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TRANSCRIPT OF PROCEEDINGS

O/N 2186

TASMANIAN INDUSTRIAL COMMISSION

**PRESIDENT P.L. LEARY
COMMISSIONER T.J. ABEY
COMMISSIONER J.P. McALPINE**

T No 12444 of 2005

ALL PRIVATE SECTOR AWARDS

**Application pursuant to the provisions of
section 23(2)(b) of the Industrial Relations Act 1984
by the Tasmanian Trades and Labor Council to vary the
above awards by inserting the provisions of the
Work and Family Test Case**

HOBART

2.15 PM, WEDNESDAY, 18 JANUARY 2006

HEARING COMMENCED

[2.15pm]

PN1

MR S. COCKER: I appear for the Tasmanian Trades and Labor Council.

PN2

MR T. KLEYN: I appear for the Health Services Union of Australia, Tasmania Number 1 Branch.

PN3

MR M. WATSON: I appear on behalf of the Tasmanian Chamber of Commerce and Industry, the Tasmanian Automobile Chamber of Commerce, the Victorian Automobile Chamber of Commerce and the Tasmanian Farmers and Graziers Employers Association.

PN4

MR W. FITZGERALD: I appear on behalf of the Australian Mines and Metals Association Incorporated.

PN5

MR P. BAKER: I am intervening on behalf of the Minister for Industrial Relations.

PN6

PRESIDENT LEARY: Thank you. Mr Cocker, this is your application.

PN7

MR COCKER: Thank you, Madam President. This application is made under the Tasmanian Industrial Relations Act and seeks to vary private sector awards of the Commission through the insertion into those awards of matters that assist working people to reconcile their employment obligations with their family responsibilities. The provisions that are sought seek to extend the period of simultaneous unpaid parental leave up to eight weeks, to extend the period of unpaid parental leave up to a maximum of 24 months and return from a child - or parental leave on a part-time basis until the child reaches school age.

PN8

This Act acknowledges that there is a dichotomy from the applications by providing that termination of an employee can't be made on the grounds of family responsibilities, and we seek to further deal with those matters. There is a history to these issues since 1979, and consequently the Tasmanian Industrial Commission have given effect to a number of obligations arising out of Parliament's ratification to the convention of the International labour organisations, convention pertaining to workers with parental responsibilities. In 1992 the Tasmanian Industrial Commission under matter T3077 of 1991 extended the right of parents in the birth of children and their adoption by insertion of parental leave into private sector awards by way of an arbitrated decision that arose from a test case of the AIRC at print J3596.

PN9

The AIRC in this decision sought to establish a package of leave associated with the birth or adoption of a child in order to provide additional choices for families. The Tasmanian Trades and Labor Council made similar comments in its presentation submissions to the Tasmanian Commission, stating that providing parents with greater flexibility in meeting their child care responsibilities and thus enabling them to better balance their life at home and at work. In the 1994 family leave case decision of the Australian Commission prints M6700 and Q5596 provided for special family leave of up to five days a year and continued this theme when within their decision the Full Bench noted that the changing demographics of Australian society made balancing work and family responsibilities of increasing importance.

PN10

The female labor participation rate has increased dramatically over time and the number of single parent households has increased markedly in Australia over recent decades, largely as a result of divorce rates. The family leave case introduced both paid and unpaid carers leaving recognition of the responsibilities associated with belonging to a family, and to further assist the decision, provides for taking of annual leave in single day absences, time off in lieu, make up time in flexibility and the taking of RDOs. In 2002 the Australian Commission determined a test case on working hours, print 7002, and again addressed the issue of competing work and family interests. In that test case decision the Full Bench determined that an employee may decline to work overtime having regard to the employee's personal circumstances, including any family responsibilities.

