a dispute "about the agreement" in s 240(1) is concerned with the substance or content of the agreement, not bargaining process.

[40] We do not accept that submission. The intractable bargaining declaration provisions do not support Qube's construction. It is at least conceivable that a dispute as to the way bargaining is being conducted might satisfy the Commission that there is no reasonable prospect of agreement being reached. The fact that the bargaining representatives cannot even agree on a basic framework as to how the bargaining is to be undertaken might, in a particular case, be good evidence that agreement is unlikely. In any event, s 235(2)(b) requires that the Commission be satisfied there is no reasonable prospect of agreement being reached in addition to, and separately from, the dispute having been dealt with by the Commission under s 240 of the Act. If the dispute under s 240 dealt with only part of the dispute or only matters of process, that might not itself provide evidence that there is no reasonable prospect of agreement being reached.

[41] There is limited existing authority in relation to the question raised by Qube's submissions. Industrial parties do not appear to have commonly raised jurisdictional objections to the Commission dealing with bargaining disputes under s 240 of the Act. The decision in *Dana Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2022] FWC 363 provides some assistance. In that matter, the AMWU objected to the Commission dealing with a dispute under s 240. The AMWU's objection was the inverse of the position advanced by Qube. The AMWU suggested that the Commission could not deal with a dispute about the content of an agreement under s 240 and was limited to dealing with disputes about process or the good faith bargaining requirements. Gostencnik DP rejected a narrow construction of s 240(1) and said (at [7]-[8]):

> The phrase "dispute about the agreement" means no more than a debate, controversy or a quarrel about the proposed agreement in relation to which there is or has been bargaining. It includes a dispute about one or more terms that should be included in the proposed agreement. There is no reason to read down the phrase as being confined to disputes about good faith bargaining requirements. Section 240 of the Act is part of a scheme in Division 8 of Part 2-4 which sets out by various means the Commission's general role in facilitating bargaining, which would plainly include, as s 240(1) contemplates, assisting the bargaining parties by resolving disputes about one or more terms that should be included in the proposed agreement.
>
> Moreover, the objects of Part 2-4 in s 171 include an object "to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through . . . dealing with disputes where bargaining representatives request assistance". The object of facilitating the making of agreements is given voice in s 240 by enabling the Commission to deal with a

> dispute about a proposed agreement, which includes a dispute about what content should be included in the proposed agreement.

[42] That reasoning is consistent with the construction of s 240(1) which we favour. Gostencnik DP concluded that a dispute "about the agreement" includes, but is not limited to, a dispute about what content should be included in a proposed agreement. We agree.

[43] For these reasons, the construction of s 240(1) adopted by the Deputy President is correct. Even if the dispute in the present matter is narrowly construed as involving no more than a dispute about the manner in which the bargaining is being conducted, it is nonetheless a dispute about the agreement that the Commission is able to deal with under s 240.

Character of the dispute

[44] In case he was wrong in relation to the construction of s 240 of the Act, the Deputy President considered whether the dispute was within the Commission's jurisdiction because it was a dispute going to the content of the agreements. The Deputy President found it was. Qube submitted that this finding involved a mischaracterisation of the dispute and that the evidence did not demonstrate any relevant dispute about the content of the agreements. In addition, even if there was such a dispute, Qube submitted that the dispute the MUA asked the Commission to deal with was not a dispute about the content of the agreement.

[45] We do not accept Qube's submissions. In our opinion, the Deputy President was correct to conclude that the dispute was, or at least included, a dispute about the content of the agreements.

[46] Qube accepted that the Commission is not confined to the terms of an application in determining the character of a dispute. That concession was correctly made. The Commission is called upon to characterise a dispute in a number of contexts. For example, the Commission is required to characterise a dispute for the purposes of determining whether it falls within a dispute settlement provision of an enterprise agreement. That exercise was often required when the jurisdiction of the Commission was limited to dealing with disputes over the application of an agreement.[28]

[47] When characterising a dispute, the Commission has recognised that it is not limited to examining the terms of the application before it.[29] In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Holden Ltd* (2003) 128 IR 101, the Full Bench said (at [47]):

