TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 3875 of 1992

IN THE MATTER OF an application by the Metals and Engineering Workers Uion to vary the Automotive Industries Award

re Scope

COMMISSIONER IMLACH

HOBART, 16 September 1992

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER IMLACH: I'll take appearances?

MR P. BAKER: Sir, I appear on behalf of the Metals and Engineering Workers Union, P. BAKER.

MRS H. J. DOWD: If the commission pleases I appear on behalf of the Federated Clerks Union of Australia, Tasmanian Branch, DOWD, H.J.

MR J. LONG: If the commission pleases, JEFF LONG appearing on behalf of FIMEE.

MS. M. O'BYRNE: If the commission pleases, MICHELLE O'BYRNE appearing for the Liquor, Hospitality and Miscellaneous Workers Union.

MR S. CLUES: If it please the commission, I appear on behalf of the Tasmanian Confederation of Industries, CLUES, S.

COMMISSIONER IMLACH: Thank you. Now who is first?

MR BAKER: I suppose, sir, it would be up to me to lead off.

COMMISSIONER IMLACH: It's your application, isn't it, Mr Baker?

MR BAKER: Yes, it is. This application forms a part of what has developed into a fairly long exercise over the last couple of years and I really don't want to, sort of, delve into the history of it. But I would, for the sake of transcript, if I may, quote from your decision of the 10th of June in matter 3616 of 1992 which I think succinctly encompasses the history of the matter, and I start at the second paragraph of your decision:

> The history behind this application was significant: in dispute matter T.2983 of 1991 the MEWU, having gained significant membership amongst the employees of the Royal Automobile Club of Tasmania (the Club), sought to gain recognition from the Club, but despite protracted hearings and negotiations, was unsuccessful.
>
> The Federation of Industrial, Manufacturing and Engineering Employees, Tasmania Branch (the FIMEE) was also opposed to any recognition of the MEWU by the Club. Through its predecessor, the Australasian Society of Engineers (the ASE), FIMEE had represented the Club's employees over a period of years and, in the process, had been able to obtain an agreement with the Club registered with the Commission in accordance with Section 55 of the Act.

> In its decision in that dispute the Commission declined to interfere with the status quo on the grounds in particular that the existence of the registered agreement precluded any interference by the Commission.

And, hence, sir, that brought us in fact to matter 3616 of 1992, and in that matter, MEWU - and I'll just paraphrase some of the submissions which we made - and was that principally that:

> Section 60 of the Act -

which provides specifically that any agreement registered with the Commission shall prevail over a relevant Award -

> does not prevent the Commission from making an award even though an existing agreement is in force.
>
> The accepted interpretation guidelines for statues, as applied in this case, indicate clearly that under Section 60 the provisions of an agreement would prevail over any provisions of an award, a pre-existing award, but not for an indefinite period.

- and -

> There is no prescription in the Act which prevents the Commission from making the new Award.

And then in response to that, of course, the TCI on behalf of the RACT or the club, contended that:

> The agreement between the Club and the ASE, registered with the Commission, stands and, as a result, if the new Award purporting to cover the Club was made it would be superfluous since it would cover no one: the application, was therefore, trivial and vexatious.

- and -

> Under Section 33 of the Act the power of the Commission to make an award on this application is questionable because it does not relate to an occupation (declared by the President) nor to an industry as required therein. The RACT is not an industry of itself and no declaration has been made by the President -

- et cetera.

Then, sir, of course you made your decision which was contained on page 4 of that which you indicated that there were two key issues and one of those was:

> Does Section 60 of the Act prohibit the Commission from making an award covering an area that is already completely covered by a registered agreement?

and

> Is it possible to make an award covering the operations of the Club without contravening the requirements of Section 33 of the Act.

And then, sir, you made the following comments:

> I consider it would not be contrary to Section 60 of the Act to make the new award despite the presence of the agreement. I accept that it may be undesirable or superfluous to make the new award when all of the area sought to be covered by the new award may already be covered by the agreement, but I would regard the making of the new award as putting a base or floor under the agreement as it were in the same way as agreements usually are made on the basis of an award already existing. I do not see anything at all in Section 60 stopping the making of the new award.

And then you go on, sir, to make comments in relation to section 33 of the application of it and indicated by way of quoting Mr Clues that the application on that instance should fail.

Sir, my application today - or the one that has been lodged with the commission - will revolve around basic the premise, namely, whether it is in the public interest to extend the scope of this award to specifically cover occupational groupings pertaining to disciplines of work undertaken by the RACT and other employing establishments engaged in such work.

The application, I would submit, meets the test imposed by your decision of T.3616, pertaining to section 33 of the act. Section 33 of the act says, in essence, and I quote 33(1)(a):

> All or any private employees engaged in an industry;

Mr Commissioner, our application is consistent with Mr Clues' comments contained on page 5 of your decision and in particular, if you look at the second paragraph of those submissions which were then encompassed into your decision. This raises two arguments. Firstly, can an award be created

for a single company as opposed to an industry? We contend, no. Section 33(1) clearly states the award can only be created for employees employed in an industry. The RACT is not an industry unto itself, but rather a part of the wider industry of road service.

Road service industry covers a wide range of areas, as I have said, that includes everything from garages that come out and do road services, to the hundreds of driving schools that exist, therefore the reference to the definitions confines the award to an occupational award and therefore it confines it to the RACT.

Mr Commissioner, our application, whilst encompassing the work of the RACT, and indeed can be definitive of it - that is the work undertaken - is not exclusively pertaining to it. This is an application that seeks to give effect to the aspirations of employees engaged in their industry, as outlined. If we satisfy the criteria of section 33(1)(a) of the act, are we then able to satisfy the requirements of public interest, particularly as you indicate in your decision.

Mr Commissioner, I would put it to you that indeed not to accede to our claim would not be in the public interest. The history of this matter as I have outlined to the commission is well known to it. My comments as to public interest in this matter can be found at page 7 of the transcript in matter T.3616 and commences on the third paragraph of the page, and sir, I would like, if I may, to read those comments into the transcript of these proceedings:

> The Metals and Engineering Workers Union had at the time of the registration -

- I'm sorry, sir, I'll start that again. I just sort of lost my train of thought there for a moment.

MR CLUES: Who are you quoting from, Phil?

MR BAKER: Page 7.

MR CLUES: I haven't got the transcript.