PN11

Again the content of that decision has been replicated in the vast majority of private sector awards of the Tasmanian Commission. The contextual issues that pertain to those proceedings are broadly similar to those that have been encompassed in earlier decisions of both this Commission and of the AIRC. Changing attitudes to gender roles reflect the growth of female employment in Tasmania and its consequential impact on the family unit. Increasingly women regard both employment and parenthood as important aspects of their life and there is growing recognition of the need for men to share a greater proportion of the family and household responsibilities. These significant issues formed the basis of the Australian Commission's decision earlier this year, Family Provisions decision print O82005.

PN12

When it advanced further, the incremental trend towards facilitated award provisions assisting employees with family responsibilities. The decision handed down on 8 August 2005 was the culmination of 20 sitting days and nearly two years of work. That decision together with the earlier decision of the Australian Commission and the Tasmanian Commissioner underpinned the application that is before us for determination by the Full Bench today. Applications that seek to adjust the safety net in awards are required to meet conditions or tests that are described by the Commission's wage fixing principles that were last determined in July 2004. Further, there is also a requirement that an application meets the requirements as prescribed by

section 36, public interest within the Industrial Relations Act, and this is a matter that I shall return to.

PN13

However, in the first instance I note that principle 4 of the Commission's wage fixing principles, the award safety net provides in part. Any adjustment will be determined in the context of specific applications and in the light of prevailing economic social and industrial circumstances. It is our submission that this application encompasses this principle in addressing particularly at the time prevailing economic, social and industrial circumstances. Workers are increasingly confronting issues of work and family and their responsibilities to both. In our society we have an aging population. We have a diverse and we have a changing family structure, and the care and responsibilities of workers are becoming more difficult to reconcile.

PN14

The requirement and necessity to ensure employees can balance their caring and work responsibilities has become a priority. United States research has shown that women provided with access to leave for the birth of a baby and the first years of new life are more likely to remain with their same employer and are more likely to return to work sooner than those who do not have access to such leave. It is recognised that children require the most intensive care and supervision during their first nought to two years and it is now recognised that the early years of life have a major impact on the outcomes throughout the lifespan.

PN15

The implementation of family friendly policies in the workplace assists to ease the transition back to work from women from maternity leave and it allows them to maintain their attachment to the labor force over time, and indeed provides opportunities for men to play a role in fathering. The employment rates for women with caring responsibilities have increased dramatically. However, they are still more likely to be engaged in part-time work than full-time work. Research has shown that take-up rates by men of family leave, particularly unpaid parental leave, are low in LADC countries. The award variations will provide more opportunities for employees to take leave or to access flexibilities in order to spend more time with their children and become more involved in parenting.

PN16

The right to request part-time employment until a child reaches school age is likely to reduce the numbers of women who withdraw early from the workforce while their children are still young, or indeed to leave their position seeking part-time or casual work elsewhere. Again, research has shown that where most developed family leave and child care arrangements are in place, employment rates for women are higher. The benefits of family friendly policies therefore can be also listed to include a reduction in staff turnover, improved commitment, morale, productivity and a reduction in absenteeism. And that indeed - that quote comes from the statements made by the State and Territory Governments to the test case.

PN17

The traditional family model of a full-time male wage earner and a female partner at home caring for the child on a full-time basis is no longer a relevant model. This increase in female labor participation is due to changing attitudes regarding female education, employment and is also related to the eradication of barriers and stumbling blocks and the creation of more opportunities for women to participate in paid work while raising their family. There are however more single families in our society. Between 1986 and 2001 there has been an increase of nearly 53 per cent, and as a direct consequence of this the increase in the number of sole parents trying to balance work and family commitments is increasing in a similar proportion.

PN18

In providing work and family balance, support is also required to provide greater participation by men in their caring responsibilities which will increase family choices about the way they work and the care for children and legitimising an active role for fathers. Policies that make it easier for women to combine work and family responsibilities are those that are most likely to have an impact on declining fertility rates. Women having fewer children and at an older age in their life and the fertility rate are all predicted to fall. The total fertility rate has been falling from around about three and a half babies in 1960 to about 1.9 in 1980 down to about 1 and three quarters now.