> In characterising the nature of the dispute in this matter the Commission is not confined to the dispute notification document. The entire factual background is relevant, including matters such as the submissions advanced. In this context we note that in *Transport Workers' Union v Mayne Nickless Ltd* the Full Court of the Federal Court held that in determining whether an application calls on the Commission to exercise judicial, as opposed to arbitral, power "a court should review the entire factual background to properly characterise the claim and the power sought to be invoked". [footnotes omitted]

[48] As the Full Bench observed, when characterising a dispute it is necessary to have regard to the entire factual background. Although relief sought and the submissions advanced might

cast light on the true nature of the dispute between the parties, the character of a dispute is distinguishable from any relief which may be sought, or granted, following an arbitration of the dispute.[30] The subject matter of a dispute is not fixed or definite and may evolve, expand or contract during the time it is being dealt with by the Commission.[31] As a consequence, it may be necessary when ascertaining the character of a dispute to have regard to both the nature of the dispute alleged in the initial application and the factual circumstances as they evolve.[32]

[49] The same approach is appropriate when characterising a dispute for the purposes of s 240 of the Act. Section 240(1) permits a bargaining representative to apply for the Commission to deal with "a dispute". The section is premised on the existence of a dispute as a matter of fact distinct from the application for the Commission to deal with the dispute. The application asks the Commission to deal with the dispute which exists independently of the Commission proceedings. It is the dispute which otherwise exists that must be characterised for the purposes of determining whether it is in fact "about the agreement".

[50] Upon examination, this matter provides a good example of why there will rarely be a bright line between a dispute about the process of bargaining and a dispute about the content of a proposed agreement. Not uncommonly, a dispute about the process of bargaining will stem from, or evidence, a disagreement about the proposed content of an agreement. A bargaining representative might propose that bargaining be undertaken in a particular manner because it wishes to prioritise certain bargaining items that might be included in an agreement. An employer might refuse to discuss wages until other terms and conditions are resolved because it hopes that sequence will achieve the substantive outcomes it desires.

[51] In this matter, the initial application to the Commission made by the MUA concentrated on the port-by-port method of bargaining being adopted by Qube up to that point and asserted that this method was inefficient and expensive. However, examination of the position of Qube demonstrates that the disagreement as to the conduct of the bargaining arose, at least in substantial part, from concerns about the content of the proposed agreement. The General Manager – Industrial Relations for Qube, Daniel Ortiz, gave evidence which included that:

> It is critical for long-term viability and job security that the Proposed EAs are fit for purpose and appropriately recognise the specific operational and client needs at each port, which in many cases are quite different. The Qube Ports bargaining team is keeping this objective in mind throughout the bargaining processes for the Proposed EAs.

[52] That is, Qube wants to first conduct discussions at individual ports in an endeavour to ensure that the terms of the proposed agreements will be, in its view, "fit for purpose and appropriately recognise the specific operational and client needs at each port".

[53] Mr Ortiz further complained that Qube did not understand aspects of the MUA's claims and explained the position of the Qube Ports bargaining team as follows:

> Whilst the revised version of the MUA's log of claims provided on 31 May 2024 did provide some additional detail that enabled the Qube Ports bargaining team to better understand some of the MUA's claims, for a large number of the MUA's claims, the Qube Ports bargaining team is still unable to understand the basis on which the MUA is making certain claims in respect of particular Proposed EAs. The log of claims provided on 31 May 2024 has certainly not been discussed in any detail during any subsequent bargaining meetings.

> The Qube Ports bargaining team is concerned that the MUA is pursuing 'Part A' claims to apply to all ports nationally, without considering whether the claims are relevant to, or appropriate for, each Proposed EA and the conditions at each specific port. For example, the MUA has stated that everything should simply be included within 'Part A' for all Proposed EAs initially, and that if a particular matter is not relevant for that port, it can be "written out" through the 'Part B' negotiations (I assume this means the clause would be left in Part A, but that its 'removal' in Part B would prevail if the clauses were inconsistent).

[54] Mr Ortiz provided examples of areas in which Qube believes that the MUA has not taken into account how aspects of its "Part A" claims could be applied at particular ports. The MUA's present claim is for uniform terms across all ports with respect to the "7 & 1 roster", changes to duties and allocations and mooring work, whereas Qube's position is that those proposed provisions are not appropriate for certain ports.