MR BAKER: Oh, that's all right, I'll just read it.

MR CLUES: I'm saying: who are you quoting?

MR BAKER: Me.

MR CLUES: Right. I just wanted to know who the poet was.

COMMISSIONER IMLACH: I hope that interruption didn't disturb you, Mr Baker, because it was completely out of order.

MR CLUES: I have not the benefit of the transcript and other -

COMMISSIONER IMLACH: Well neither have I, Mr Clues.

MR CLUES: - other than the citation of the page number there was no reference as to who we were quoting, so in order to appreciate the context of the forthcoming submission, I needed to interject, Mr Commissioner. I apologise if it's against -

COMMISSIONER IMLACH: Well, you didn't need to, Mr Clues. I make the point with you, Mr Baker quoted T.3616, page 7, and himself speaking.

MR CLUES: Thank you, Mr Commissioner.

COMMISSIONER IMLACH: He said that before you raised to interjection.

MR CLUES: I apologise to Mr Baker and yourself.

MR BAKER: I should have marked it, sir, I apologise to the commission.

COMMISSIONER IMLACH: I think - as Mr Clues has had a rap - I'm not giving you a rap, Mr Baker, but it would have been better to produce an exhibit, wouldn't it, just as an aside? I mean, if you're reading it into the transcript - into the record that is good enough really.

MR BAKER: Yes, yes.

COMMISSIONER IMLACH: But obviously it would have been better if we all had a copy. However, let's get on with it.

MR BAKER: Well done, sir. Yes, sir.

The Metals and Engineering Workers Union -

- this relates to what we said at the time -

> - had at the time of the registration of the agreement in 1990 some 27 members. In August 1990 or thereabouts the MEWU approached the RAC seeking proper representation and discussions with the company. The employer refused to even talk with the MEWU. They didn't advise us that they were entering into a new agreement with the ASE even though they knew the ASE had limited coverage in the workshop. An application to file a new agreement was listed before the commission and subsequently the matter was dealt with.

The employer did not tell the MEWU of its intention to make the application. It did not tell the MEWU of the hearing date or the application to the registrar. The employer didn't tell the commission that the ASE didn't have coverage of all the employees. The employer didn't tell the commission that the MEWU had coverage of some 27 members. The employer didn't tell the commission that the MEWU wanted to become party to the previous agreement. Ms Pavlic, who was representing the ASE, said to the commission on page 172 of transcript of the earlier matter on 12 June, by inference, that the MEWU was told the application to register the agreement was, in fact misstating the position.

The parties to the agreement had, at the very least, a duty to tell the commission of these facts as they were material in enabling the commission to act according to equity, good conscious and the merit of the case, as is provided by Section 1 of the Act. Courts have long held that silence can amount to misleading conduct and a misrepresentation of the facts. In fact, the commission was misled, and I refer, sir, to your comments on pages 12 and 18 of the transcript in March and June of 1991. Sir, we would submit that you were misled, that the agreement was registered - with the agreement - of all the RACT employees and that the ASE was the only registered organisation with members within the workshop. Sir, it would be our submission that to refuse to deal with the current application for an award would be to condone such misleading conduct by the parties in their appearances before the commission. //

And I end the quote there, sir.

// The questions posed in that submission were, we submit, critical of the determination of public interest. Those comments, sir, which we believe were valid in that earlier hearing are no less valid in these proceedings. The comments form part of the record of that case. They were submitted in evidence and were not challenged. Can there be a rebuttal from the TCI today? I do not believe so.

I would submit to you, sir, that it is incumbent upon the commission to accede to our claim in the public interest. As I have previously quoted from my earlier submission, to do otherwise would be to condone a position adopted by the parties which are subject to these proceedings. //

Now existing and former membership still desire our representation. We still have regular visits from our ex-members who maintain a close interest in these and other proceedings of the commission as they await the opportunity to give effect to their legitimate right to organise.

Just yesterday, a FIMEE shop steward from the RACT visited my office to be briefed on today's proceedings. One of the reasons he called was to enquire whether he or others would be required to give evidence or provide some presence at today's hearing. I indicated that would not be necessary.

As I indicated to you at the previous hearing, sir, the - our former 27 members, a number of whom resigned and rejoined FIMEE following a request from our organisation, because we believed at that stage that we would be unable to offer them effective representation. But still they seek our representation. Sir, I would submit to you that the time is rapidly approaching to find an end to this continual farce.

I'd like to read to you, sir, a letter, which was received by our office by one of our former stewards and it's addressed to the secretary: It is with an enormous amount of sadness that I will advise you of my resignation from the MEWU. This will take effect et cetera. I have advised all mainland delegates of Commissioner Imlach's decision. Thank you for your extraordinary efforts in trying to achieve a decent informative and honest coverage for us. To your office staff that have at all times been most helpful and always very pleasant, to Tom Harding for his help during the campaign, and to Neil Marshall for his efforts when representing the national scene, thank you very much. The likely non-attendance of Tasmania at the road patrols conference in the future is of major concern to us, as is the likely difficulty in obtaining sensitive union information from mainland delegates. Western Australia have indicated they will push for the inclusion of Tasmania at a future conference. In this era of rapid reform in the workplace where restructuring, rationalisation and making the most cost-effective use of available resources are not just catch phrases, but a reality, it must make more sense if Tasmania was linked with the MEWU as FIMEE will not be able to match the ability of the MEWU to gather information from the auto clubs and associations on an Australia-wide basis. It was simply plain - it would just be plain silly for any person to organise - sorry, I'll repeat that - it would be just plain silly for any person or organisation to suggest otherwise. We may have lost this battle but we have retained our honesty and integrity. Not all others can claim that.

And I'd - due to the sensitivity as far as the name is concerned, sir, I would sort of offer that to you just as a - to verify it's authenticity.

COMMISSIONER IMLACH: I don't need it really. Mr Clues?

MR CLUES: Mr Commissioner, we would seek leave to interject on this point. I question the validity of a document if it's not to be entered as an exhibit and is for the commission's eyes only. What weight can be placed on evidence if it is from an unsourced reference?

COMMISSIONER IMLACH: Yes, well, Mr Clues, I mean Mr Baker is free to read out anything he likes as far as I'm concerned, and it seems to me that the substance of the letter doesn't really come to the points that we have to consider today if that's any help to you.