PN19

PRESIDENT LEARY: Those half a baby's are a worry, aren't they?

PN20

MR COCKER: Depends which half you end up with, I suppose. These changes attempt to address employees' family responsibilities, the retention of women in the workforce and that declining fertility rate. These proposals provide a combination of rights and entitlements that will permit more parents to more easily combine work and family without undue cost or burden on their employers. The leave is in the main unpaid and the costs lie in replacing the employee which the employer is currently obliged to provide. There will be minor administrative costs, that is acknowledged, but the ability to retain skilled employees should weigh out those costs considerably.

PN21

The right to request an additional 52 weeks parental leave will be taken up by some families in order to enable the mother to stay at home for a longer period while the child is young. It may not be used at all, it certainly won't be requested by all families. There is no evidence to suggest that the take-up rate of employees taking parental leave is especially high, and with any increase the same take-up rates could be expected. Presumably some employees will request extra time in order to devote more time to child care during the early years, but equally others won't and will return to work prior to the 12-month period expiring.

PN22

I would reiterate that this matter is consistent with the principles in the award, safety net principle 4. It is my strong submission that this application complies with this principle and accordingly meets the Commission's test for claims in

relation to changes in wages and conditions of employment. It does not offend the public interest test as prescribed in section 36 of the Act as the adoption of it into awards will not impact adversely on the economic position of any industry, nor will it adversely affect the level of employment in Tasmania.

PN23

Indeed, it is my submission that it is in the public interest approve this application as it strongly promotes the balance of family responsibilities by workers, strengthens our communities, and with their employer obligations moves into a better balance. President, if I may, I note that there are a couple of issues with granting our application precisely as listed, and I would like to note that the use of model clause A will require a little adjustment in that while the vast majority of awards can use it direct, there will a few that the numbers in it will have to be changed because we would otherwise be reducing the current conditions of employment.

PN24

PRESIDENT LEARY: The model clause, or attachment A to the application also has some blank spaces in it. Do you have another copy, or a standard copy, or are you going to wait until you have worked out - - -

PN25

MR COCKER: The numbers.

PN26

PRESIDENT LEARY: - - - the numbers, okay.

PN27

MR COCKER: Yes. And the - alternatively, the conditions of the parental leave clause to be found at attachment 1 of the print PR082005 can all be put into the awards by common order. That is where I would leave me submission, Madam President.

PN28

PRESIDENT LEARY: Sorry, I will just take you back to the parental leave again. We have got a - the application refers to attachment A which talks about personal leave, and there are some blank spaces there. Now, I understand you to say that you need to have a look at each of the awards because some awards provide (a) a more favourable condition; is that - - -

PN29

MR COCKER: There is actually a second letter - as the sand and sun blows out of my brain, I have come back to this. To fully implement the terms of PR082005 - - -

PN30

PRESIDENT LEARY: The AIRC decision, yes.

PN31

MR COCKER: - - - requires the terms of the parental leave test case standard to be found at appendix 1 of that decision to be implemented, and the terms as listed in the application at attachment A to be implemented. To implement

attachment A there will be a few awards needed to be done on a case by case basis because the numbers will be different.

PN32

PRESIDENT LEARY: Okay. So you are amending the application to also include the parental leave part of the test case, and there will be some awards where the variation may have some different wording because of conditions that already apply; is that in general terms what you are saying?

PN33

MR COCKER: If it pleases the Commission.

PN34

PRESIDENT LEARY: Is it possible for you to identify those awards and perhaps alert us to which ones will not have the standard clause go in?

PN35

MR COCKER: I believe there is five of them. I am aware at the moment the Nursing Homes Award and the Hospital Award are two of those, and they fit in this category because they currently have 20 days of sick leave in them. I understand there might be another three or four, but I can't list those at the moment.

PN36

PRESIDENT LEARY: All right. So that will mean that the clause that goes into those awards will refer to the actual number of days they are entitled to. So there will be a slight variation to the standard clause.