[55] In correspondence dated 14 June 2024, Qube communicated its concerns in relation to the MUA's approach to bargaining. Among other things, Qube asserted:

> As is clear from the letters that have been issued, Qube Ports is concerned with how the MUA is seeking to approach bargaining for each Proposed EA. Specifically, that the MUA wants to impose a significantly expanded set of common terms and conditions across all ports, irrespective of their applicability and relevance to any particular port. It seems that the MUA's strategy is to frustrate the bargaining for each Proposed EA, including by pursuing claims with no apparent relevance to the particular port in issue, rather than progress that bargaining. It also appears that the MUA to trying to avoid the good faith bargaining obligations that apply to it in respect of each Proposed EA and that it has not been bargaining to reach an outcome at any port.

[56] In our opinion, the dispute as to whether the bargaining should proceed by means of port-by-port meetings cannot be described as purely concerned with the process of bargaining. The parties are in dispute because Qube believes that the MUA's substantive claims have been formulated, and are being pressed, without proper consideration being given to their suitability to its operations at particular ports. The dispute concerns the content of the proposed agreements, specifically the content of Part A of the agreements. One way in which the dispute about Part A has presently manifested itself is a disagreement about the structure of the bargaining process.

[57] Qube's submissions assume that there is no dispute as to the content of a proposed enterprise agreement unless an identified claim or proposed clause advanced by one bargaining representative has been specifically rejected by other bargaining representatives. That represents an impermissibly narrow view of what could constitute a dispute as to the content of a proposed agreement. In any event, Mr Ortiz's evidence demonstrates that specific claims are being advanced by the MUA to apply across all ports and that Qube has rejected those claims. On any view, there is a dispute as to content.

[58] In the alternative, Qube says that, even if there is a dispute about the content of the proposed agreements, no bargaining representative had asked the Commission to "deal with" it. There are several difficulties with that submission. The submission is inconsistent with the proposition, accepted by Qube, that the characterisation of a dispute is not determined by the terms of the application itself. A bargaining representative cannot determine the nature of a dispute by the terms of its application. More fundamentally, for the reasons we have explained,

there are not distinct disputes as to content and process in this matter. The dispute in relation to the process of bargaining and the content of claims are part of the same dispute.

[59] For these reasons, even if the expression "dispute about the agreement" in s 240(1) of the Act is confined to disputes concerning the content of a proposed agreement, the present dispute involving the MUA and Qube is such a dispute and within the jurisdiction of the Commission.

Unable to resolve the dispute

[60] The final submission advanced by Qube is that the Deputy President erred in finding that the dispute between the MUA and Qube was one that the bargaining representatives were "unable to resolve" for the purposes of s 240(1) of the Act. Qube submitted that the expression "unable to be resolved" at least requires that meaningful attempts have been made by the bargaining representatives to resolve the subject matter of the dispute between themselves. It submitted that there was no (or insufficient) evidence that the parties were "unable to resolve" the dispute in the present matter.

[61] Qube suggests there is an undefined minimum threshold of effort that all bargaining representatives must apply to resolving a dispute before assistance can be sought from the Commission. This construction would render the operation of s 240 uncertain and potentially unworkable. What Qube means by "meaningful attempts" has not been made clear. Qube further suggests that those attempts must persist "over some period of time". What period will be adequate is a mystery. If Qube's submissions are correct, a pall of jurisdictional uncertainty will always hang over proceedings under s 240 of the Act as it would never be possible to know whether the bargaining representatives had made sufficiently meaningful attempts to resolve the dispute over a sufficient period of time.

[62] In referring to a dispute which bargaining representatives are unable to resolve, s 240(1) does not envisage that the dispute must be intractable or impossible to resolve. The purpose of the provision is to facilitate the Commission assisting the bargaining representatives to resolve a dispute. The type of dispute which can be referred to the Commission must include disputes that, it is hoped, are capable of resolution. In our opinion, the phrase "are unable to resolve the dispute" does not import a qualitative assessment of the efforts of the parties to resolve the dispute. The use of the present tense in the phrase "are unable" indicates that the provision envisages no more than that there is a dispute, and the parties are unable to resolve it in that they have not managed to do so at the time the assistance of the Commission is sought.

[63] Such a construction is consistent with the objects of Part 2-4 of the Act to enable the Commission to facilitate good faith bargaining and the making of enterprise agreements through dealing with disputes where the bargaining representatives request assistance. It would be inconsistent with the objects and fail to give practical operation to practical provisions to regard the words "unable to resolve the dispute" in s 240(1) as requiring, in each case, a jurisdictional determination of the adequacy of the efforts of the parties to do so judged against uncertain standards.