MR CLUES: Thank you, Mr Commissioner.

COMMISSIONER IMLACH: I mean it might provide a bit of background, et cetera, et cetera, but it doesn't affect the technical matters we have to consider, does it? That's how I see it.

MR CLUES: I would hope it wouldn't. If evidence was persuasive then I would suggest that unsourced reference couldn't be used, but if the commission's indicating that it is not of pertinence in reaching a decision then I won't be objecting.

COMMISSIONER IMLACH: Well I'm saying that now unfortunately, Mr Baker, but that's - it's -

MR BAKER: I well understand that, sir.

COMMISSIONER IMLACH: Right, good.

MR BAKER: If Mr Clues wishes, I will make the letter available to him at the conclusion of the hearing. As I indicated, sir, I believe that it's time that this farcical situation that we have at the present time comes to a satisfactory conclusion. Section 60 of the act is dealt with by your decision in a clear and meaningful manner. At page 4 of the - of your decision you expressed your viewpoint as such. I consider that it would not be contrary to section 60 of the act to make a new award despite the presence of the agreement.

I accept that it may be undesirable or superfluous to make a new award when all the areas sought to be covered by the new award may already be covered by the agreement, but I would regard the making of the new award as putting a base or a floor under the agreement as it were, in the same way as agreements usually are made on the basis of the award already existing. I do not see anything at all in section 60 stopping the making of the award.

Sir, I would see a process developing whereby if this application is successful it would be the first step in creating that base or floor as you've indicated in your decision.

There are two, in my opinion, sir, two keywords within that paragraph; one is undesirable or superfluous. The undesirability or desirability of creating it I think can be addressed under the issue of - of public interest. But in turning to superfluous then I would put the following questions to you.

As I indicated to you earlier, this is our first step in creating and obtaining representation for the trades technical and supervisory staff at the RACT. We would submit to you, sir, that such representation is not available through FIMEE. We would ask you whether or not it is superfluous to establish an award to provide a base which would provide the development of a proper and effective career structure.

The establishment and development of a training program to reflect the previous matter. A VDU allowance, recognised within the career structure, the provision of necessary safeguards for the introduction of our shifts, the '90s concept of a stand-by allowance, indexation of service and other increments. Consistent with this, the ability to and to develop a national framework into which delegates from all states, and not all states excluding Tasmania, can nurture and foster a resource fundamental to their industrial expressions.

Such a framework would of course see the ongoing development of the award struck agreement in the context of a national framework reflecting an industry perspective. The industry perspective of course would see the opportunity of wage increases based upon improving the productive performance of the enterprise for the basis of multifactor productivity arising from direct negotiations at the enterprise level.

It is therefore our challenge - our collective challenge - to continue the process of reassessment with an ongoing investment in skills and performance to preserve and increase the living standards of our members in this industry. Sir, that is the base which we would submit that is being taken in your decision. It would provide the floor under which the agreement would grow. The basis from which it - I'll rephrase that again, sir, if I may - the basis from which the agreement would grow.

However, for that to occur of course, there needs to be a beginning, and that beginning, sir, would be our application today. Obviously, sir, our application must succeed if that beginning is to be created. We must provide an award framework into which the industrial aspirations of our membership can be realised. And I just reiterate again, sir,

we believe three things; that the base through your decision on page 4 can be met; we believe that section 33(1)(a) of the act is met in the description of industry and insofar as the public interest test is concerned, sir, we believe we can meet that through the submissions I have made. And barring any questions from the bench I will conclude my submission at that point.

COMMISSIONER IMLACH: Thank you, Mr Baker. Mrs Dowd?

MRS DOWD: I have no submission at this stage, Mr Commissioner.

COMMISSIONER IMLACH: Thanks, Mrs Dowd. Mr Long?

MR LONG: Yes, sir, we would certainly be opposing this application and it would by my intention to - to speak on .... the TCI.

COMMISSIONER IMLACH: Right. Mr Clues?

MR CLUES: Mr Commissioner, the application by the MEWU to vary the scope of the Automotive Industries Award is opposed by the TCI. The application by the MEWU is a unilateral application with no obvious support from the other employee organisations and complete opposition from both the TCI and to the best of my knowledge, the VACC or the TACC as it is, who are also party to this award.

The MEWU have made no endeavours to discuss or conciliate on this matter. The grounds for opposition fall under three broad arguments. The first is, that the application is nothing more than an attempt by the MEWU to save face in an area of dispute in which they have had no success to date. We would submit this is a barely disguised effort to rerun T.No.3616 of 1992 in which they sought to create a new award for roadside service and driving instruction - driving instructors in an application that was rejected by this commission.

The second body of argument goes to the intended coverage of the new proposed scope clause. We submit the award will have no application to driving instructors, for there are no employees in the industry, only owner-drivers. Nor will the extended scope clause cover any roadside service companies. There exists only one other company outside of the RACT and that company is already bound by the Automotive Industries Award.

COMMISSIONER IMLACH: I'm sorry, Mr Clues, I was a bit behind you, could you go back over that last point please?

MR CLUES: The second body of argument that we will be raising goes to the intended coverage of the new proposed

scope clause. We submit that the award will have no application to driving instructors for there are only owner-drivers in the driving instructing industry - no employees, and hence there is no employment relationship and therefore there can be no award.

We also submit that the intended scope clause will have no coverage for road service as there exists only two companies in the road service industry, and one of those is the RACT and the other is already bound by the existing scope of the Automotive Industries Award. So we will be submitting that the proposed new scope clause will be superfluous due to its non-application within Tasmania.

The third and final ground for opposition goes to the nature of the automotive industry and the Automotive Industry Award. We submit that driving instructors are no more a part of this industry than a dressmaker or a circus entertainer. The scope of the Automotive Industry Award is very specific in nature and has endeavoured to avoid confusion with other industries, and I make reference specifically to the preclusion of the rubber industry in the existing scope clause.

Mr Commissioner, I shall be asking this commission to dismiss this application under section 21(c) subparagraph (i) and (ii), that is, the matter is trivial and further proceedings are not necessary or desirable in the public interest. I now turn to each of the arguments I have identified in my opening submissions in detail.

The first goes to the matter - the first is - that this matter has already been heard. The TCI submits that the application by the MEWU is a poorly disguised attempt to rerun the case that has already been determined in two previous applications before this jurisdiction. The MEWU's obsessive pursuit of representation of RACT staff is well known to all in this room. Likewise, is the commission's rejection of that pursuit.