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MR COCKER: Yes.

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PRESIDENT LEARY: All right.

PN39

MR COCKER: I would propose if it pleases the Commission to discuss those with my colleagues and bring them forward.

PN40

PRESIDENT LEARY: All right. Can I just ask you also, the application is for private sector awards only. What is happening with public sector awards, are you aware? We have the Minister's representative, so he can have some time to get ready with his answer.

PN41

MR COCKER: President, it is a matter that has been of some discussion and it is certainly of some concern to us that public sector awards may not be shiny bright and ready to be taken off to the brave, new world. And it is a concern that where particularly GBEs might have any awards that apply to them, that they do need to be brought up to pace and - - -

PN42

PRESIDENT LEARY: So you have no information as to whether they are going to be varied or not?

PN43

MR COCKER: I can't shed any light.

PN44

PRESIDENT LEARY: No, all right. Thank you. Did you wish to add anything, Mr Kleyn?

PN45

MR KLEYN: No, not at this point.

PN46

PRESIDENT LEARY: Thank you. Mr Watson will give Mr Baker some time to prepare his defence.

PN47

MR WATSON: Thank you, President. I would imagine it would just simply be a matter of an application to vary public sector awards.

PN48

PRESIDENT LEARY: That sounds so simple, I like it.

PN49

MR WATSON: Anyway, I will stick to what I am here for.

PN50

PRESIDENT LEARY: Yes.

PN51

MR WATSON: President and Members of the Bench, we advise that there is agreement to the application on the basis that it is the outcome of a Federal test case decision. And following the history of the way that this Commission has dealt with those particular decisions, we see no reason to depart from that approach in this particular case. So on that basis, we advise that we agree to the application. As to the exact detail, and I guess it is probably my fault to a certain extent, but I read the application with the attachment to it thinking that that was actually the application, but as Mr Cocker has pointed out today, and quite rightly, there is a bit more to it.

PN52

PRESIDENT LEARY: Yes.

PN53

MR WATSON: What I would suggest, President, is that perhaps we need to have two draft orders. One would be the standard to go into the bulk of awards, and another one which perhaps needs to be amended for those ones that don't quite comply. Parties would then get those agreed and then present them to the Commission as agreed orders.

PN54

PRESIDENT LEARY: I think those that pick up the standard clause we should do by general order - - -

PN55

MR WATSON: I am happy with general order.

PN56

PRESIDENT LEARY: - - - in light of the time of the year and the future.

PN57

MR WATSON: Yes, that is fine. But I think as far as the actual - the form of that general order is concerned, I think at least the parties should be given a short period of time to agree on those words, that is all.

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PRESIDENT LEARY: I think that is necessary and it will be a short period of time.

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MR WATSON: That is fine, that is all we need.

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PRESIDENT LEARY: All right.

PN61

MR WATSON: In terms of operative date - did you address operative date? Perhaps I will let Mr Cocker make submissions to that operative date before we respond to that.

PN62

PRESIDENT LEARY: Yes.

PN63

MR WATSON: Thank you, President.

PN64

PRESIDENT LEARY: Yes, Mr FitzGerald?

PN65

MR FITZGERALD: I have nothing further to add, Members of the Bench, other than to support Mr Watson.

PN66

PRESIDENT LEARY: Okay, thank you. Mr Baker?

PN67

MR BAKER: Thank you, President. The Minister fully supports the application in the terms as amended by Mr Cocker, fully supports the submissions made by him and we would urge the Bench to deliver a decision in the terms sought by the applicant. Insofar as those other matters that have been raised, in particular in relation to public sector awards - - -

PN68

PRESIDENT LEARY: I am beginning to sound like a bit of a broken record, aren't I?

PN69

MR BAKER: I can't answer the question.

PN70

PRESIDENT LEARY: The concern is that some of the so called public sector awards may cover GBEs that will end up in the Federal system, which means that they are frozen. As I understand the power of legislation, minus regulations, they stand frozen then for three years.