[64] Qube submitted that any other construction gives the words "unable to resolve the dispute" no work to do because those words add nothing to the existence of a dispute. We do

not accept that is so. It might be possible to read the phrase as erecting a more substantial jurisdictional barrier. However, in our opinion, the language of the section is at least equally consistent with a construction which permits a bargaining representative to seek assistance in relation to a dispute which the parties are "unable to resolve" in the sense that the parties have not, at that time, managed to resolve it.

[65] Even if s 240(1) requires an assessment of whether adequate or meaningful attempts have been made to resolve the dispute, the Deputy President found that the parties had attempted, but were unable, to resolve the dispute. The conclusions of the Deputy President were as follows:[33]

> Qube's second jurisdictional objection is that the MUA has failed to establish that the dispute meets the stipulation in s. 240(1) that the bargaining representatives for the agreement are unable to resolve the dispute. This is a question of fact. The evidence of Mr Ortiz demonstrates that the parties are unable to resolve the dispute. The issues between them first arose in the correspondence of late March and early April 2024. At the initial port meetings, the issue of whether the MUA claims for Part A would be discussed, whether they were adequately explained and whether the MUA would provide draft clauses for all claims were, amongst other things, discussed. The dispute was notified on 25 May 2024 and a conference was held in the Commission at which it was clear the dispute was ongoing, and the parties were unable to resolve it. Mr Ortiz statement describes further meetings following the conference where the dispute was unable to be resolved. The 12 June 2024 correspondence also demonstrates that the parties are unable to resolve the dispute.

[66] In our opinion, that finding is correct and there was ample evidence to support it. The evidence of Mr Ortiz indicated that the issue of addressing Part A claims first before moving to port-specific claims was referred to in the correspondence exchanged before the commencement of the first-round bargaining meetings. For example, by letter dated 4 April 2024, the Deputy National Secretary of the MUA, Warren Smith, indicated:

> We seek to commence bargaining for agreements to replace the current agreements with discussion of the Part A to apply in each of the replacement agreements. This will involve the exchange of a Log of Claims to be included in Part A of each of the replacement agreements. To that end, I also attache our Part A Log of Claims. Please note in particular the proposed new rates of pay set out in that Log of Claims.
>
> We note you have proposed a series of meetings to occur in each port and we confirm we will attend some of those meetings without resiling from our position that Part A negotiations ought to occur first before moving to site by site negotiations.

[67] Although Mr Ortiz asserted that there had been no meaningful discussions about whether the bargaining process should proceed on that basis, or by dealing with all negotiations on a port-by-port basis, the bargaining continued to be conducted on a port-by-port basis. Individual meetings were held at 10 of the 19 ports prior to the application being made on 25 May 2024. Qube plainly did not accede to the MUA's position, and the evidence makes clear that the MUA persisted in seeking national negotiations.

[68] The application itself records that the MUA continued to press its position. MUA communications which were in evidence recorded that:

> The MUA has said from the beginning that Qube's port-by-port meetings would not be an effective bargaining method. We have consistently sought Part A meetings with the Company. Qube continues to reject Part A meetings. Every single port has the exact same log of claims for Part A.

[69] The Deputy President also relied upon the conduct of the parties when the dispute came before the Commission. The Deputy President recorded that "the dispute was notified on 25 May 2024 and a conference was held in the Commission at which it was clear the dispute was ongoing, and the parties were unable to resolve it".[34] Qube did not suggest that the observations of the Deputy President in relation to the position of the parties at the conference were wrong or not open to him.

[70] For these reasons, we reject the construction of the phrase "unable to resolve the dispute" contended for by Qube. Even if Qube's construction is correct, however, there was ample basis in the evidence for finding that the parties are unable to resolve the particular dispute in this matter.

Conclusion

[71] For these reasons, the decision of the Deputy President is correct. Permission to appeal is granted, but the appeal is dismissed.

VICE PRESIDENT

Appearances:

M Follett SC and *M Minucci*, counsel, for the Appellant, instructed by *S Millen*, solicitor, Allens.
L Edmonds, Legal Officer, Maritime Union of Australia, for the Respondent.