Throughout 1991 the RACT was forced to defend its long-standing agreement with FIMEE against a protracted assault by the MEWU who sought to represent members. The commission rejected the MEWU's application in its decision T.2983, and I tender for the commission an exhibit book to which I will be making extended reference.

COMMISSIONER IMLACH: Getting some good example here, Mr Baker?

MR BAKER: I take note, sir.

COMMISSIONER IMLACH: TCI.1.

MR CLUES: All the TCI exhibits will be contained in here and I have identified each of the exhibits which I will be referring to.

COMMISSIONER IMLACH: In the exhibit, have you, Mr Clues?

MR CLUES: In the exhibit. That's correct.

COMMISSIONER IMLACH: Right. Am I still permitted to call this TCI.1?

MR CLUES: Well, TCI Exhibit 1 will be the actual decision which you'll find on the second page.

COMMISSIONER IMLACH: I see. Yes. Right.

MR CLUES: If the commission wishes to amend the actual numbers in the booklet to suit the protocol of the commission, then I have no objection.

COMMISSIONER IMLACH: No, no, not at all. I think it is fair enough what you have got there.

MR CLUES: Okay. I refer to TCI.1 on page 4, and if I draw the commission's attention to the final paragraph which I have made my own markings beside, it reads, and these are the words of the commission:

> I accept that the Commission has no power under the Act to decide the validity or otherwise of industrial agreements registered with it. It is also true that under the provisions of the Act once an agreement is registered with the Commission, it is very difficult indeed for a person or organisation outside the ambit of the agreement to become a party, challenge it or seek to change it, if one or all of the parties to the agreement do not agree to any such involvement. At present, without drastic action the MEWU is powerless to thwart the agreement.

T2983.

I now draw the commission's attention to page 5 of TCI.1, and again if I can draw the commission's attention to paragraph 3, 4 and 5, and my markings are next to those paragraphs where it reads:

> The Act further provides for industrial agreements made between registered employee organisations and employers to be filed and registered in the Commission. Such agreements are ironclad virtually and unassailable by parties outside the agreements.

T2983.

> I repeat, all these requirements and provisions are clearly envisaged by the Act and form part of our established industrial system.
>
> The Club, by refusing to deal with the MEWU is relying on its rights established under the system. It would be wrong for me, as a Commissioner, to even recommend that the Club acknowledge the MEWU.

To that end, I would refer to Mr Baker's comments that he has drawn this morning in which he made detailed reference to transcript inciting that the MEWU would not talk to the - the RACT would not talk to the MEWU, while it suggested the commission has acknowledged that is their right as they have no industrial standing with the RACT.

Mr Baker made reference to the fact that the RACT did not acknowledge, or did not inform, the MEWU of the hearing date, while it suggests that it is not their obligation to notify parties whom they believe may or may not have an interest in it - that is a role for the commission - and the commission is confined to the persons and parties bound clause in doing so.

So, I believe those remarks have no validity in the proceedings here today, and the RACT has done nothing wrong by the MEWU but merely defended itself against a claim which we would submit has not validity. The MEWU, not content to accept the ruling of the Industrial Commission in the aforementioned decision, sought to undermine the intent of that decision with a subsequent application 5 months later in June 1992.

The application sought an award to cover the occupations of employees of the RACT, including vehicle inspector, vehicle servicemen, traffic officers, and driving instructors. The TCI successfully opposed the application on the grounds that the proposed award was not an industry award as it applied only to the RACT and the RACT was not an industry unto itself. The commission accepted this argument and offered the MEWU the opportunity to amend their application.

The subsequent application made no reference to the RACT, but rather referred to automotive road service and automotive inspection and automotive instruction. The TCI opposed this scope clause on the grounds that no declaration had been made by the president under section 33(1)(b) to gazette those occupations as occupations for which the commission may make an award. The commission, as currently constituted, accepted that argument and rejected the MEWU's subsequent application.

Despite two successive decisions denying the MEWU the right to represent the RACT staff, or to create an award for the automotive road service, automotive inspection and maintenance, or automotive instruction, we are yet again

brought before this jurisdiction to argue the same principles again, less than 3 months after the latter decision.

The question has to be asked: what fundamental changes have occurred that makes this application any more valid than the last? We submit: nothing. The last application by the MEWU cited on page 3 of your decision, and I put that in as TCI. exhibit 2. I read from page 3, and it is the final paragraph there:

> I overruled the objections on the basis that all parties knew what the MEWU was seeking and it would be counter productive not to allow the MEWU to amend its claim to more properly put it before the Commission.

Now, in saying that, it was our understanding that the commission had believed that it they had allowed the MEWU to amend its application so that it was not making any reference to the RACT but rather dealt with road service and driving instruction that this matter may be resolved once and for all. Unfortunately, that is not the case. The same words appear in the current application and they are not too different from the ones that were in the amended application, not either in intent or in principle.

The amended scope clause I read, it says:

> The amended scope clause proposed by the MEWU read as follows:
>
> "This award is established in respect of:
>
> (a) automotive road service.
>
> (b) automotive inspection and maintenance.
>
> (c) automotive instruction.

The existing application is extended to the Automotive Industry Award and it reads: This award is established in respect of (b) automotive roadside service, and (f) driving school instruction. There is no change between this application and the last either in principle or in the intent. Both applications sought award coverage of automotive road service and driving instruction. The only marginal difference is the application for coverage is not pursued under an award but under an existing award.

The use of an existing award does not negate all the sound reasons put by the TCI in the last application for rejecting the scope clause being put by the MEWU. There still has been no declaration by the president that states these occupations should be covered by an award. We have a decision by this

commission, as currently constituted, rejecting an application to create an award for the industries or the occupations of roadside service and automotive instruction.

Now I would suggest that - we submit to rehear a matter that has already been determined is a fundamental denial of natural justice. No industry, company, or individual should be continually asked to defend itself against an application that has already been heard, fought and won. There is no difference between this application and the last, either in principle or in intent. The matter is therefore trivial and should be dismissed under section 21(c) subparagraph (i).

We submit further proceedings are not desirable in the public interest. It should be dismissed and no proceedings should be continued in order to comply with section 21(c) subparagraph (ii). What confidence can RACT have or any organisation in a system if it cannot enter into that system knowing that having entrusted the matter to be resolved there is every chance that in 3 months time it will be relisted under a poorly disguised subsequent application.