PN71

MR BAKER: I understand that.

PN72

PRESIDENT LEARY: And I would have some concern that people may not have this provision.

PN73

MR BAKER: Well, I have raised the matter with Mr Cocker, and when the application was first made I inquired with him as to what was happening insofar as the public sector awards were concerned.

PN74

PRESIDENT LEARY: So if Mr Cocker were to put in an application to vary the public sector awards - I will put you right on the spot - would they be varied by consent, are you aware?

PN75

MR BAKER: I could not imagine the Minister opposing them, President.

PN76

PRESIDENT LEARY: That is why I was game enough to ask the question. All right. Well, it may well be that if an application was made, that will pick up the slack of anybody who may, and I don't quite know how it is all going to work out. I don't think anybody does at the moment.

PN77

MR BAKER: No.

PN78

PRESIDENT LEARY: But just to ensure that people that may move into the Federal system don't lose the provision.

PN79

MR BAKER: Yes.

PN80

PRESIDENT LEARY: All right. Well, Mr Cocker can - - -

PN81

MR BAKER: Chase it up.

PN82

PRESIDENT LEARY: - - - proceed in his usual matter.

PN83

MR BAKER: The other thing in relation to the awards, we do actually have a list that was prepared by my colleague in my office in so far as the standards

that apply to the awards so far as sick leave and parental leave is concerned. And I can make that available to Mr Cocker, which would greatly assist this process.

PN84

PRESIDENT LEARY: That would be of assistance.

PN85

MR BAKER: There are about three or four awards that have a lesser amount of sick leave versus the standard and there are a number of slightly more awards that actually have a lesser number of days or hours pertaining to bereavement leave than the standard.

PN86

PRESIDENT LEARY: Well, perhaps it requires there to be some discussion between the parties, and if there are any anomalies that need to be sorted out if you can't sort them out between you, if you refer them back to us and we can perhaps have a discussion to try and tie up the ends so that we can get the orders through and they will be ready to move into that new place in due course.

PN87

MR BAKER: Whenever.

PN88

PRESIDENT LEARY: Well, whenever is the question, isn't it? All right, thank you. Operative date?

PN89

MR COCKER: I propose if it pleases the Commission the operative date would be the date that the orders are accepted by the Bench.

PN90

PRESIDENT LEARY: Commissioner Abey is suggesting that we do all of the awards, public sector awards - private sector awards by general order, and those that have a different requirement can be done by the Commission as responsible with those. I am concerned about the timing. I want to make sure that this is all ready and finalised. So we can do that; issue the order, and then where there are variances and the parties need some assistance to work those out we can do an award variation, but also in a very short space of time.

PN91

MR WATSON: President, happy with that. So does that - sorry, so the operative date being the date that the orders are issued by the Commission?

PN92

PRESIDENT LEARY: Yes, the operative date doesn't change.

PN93

MR WATSON: Okay. So that means that after today then you will simply start issuing orders? So there is nothing more to - - -

PN94

PRESIDENT LEARY: We will issue a decision.

PN95

MR WATSON: Sorry, a decision and orders. And yes, okay, I just wanted to clarify that when we go away from today about advising our members, we can indicate that these orders are imminent, that is all. So yes.

PN96

PRESIDENT LEARY: We might have to deal with different operative dates depending on what the difference is. I have got a funny feeling it may not make a difference at the end as to the entitlement. It is almost the application of it, I think. But I think something that Mr Baker said, some awards have a lesser entitlement and some have a more favourable. So that is something that you need to sort out, because the result of our decision would be, once we get a copy of the final order, would be that everybody comes up to a level - that dreadful expression - level playing field. And it is then how you apply the terms of the order to those that have a benefit in excess of that, which shouldn't really make much difference I don't think.

PN97

MR WATSON: I suppose, President, if I might say that I think we would probably have the difficulty if we are talking about entitlements being increased other than as per the decision, so in other words for example - - -

PN98

PRESIDENT LEARY: That is what I mean. I don't think that it possibly makes much difference about whether you get more or less, it is the application of what you are entitled to.