Hearing details:

2024.
Sydney (in person):
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[1] *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd T/A Qube Ports* [2024] FWC 1646.

[2] [2024] FWC 1646 at [42].

[3] [2024] FWC 1646 at [43].

[4] [2024] FWC 1646 at [50].

[5] *Fair Work Act 2009* (Cth), ss 240(4) and 595(3).

[6] *Fair Work Act 2009* (Cth), s 595(2).

[7] *Fair Work Act 2009* (Cth), s 230(1).

[8] *Fair Work Act 2009* (Cth), s 235(1).

[9] *Fair Work Act 2009* (Cth), ss 237(1) and 238(4).

[10] *Fair Work Act 2009* (Cth), s 240.

[11] *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ); *Construction, Forestry, Maritime, Mining and Energy Union v ABCC (The Bay Street Appeal)* [2020] FCAFC 1; (2020) 282 FCR 1 at [4] (Allsop CJ).

[12] *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204; (2021) 106 NSWLR 1 at [31] (Bell P).

[13] *R v A2* [2019] HCA 35; (2019) 269 CLR 507 at [32]-[33], [37]; *Mondelez Australia Pty Ltd v AMWU* [2020] HCA 29; (2020) 271 CLR 495 at [13] (Kiefel CJ, Nettle and Gordon JJ).

[14] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 225 at [69] (McHugh, Gummow, Kirby and Hayne JJ citing Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397; *CPB Contractors Pty Limited v CFMMEU* [2019] FCAFC 70 at [57] (O'Callaghan and Wheelahan JJ).

[15] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Saraswati v The Queen* (1991) 172 CLR 1 at 21 (McHugh J); *North East Forest Alliance Inc v Commonwealth of Australia* [2024] FCA 5 at [52] (Perry J).

[16] As it existed on 25 June 2009: see *Fair Work Act* 2009 (Cth), s 40A.

[17] *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson J).

[18] *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28; (2005) 221 CLR 249 at [28]; *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 248 CLR 1 at [28] (French CJ, Hayne, Kiefel and Bell JJ); *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [26].

[19] *Sydney Seaplanes* at [36].

[20] *R v NM* [2012] QCA 173; [2012] 1 Qd R 374 at [23] (Fryberg J).

[21] Macquarie Dictionary.

[22] *Fair Work Act 2009* (Cth), s 595(1).

[23] Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at [989].

[24] *Federal Commissioner of Taxation v Consolidated Media Holdings Pty Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

[25] See, for example, *Director-General of the Department of Corrective Services v Mitchelson* (1992) 26 NSWLR 648 at 657 (Kirby P).

[26] *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 70 CLR 73 at 86 (Dixon J).

[27] *Federal Commissioner of Taxation v Energy Resources of Australia Ltd* [2003] FCAFC 314; (2003) 135 FCR 346 at [19] (Ryan and Finkelstein JJ).

[28] See, for example, *Maritime Union of Australia v Australian Plant Services Pty Ltd* (Print PR908236, Lacy SDP, 3 September 2001) at [57] (*Australian Plant Services*); *Seven Network (Operations) Ltd v Community and Public Sector Union* (2003) 122 IR 98 at [29]-[32]; *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (2006) 158 IR 1 at [10]-[13] (*MFESB*).

[29] *Davis v University of Newcastle* [2019] FWC 2282 at [13] (*Davis*); *FreshFood Management Services Pty Ltd v Australian Manufacturing Workers' Union* [2023] FWCFB 97 at [118] (*Freshfood Management*); *Mitchell v University of Tasmania* [2023] FWCFB 160 at [121].

[30] *Australian Plant Services* at [57]; *MFESB* at [20]; *Maritime Union of Australia v ASP Shipping Management Pty Ltd* [2015] FWC 4523 at [21]-[22]; *Freshfood Management* at [118].

[31] *R v Bain; Ex parte Cadbury Schweppes Australia Ltd* (1984) 159 CLR 163 at 168 (Murphy J); *Re Printing and Kindred Industries Union; Ex parte Visy Paper Production Pty Ltd* (1993) 48 IR 221 at 233 (Gaudron J); *MFESB* at [14]-[15].

[32] *Davis* at [13]; *Freshfood Management* at [118].

[33] [2024] FWC 1646 at [49].

[34] [2024] FWC 1646 at [49].