The MEWU must be told that this matter has been resolved, and just because it is not in their favour does not mean that they can forever and a day relist the matter. It is a waste of time and money for the RACT, and the public purse, to fund the MEWU's excessive behaviour, and that is not, I would contend, in the public interest.

The second body of argument goes to opposing this application based on the fact that the proposed amendment to the scope clause would have absolutely no application in Tasmania. A scope clause with no application - using the commission's own words - would be undesirable and superfluous, and I quote from page 4 of the TCI exhibit, and I draw the commission's attention to the seventh paragraph with my marking on the right-hand side of the margin:

> I accept that it may be undesirable or superfluous to create a new award when all the areas sought to be covered by the new award may already be covered by the agreement.

T3616

The scope clause if taken seriously would have you believe it is designed to cover roadside service industry and driving school instruction.

There are only two major companies involved in providing roadside service. One of those is not, surprisingly, the RACT which has roadside agents across Tasmania. As we all know by now through two previous hearings the RACT roadside service employees are covered by the RACT - ASE Roadside Service and Technical Department Staff Agreement 1990.

Therefore it is not difficult to conclude that in light of section 60 and the comments of the commission in T.3616 of 1992 that the RACT agreement will prevail over any award perspectively made or an amended existing award. The only other independent company providing roadside service in Tasmania is the Tasmanian Transport Repairs Company Pty Ltd. I just repeat that for the commission's reference, the Tasmanian Transport Repairs Company Pty Ltd.

This company is a bodywork and mechanical shop that also runs a towing operation. This company has a contract with Nissan Australia to provide roadside support. The Tasmanian Transport Repairs Company employ a driver and mechanic under Division A of the Automotive Industries Award under the classification of driver of mobile crane with lifting capacity, and pay a tow truck driver's allowance prescribed by the Automotive Industries Award.

Therefore the only independent company outside of the RACT is already covered by the existing scope clause of the Automotive Industries Award. As for the intent to cover driving instructors, we submit the RACT is the only driving school that actually employs driving instructors. To that end, I would refer the commission to Exhibit 5 of my booklet. It is somewhat difficult to read that letter, but I have another copy here. I will read it into transcript for the benefit of the commission.

COMMISSIONER IMLACH: It's Exhibit 4 here, Mr Clues, is that what you meant?

MR CLUES: Yes, Exhibit 4, Mr Commissioner.

COMMISSIONER IMLACH: You said 5.

MR CLUES: I apologise.

COMMISSIONER IMLACH: That's all right.

MR CLUES: The letter is from the Driving Instructors Association of Tasmania. They are located in Montrose, and the letter is written from the President of that organisation, Christine Boyd.

And it reads:

> Stuart Clues
> Industrial Advocate.
>
> Dear Stuart,
>
> In answer to your letter 31.8.92 and consequent telephone discussions to our secretary. Apart from the R.A.C.T. no other driving school employees

> instructors on a wage basis. The majority of instructors in this state and as members of our association are self employed one man operators. Outside the one man operators are Elite (my business) V.I.P. and M.J.R. who have a number of instructors working under their established business names, these drivers supply their own vehicles and maintain such, they receive no weekly wage, sickness or holiday monies, they are responsible for their own taxation, we simply receive a commission for the work we supply them with, all advertising to obtain such work, office & secretary, 2 way radios and dual controls and car signs, when instructors take time off holidays etc neither party has any income we offset this and compensate for it during the year. To have Mr Boyd attend your meeting 16.8.92 means time off the road at a time when we can least afford it, so I hope the information enclosed is to your satisfaction.
>
> Your's sincerely,
> Christine Boyd
> President D.I.A.T.

We submit that section 32 of the Industrial Relations Act 1984 reads:

> Subject to subsection (2), an award under this Act may contain provisions with respect to any industrial matter.

Subsequent reference to section 3 describes an:

> "industrial matter" means any matter pertaining to the relations of employers and employees and, without limiting the generality of the foregoing, includes -

- and it goes on to list a number of industrial matters.

Section 3 defines the industrial matter as being any matter pertaining to the relations of employers and employees. It is our contention and that of the Driving Instructors Association of Tasmania and the Australian Tax Office that outside of the RACT there is no employer and employee relationship within driving schools.

The Australian Tax Office, I would submit, is the leading authority in determining employees versus contractors - it's something they deal with every day for taxation purposes, and the Australian Tax Office - Taxation Office - does not consider driving instructors as having an employment relationship. As evidenced by the Driving Instructors Association of Tasmania's correspondence, all members,

including those companies that use a number of drivers accept responsibility of taxation as being that of the driver.

In determining whether an individual is a contractor, the ATO apply the following criteria and I refer the commission to TCI exhibit 3. This is an extract from the document that the Australian Tax Office - they allow this for employers and employees and is the guidelines that they apply in determining what is and is not a contractor. And I read that for the benefit of the commission.

> Subsection 12(3) defines "employee" to include persons who work under a contract that is wholly or principally for their labour.
>
> This subsection only becomes relevant if the person is not also an employee within the ordinary meaning.
>
> Contract
>
> The Commissioner's view (Taxation Ruling IT 2129, Appendix B) is that a contractor, as distinct from an employee, is someone who:
>
> . is contracted to perform a specific task within a specific time for an agreed amount of money;
>
> . otherwise has freedom in the way they perform their task;
>
> . doesn't have to pay normal entitlements of employees, such as leave and sick pay;
>
> . normally renders accounts payable by invoice;
>
> . bears the responsibility and liability for losses;
>
> . generally is not eligible for workers' compensation from the principle; and
>
> . generally will be available to perform services for the public at large.

To answer question 1, driving instructors for the most part work for themselves and only three companies have a number of employees. They are Elite VIP and MJR and hence there is no employer-employee relationship. But those drivers who are contracted by VIP, MJR, and Elite are contracted for a specific task, that is, of teaching persons to drive, usually for an agreed hourly rate and a percentage of which is paid to the company.

The individual drivers have total freedom - to answer question 2 - the individuals have total freedom in the way they teach their students, they determine the total lesson structure with no input from the company. In relation to question 3, as is evidenced by the correspondence from DIAT, instructors do not have normal entitlements to annual leave, sick leave, public holidays - the drivers set their own hours and take holiday breaks as and when they so desire for as long as they so desire which, to answer question 4, driving instructors render accounts to those co-ops for their services from which a commission is deducted.

