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TRANSCRIPT OF PROCEEDINGS

O/N 1655

TASMANIAN INDUSTRIAL COMMISSION

COMMISSIONER T.J. ABEY

T No 11961 of 2005

METALLIFEROUS MINING AND PROCESSING AWARD

**Application pursuant to the provisions of
section 23(2)(b) of the Industrial Relations Act 1984
by the Australian Workers Union, Tasmania Branch
to vary the above award re inserting a new clause
in respect to portable long service leave**

HOBART

9.30 AM, TUESDAY, 15 MARCH 2005

**This transcript was prepared from tapes recorded
by the Tasmanian Industrial Commission**

HEARING COMMENCED

[9.34am]

PN1

MR R. FLANAGAN: I appear for the Australian Workers Union, Tasmania Branch.

PN2

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

PN3

THE COMMISSIONER: Thank you. Mr Flanagan, what is the position of this application?

PN4

MR FLANAGAN: Thank you, Commissioner. Commissioner, I realise that this is a reasonably unprecedented application to the Commission, and if I perhaps can just give you a brief background. The union is concerned that the structural nature of employment in the metalliferous mining industry in Tasmania over the last 20 years or so has significantly changed from a position where the owner of a particular establishment is the employer, to what is now the situation in many cases where the employer is not the owner of the premises.

PN5

Accordingly, the union is seeking to achieve with this application portable long service leave in order to recognise the circumstance of many employees where they will work with various contractors within the industry but not necessarily attract long service leave as envisaged by the Long Service Leave Act. Now, I need to indicate and seek leave to vary the application, Commissioner. It currently states that the union is seeking to vary the award by inserting a new Part V clause 5 in terms of attachment A. That should in fact say Part V clause 7.

PN6

THE COMMISSIONER: Yes. Do you have any objection to that?

PN7

MR FITZGERALD: No objection at all.

PN8

THE COMMISSIONER: Yes. Leave is granted, Mr Flanagan.

PN9

MR FLANAGAN: Now, Commissioner, I have had discussions with Mr FitzGerald and I understand that the industry does not consent to the application, which is most regrettable, and I understand they may have issues that go to both jurisdiction and merit. So I think the appropriate course of action would be firstly to deal with the issue of jurisdiction and then having had that determined, then to move on to the issue of merit. Now, I understand that Mr FitzGerald is not in a position today to put the issue in relation to

jurisdiction - or the arguments in relation to jurisdiction - so we would simply be seeking that a date be set for that to be heard.

PN10

THE COMMISSIONER: Yes.

PN11

MR FLANAGAN: I also need to flag that an examination of the application this morning has shown that attachment A to the application, which details the proposed new clause 7, portable long service leave, is deficient in one respect. It should have with it a subclause (d), and I am not sure why that is not there, but I will provide that to Mr FitzGerald. But the effect of the subclause (d) that should be there is that:

PN12

Where a payment is made pursuant to this clause, the employer is deemed to have satisfied the requirements of section 12(6A) of the Long Service Leave Act.

PN13

which is actually the mechanism which requires an employer to make payment in respect of long service leave. So we will provide an amended attachment A to Mr FitzGerald. Certainly the application is not looking to double-dip, as it were. So we will provide an amended attachment A to Mr FitzGerald to deal with that issue.

PN14

THE COMMISSIONER: Yes. Mr FitzGerald, what is your position?

PN15

MR FITZGERALD: Thank you, Commissioner. I was pleased to hear about the no double-dipping. I was assuming that, in any event. But yes, it is quite ironic, Commissioner, that with the award some 12 to 15 years in the making, that within a matter of weeks we get an application against it. But that is the nature of the order, and we have to respond to these. I can indicate, Commissioner, with the shortness of time - we had some brief discussions and they are certainly the - I think Mr Flanagan has fairly put our position as well.

PN16

I have actually put this out to our members for instruction. Little has come back in the short period that I have had at this stage, but certainly I would be intending to convene a meeting of members some time in the future to discuss this issue specifically. We - as Mr Flanagan indicated, we certainly will be opposing it. We are aware, although the Act seems to have been changed, that long service leave was a proscribed matter. But we say that - we acknowledge just in a preliminary sense - we acknowledge the point made by Mr Flanagan that there has been some structural change in terms of who employs who within the mining industry workforce, but that is not indeed significant enough to, in our view, justify such an application.

PN17

And indeed, some workforces where they have contracted out mining functions have been resumed by the owner-operator in some cases. So it is one of those

things which is a bit like fashion. I does change quite regularly. At the moment we have some mines who do in fact engage their mining workforce by way of contract rather than directly, but that may change in the years to come. And for that reason, we don't think it is necessary. But we also say - and we will be saying this in more detail when the matter comes on again - is that the provisions of the Long Service Leave Act have adequately taken care of these matters. There is no need for such a portable long service leave fund provision.

PN18

The Elkin decision, which you are very much aware of - the Barminco v Elkin decision - I think it clearly defines the responsibility for long service leave and we don't think there is a crying need to suddenly change the world and create - as what Mr Flanagan says - "reasonably unprecedented", I think it is a totally unprecedented provision within this award. So for those reasons we would agree that the matter be adjourned and set down for jurisdictional in the first instance, but it may be wise if we just have - I just suggested to Mr Flanagan that we just have a brief conference just to discuss that, and obviously we need to discuss dates. But it may be that we have both jurisdiction and merit on the same day.

PN19

THE COMMISSIONER: We will go off the record.

OFF THE RECORD

[9.40am]

RESUMED

[9.45am]

PN20

THE COMMISSIONER: Having heard the parties, this matter will resume at 9.30 on 18 April to hear argument in relation to jurisdiction alone. Mr Fitzgerald, I would ask that you provide a dot-point summary of the nature of your jurisdictional argument to Mr Flanagan by 11 April.

PN21

MR FITZGERALD: Yes.

PN22

THE COMMISSIONER: And we will proceed to determine the jurisdictional question first, and having determined that we will decide if there is any need to take it any further and we will deal with the merit later.

PN23

MR FITZGERALD: I am fine with that.

PN24

THE COMMISSIONER: Anything further for the record?

PN25

MR FLANAGAN: No, nothing further. Thank you, Commissioner.

PN26

MR FITZGERALD: No, nothing further, thank you.

PN27

THE COMMISSIONER: All right. We will adjourn on that basis.

ADJOURNED UNTIL MONDAY, 18 APRIL 2005

[9.46am]