PN99

MR WATSON: Yes.

PN100

PRESIDENT LEARY: But some of them I think it spells out the number of days, and you would have to specify there what the entitlement was.

PN101

MR WATSON: The example about nursing homes and hospitals is fine, because those standards are in excess of the norm for sick leave, for example.

PN102

PRESIDENT LEARY: Yes.

PN103

MR WATSON: So we don't have any difficulty with that. But if for example an award currently has, say, eight days sick leave, then I don't think this application would just automatically put that up to 10.

PN104

PRESIDENT LEARY: No, you have got to - - -

PN105

MR WATSON: That is fine.

PN106

PRESIDENT LEARY: No, but you would have to then look at the actual application of it as to the days.

PN107

MR WATSON: Yes.

PN108

PRESIDENT LEARY: And that is where there may be some variances. Now, I am not suggesting that - I am talking application rather than entitlement. Just while you are all here, one of the questions that has been crossing my mind is are all of our awards, all of the public and private awards, do they all have all of the standard test case entitlements now? Are there any that don't that should?

PN109

MR KLEYN: Well, President, I can say from the HSUA point of view that some of our awards don't have every test case inserted in them, so - but the other question I have is that will we need to put in separate applications to - like, I have two awards at least, nursing homes and hospitals, that have sick leave entitlements in excess of the standard. Will you require additional applications or will simply we just proceed on the basis of providing the orders?

PN110

PRESIDENT LEARY: I don't think we require additional applications, it is just that it will be a different award prescription.

PN111

MR KLEYN: Yes, I understand that side of it, yes.

PN112

PRESIDENT LEARY: It is an application as to how you apply the - - -

PN113

MR KLEYN: Okay, yes. So we just draft the orders, present them and - - -

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PRESIDENT LEARY: Yes.

PN115

MR KLEYN: Yes.

PN116

PRESIDENT LEARY: We are dealing with the decision in principle, and then it is how it applies in each award that may require some changes in the number of days.

PN117

MR KLEYN: Okay, yes.

PN118

PRESIDENT LEARY: It doesn't change an entitlement.

PN119

MR KLEYN: No, I understand that.

PN120

PRESIDENT LEARY: It just applies this. Any others that you know of?

PN121

MR COCKER: I just wanted to clarify, I am not quite sure if I heard it right, that whether my colleague was suggesting that we should actually put in less than the test case standard in some awards. Because if that is, then that is certainly a matter we would not let past without significant discussion.

PN122

PRESIDENT LEARY: Well, I don't think the test sets the standards, the test case just says how you can use what the entitlement is that you have already got. It doesn't change the entitlement.

PN123

MR COCKER: Yes, thank you.

PN124

PRESIDENT LEARY: Yes, I might have confused the issue with what I was saying. That wasn't my intention.

PN125

MR COCKER: Yes, that is fine.

PN126

PRESIDENT LEARY: Now, are you aware of any other awards that have got outstanding test case or safety net adjustments?

PN127

MR COCKER: No, not at the moment. I have asked that question and not received an answer.

PN128

PRESIDENT LEARY: I know. All right.

PN129

MR COCKER: That is as far as I am prepared to say.

PN130

PRESIDENT LEARY: Good.

PN131

MR BAKER: Yes. Unfortunately, there are, President.

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PRESIDENT LEARY: A number in the public sector, I believe.

PN133

MR BAKER: Well, putting the public sector to one side, there are a number in the private sector that still for example don't reflect carers leave. But this decision will pick that up.

PN134

PRESIDENT LEARY: That will pick that up, okay.

PN135

MR BAKER: Yes.

PN136

PRESIDENT LEARY: All right then, thank you for that. We will issue a decision in due course and deal with the intricacies of the orders before the members responsible for each of the awards. Okay, thank you, this matter is adjourned.

ADJOURNED INDEFINITELY

[2.50pm]