To answer question 5, the instructors bear responsibility for any profit or loss which he or she make - may make during any financial year. To answer question 6, they're not eligible for workers' compensation and thus provide their own workers' compensation insurance. To answer question 7, they are able to work for the general public or a co-op, the choice is theirs, the vast majority of which work for themselves and service the general public.

Driving instructors have met the criteria established by the Australian Tax Office for being a contractor. The same test, we would submit, are applicable for this jurisdiction. There is no employer-employee relationship and, thus the definition of an industrial matter is not met in section 3 of the Industrial Relations Act 1984.

If the relationship of a driving instructor is not an industrial matter, then it cannot be covered by an award, according to section 2 subparagraph (1) of the Industrial Relations Act 1984. We submit that the commission should find that it does not have the jurisdictional power to cover the occupation of driving instructor by an award because the relationship at law is not one that could be considered to be an industrial matter.

If the commission accepts my submission in relation to roadside service being covered by the RACT agreement and the existing scope of the Automotive Industries Award, along with the submission put by myself - and I would suggest is supported by the Australian Tax Office - that all driving instructors outside of the RACT are contractors and, therefore, this commission has no jurisdiction to create an award coverage, the MEWU application would have no application in Tasmania and, therefore, should be dismissed under section 21 as being trivial and against the public interest.

The final grounds upon which I wish to make submissions to the commission goes to my opening submission as to what is the nature of the automotive industry and the relevance of driving instructors to it. We submit that driving instructors are not only contractors and, thus not capable of being covered by an

award, but also they are not part of the automotive industry. Upon reading the scope of this award it is obvious that the automotive industry is limited to businesses either selling or repairing automobiles.

Such is the defined nature of this industry that this commission has ratified an application to specifically preclude businesses that sell rubber tyres for automobiles. It is very arguable that the sale of rubber car tyres is more akin to the automotive industry than that of the business of teaching individuals to drive safely and how to use a car. In fact, I would suggest that the driving instructor has about as much relevance to the Automotive Industries Award as in inserting a boilermaker/welder application into the Child Care Award.

The Automotive Industries Award has no relevance to driving schools. Driving instructors do not receive weekly wages, only drivers are paid by the lesson and they keep the money themselves or pay a percentage of it to a co-op arrangement. They do not work a 38-hour week Monday to Friday between 6.00 and 6.00 as prescribed by the Automotive Industries Award, nor do owner-drivers apply all the other conditions of employment on themselves that is prescribed by the Automotive Industries Award.

The only logical correlation between a driving instructor and the Automotive Industries Award is that they drive an automobile. This factor alone cannot be in any way persuasive, otherwise the award could also be used to cover taxi drivers, delivery people, salespeople, or a clerk who runs errands. So, why has the MEWU gone down this somewhat questionable track of trying to use the Automotive Industries Award to cover roadside service and driving instructors?

We assume because both functions of a driving instructor and automobile roadside service are performed by the RACT, and this is but a poorly disguised attempt to try and cover a business to which it has already been determined they will never cover as long as the RACT-ASE agreement is in place. The Automotive Industries Award is not the appropriate award to cover driving instructors as they are not a part of the automotive industry.

Mr Commissioner, the TCI, the VACC, and FIMEE have all opposed the unilateral application by the MEWU to vary the Automotive Industries Award. The TCI, for its part, opposes the application to vary the scope clause on three grounds, and I just reiterate those in my closing remarks. Firstly, the application by the MEWU is merely an attempt to rerun cases that have already been heard and determined, and it is not equitable to ask the RACT to repeatedly defend itself against a continual onslaught by the MEWU over the same industrial matter.

The variations being sought are identical to those that were rejected in T.3616 of 1992. The only difference being the scope was designed for a new award instead of an existing award, but the amendments and their intent are identical. We submit the sound principles that were rejected in that application should apply here today, and this application should be dismissed under section 21.

The second ground went to the issue of who the MEWU were intending to cover by extending the scope of the Automotive Industries Award, and we submitted that outside of the RACT there is only one other company providing roadside service, that company is the Tasmanian Transport Repairs Company, and they have a contract with Nisson. They are already covered by the existing scope clause of the Automotive Industries Award and utilize a tow truck application.

Thus we would contend that extending the scope for roadside service would be trivial and have no application, and the matter should be dismissed. Nor does the scope have coverage for driving instructors. Outside of RACT, whom have a registered agreement, all driving instructors are either owner operators or owner operators that operate under a co-op and pay a commission.

The driving instructors are, according to the Australian Tax Office and the TCI, contractors. Contractors have no employer-employee relationship, therefore there is no industrial matter that is in existence, and an award can only be made to cover an industrial matter under section 32. In conclusion, the matter of driving instructors falls outside the jurisdiction of the commission. The final point was driving instructors are not part of the automotive industry. The fact that they drive a car does not allow one to draw the conclusion that they are a part of the automotive industry.

In conclusion to my submissions we could ask the commission to dismiss the MEWU application as being trivial and against the public interest, as specified in section 21(c) and section 36, and for this reason and the reasons that I have submitted today, I would ask the commission to reject the MEWU application. Subject to any questions that the commission may have of me, that would conclude my submissions.

COMMISSIONER IMLACH: Yes. thanks, Mr Clues. I do have one or two. As I understand your submissions, the concept of a road service man is no different than that of a mechanic. Would that be a fair comment?

MR CLUES: This is an old argument. The RACT have always contended that a road service person requires mechanical

skills and skills beyond that of a mechanic, but they would contend that he doesn't necessarily need to be a mechanic.

COMMISSIONER IMLACH: Yes. Well I ask that question because you were telling me about the one other company and they provide road service but they employ crane driver and a mechanic; is that right?

MR CLUES: That's correct, yes.

COMMISSIONER IMLACH: Yes. Well that implies to me that you are saying to me that a mechanic is a road service man.

MR CLUES: What I'm saying to you, Mr Commissioner, is on this particular occasion, that being Tasmania, there are only two companies, one being RACT which is covered by an agreement; the other is the Tasmanian Transport Company and their road service division is covered by a - by the utilisation of a tow truck driver and a mechanic. That in itself in no way negates all the arguments that have been put forward by the RACT as they are a separate entity.

COMMISSIONER IMLACH: What if, just for argument say, if the classification road service man or whatever it is, were put into the award, would not the man employed by that other company be covered by that if - especially if it was $10, $20 more per week?

MR CLUES: Well as to the - I think the wage rates are irrelevant because we'd obviously have to have some argument as to what rates would be applicable if that classification were to go into the award, but I would submit to the commission that there is adequate coverage under the existing award to cover the functions that that individual performs and it would seem a crazy scenario to me to create an award to cover one guy who is already adequately paid under the Automotive Industries Award where his trade is recognised, his other activities such as tow truck driving is also recognised and all the functions that he would be asked to perform in this contract for Nissan are covered by the Automotive Industries Award.

COMMISSIONER IMLACH: Yes.

MR CLUES: It seems that we would be creating an award or a classification within an award for one individual who is adequately covered for at this point in time.

COMMISSIONER IMLACH: Well adequately is a matter of opinion and judgment, isn't it?

MR CLUES: Well given that he is a mechanic and there is a mechanic's classification in there and he's paid that, given that there's a classification in there for tow truck driver

and he's paid that, given that there is a conditional allowance for when he drives a tow truck, and having attained the skills to receive a tow truck licence, I would suggest that he is more than adequately covered.

COMMISSIONER IMLACH: Well maybe, Mr Clues, but I have to stick with this point because it may become significant, I don't know, but we have heard argument I think - maybe from all sides - but we have heard before that the road service man employed by the RACT - that's the only area that I've heard it from - about - is a different kettle of fish, meaning that if that mechanic in the other company - not the RACT - it's possible, going on what we've heard before, that his duties could be construed as different duties to that of an ordinary mechanic. In other words, there is an argument that there could be another classification and there could be a different amount of money. I know it's a matter of opinion and judgment but -

MR CLUES: Yes, I'd like to address you on that point. It is my understanding from the detailed history of this matter, that the main arguments that RACT were putting up, that a roadside service individual was not the same as a mechanic, went to the fact that a person was required to sell membership; was to give advice; was not to perform a full range of mechanical tasks on the - by the side of the road; did not have the benefit of automotive manuals.

Now, what I would suggest that this person is fundamentally different to that person that is engaged by the RACT. The person that is employed at the Tasmanian Transport repairs company is not expected to fix the vehicle there and then, other than to perform maybe a minor mechanical task such as a battery or a generator or whatever other parts are underneath my car - I'm not really that familiar with them - any major mechanical functions, he would then personally take back to his workshop located at the Transport Company and perform major mechanical tasks, if they were so required; or he would deliver that car back to Nissan who would probably more often than not also do the repairs under the warranty.

So I would suggest that this person performs a fundamentally different task than that engaged - than those persons engaged by the RACT and those functions that he performs are more than adequately covered and envisaged by the scope of the existing Automotive Industries Award.

COMMISSIONER IMLACH: Yes. All right. Now there's one other thing. If I remember correctly, Mr Baker made a lot of my decision where I referred to the matter of putting in a floor or a base and where is it in yours. There it is - page 4 of exhibit -

MR CLUES: I'm aware of the reference, Mr Commissioner.

COMMISSIONERIMLACH: Yes, - TCI.2. And reading it now, Mr Clues, it seems to go both ways at the one time, doesn't it?:

> I accept that it may be undesirable or superfluous to make the new award when all of the area sought to be covered by the new award may already be covered by the agreement, but I would regard the making of the new award as putting a base or floor under the agreement as it were in the same way as agreements usually are made on the basis of an award already existing.

Now, I'm certain Mr Baker made - used that as a point and I put that to you. Forget about any other company. Let us consider the RACT and we all know that's in the background. What do you say about that point that I have made that - and I almost say it outright:

> I would regard the making of a new award as putting a base or floor under the agreement -

Am I right in that or wrong. What do you think?

MR CLUES: It could have been a typographical area, Mr Commissioner.

COMMISSIONER IMLACH: No, I'm putting it to you seriously, Mr Clues.

MR CLUES: No. What I would say in rebutting that argument is that your conclusions that you have drawn are those which are logical. If the RACT Agreement were to fall over tomorrow, where would they go - under which award would they fit - would these people become award free, and I think there could be argument raised that they come under the scope of the existing Automotive Industries Award.

A number of their people are engaged as mechanics. They could be paid out as a mechanic. Those that don't have trade qualifications, well it would be up to the company to determine whether or not they would continue to recognise their existing rates of pay. I would suggest that the company at common law would be obliged to continue their existing rates, based on the fact that they have an agreement in which the terms of that contract are set.

So, I would suggest that there would be no disadvantage if the RACT agreement were to fall over tomorrow. The conditions of employment could be drawn from the Automotive Industries Award and the rates of pay would continue that they are currently paying. Then again, I am saying that `without prejudice' because the RACT might have another view. But I would suggest that is what would happen.

As to your specific comments about putting in a flaw, I'd suggest that that is relevant where you have an industry award that covers a large number of companies and there is, say, one company that has a registered agreement. The fundamental difference between that and the scenario you currently have before you at this point is time is that it is premised solely on the RACT agreement falling over. It has absolutely no application until such time as that agreement falls over.

There is not one person within this state that would be covered by the - who is not already covered by the Automotive Industries Award - that would be benefited by the extended coverage being proposed by the MEWU. Not one single individual within this state.

And I would put the - it is not a question to the commission - but I would put the statement that it is not desirable or in the public interest to create award for the `what if' one in a million chance that the RACT is going to fall over. I mean, that's basically putting a damner on the current agreement.

I would suggest that the agreement will continue forever and a day as it has done for a large number of years with FIMEE, and I don't believe that it is appropriate to be creating awards for `what if'. I think there needs to be a demonstrated need to create the award and at this point in time there is no demonstrated need because there is not one single individual in this state who is going to be covered by the terms and conditions of the Automotive Industries Award that is not already covered by it.

So, I would suggest that those comments whilst relevant are not applicable to the RACT because it is premised upon an award being set up solely to cater for, you know, the obscure chance the RACT agreement is going to fall over; and as I have said, if the RACT agreement does fall over then chances are that they will come under the Automotive Industries Award, and therefore that argument is further negated in relation to extending the existing scope.

COMMISSIONER IMLACH: Yes. And, so I must go one step further, Mr Clues. So, in your opinion, is it so in your opinion, that if I were nevertheless to go ahead and do what the MEWU is asking of me I'd do so at my own peril; is that right? What I mean is, I would be acting incorrectly, or whatever.

MR CLUES: I believe so, Mr Commissioner. I don't believe that it is the role of the commission - with all due respect, and I do mean that - to be creating awards for `what if' type scenarios. There is no demonstrated need at this point in time for the application that is being sought by the MEWU. I think it is merely a matter of an ongoing obsessive pursuit by

the MEWU to be able to show what members it has at RACT that it has done something constructive for them over the last 2 years.

COMMISSIONER IMLACH: Thanks, Mr Clues.

MR CLUES: That's all, Mr Commissioner?

COMMISSIONER IMLACH: That's all I think, yes. Right, now, Mr Long?

MR LONG: Yes, sir. As I said earlier, I rise to oppose the metalworkers' application, and fully support the submission - an extensive and comprehensive submission - put in by the TCI. I just wish to confine my comments, or submission to some of the comments made by Mr Baker in relation to FIMEE's involvement at the RACT.

Sir, I can assure this commission FIMEE is representing membership at the RACT. We are involved in award restructuring, consultative committees, career paths, and what have you. We have set up committees in all areas to advance the productivity and efficiency of the enterprise. To my knowledge the metalworkers do not have any members at the RACT. At this point in time they are all members of FIMEE.

Mr Baker's comments in relation to the inability of FIMEE to cover technical and supervisory staff is not correct. A branch of our organisation called `TAPS' - Technical and Professional and Supervisory Branch - has some 2,000 members, and we are well able to cover those people. Sir, as I said earlier, I believe that the issue has been canvassed adequately by the submission of the TCI, and we would also ask the commission to dismiss this application as being trivial. If the commission pleases.

COMMISSIONER IMLACH: Thank you, Mr Long.

MR CLUES: Excuse me, Mr Commissioner, just on procedure, I wanted to enquire as to what the status of the document submitted by the TACC has at this point in time?

COMMISSIONER IMLACH: Yes, I appreciate that, Mr Clues, I had it here and I have been meaning to raise it and didn't. Perhaps I should have raised it at the start. If we just go off the record for a minute.

OFF THE RECORD

COMMISSIONER IMLACH: I'll just preface this. I have received communication from the Tasmanian Automobile Chamber

of Commerce and a written submission which, after consultation with the parties and also I say that with my agreement, concurrence with their views, that we'll have now read on the record.

ASSOCIATE: TACC submission:

RE: MEWU APPLICATION TO VARY THE AUTOMOTIVE INDUSTRIES AWARD T. No. 3875 of 1992.

The Tasmanian Automobile Chamber of Commerce (the Chamber) opposes the MEWU's application to vary this Award on two grounds:

1. There is no genuine need to vary this Award.

2. To grant this application would not be in the public interest.

1 THERE IS NO GENUINE NEED TO VARY THIS AWARD

The MEWU's application seeks to expand the jurisdiction of this Award to cover "automotive roadside service" and "driving school instruction". The MEWU must persuade this Commission that there is a genuine need to vary this award. The Chamber's respectful submission is that there is no genuine need to vary this award.

The Tasmanian automotive industry is already successfully and comprehensively regulated by the Automotive Industries Award and the RACT/ASE Roadservice and Technical Staff Agreement registered pursuant to section 55 of the Act.

Automotive Roadside Service

The vast majority of automotive roadside services are performed by the RACT. The terms and conditions of employment for these employees are governed by the "RACT Agreement" that is registered with the Commission. This Agreement is still valid and binding upon the parties and their successors.

The only other company that provides automotive roadside service is thee Tasmanian Transport Repairs. This business is a towing company that has recently been contracted by Nissan Australia to provide 24 hour roadside service to part of their extended warranty. This company is already covered by the Automotive Industries Award, consequently, it is unnecessary to vary the jurisdiction of this Award to cover this part of their operations.

Driving School Instruction

Driving instruction in Tasmania is provided by "owner drivers" - the driving instructor owns the vehicle, is personally responsible for the payment of tax, insurance, and superannuation. These driving instructors are not employees, nor are they employed under a contract of employment, they operate under a contract of service. In view of this fact, the Chamber respectfully submits, that it would be wholly inappropriate for the Commission to vary this Award.

2 TO GRANT THIS APPLICATION WOULD NOT BE IN THE PUBLIC INTEREST

An object of the Act is the "settling of disputes". The Chamber respectfully submits that the unnecessary expansion of the jurisdiction of this Award is not in the public interest, because it has the potential to create disputes - especially between the MEWU and FIMEE.

The Chamber further submits that the Commission should be guided by the provisions contained in section 63 (10) (c) (iii). In particular, the Commission should be satisfied that the proposed variation "would not prejudice the orderly conduct of industrial relations in Tasmania". In this instance it is possible that the granting of this application will prejudice the orderly conduct of industrial relations in Tasmania and therefore the Commission should dismiss this application.

CONCLUSION

The Chamber opposes this application to vary on two grounds. The first is that the MEWU have failed to establish there is a genuine need to vary this Award. The second is that the granting of this application is not in the public interest as it has the potential to create industrial disputation.

Further, the Chamber endorses the submission made by the TCI in this matter.

COMMISSIONER IMLACH: Right, now I propose - is there anything else from those opposing the application? Well, I propose to give Mr Baker the final call.

MR BAKER: Thank you, sir, I'll be brief. One of the most remarkable things I think the commission has heard this morning was Mr Clues telling us that road service patrolmen are in fact mechanics. I think there was 190-odd pages of transcript where the argument went in reverse, but nevertheless, I suppose we're all entitled to a change of mind eventually, but I'm glad to see that it actually - that argument has finally succeeded.

MR CLUES: Mr Commissioner, if I can seek leave to intervene on that point.

COMMISSIONER IMLACH: We'll hear what he has to say, Mr Baker.

MR BAKER: Yes, Mr Clues.

MR CLUES: I think transcript will show at no point in time have I ever said that RACT service men are mechanics.

COMMISSIONER IMLACH: All right, well he's just responding. I mean he's having a go and you're having a go; you've had your go, Mr Clues.

MR CLUES: I know, but -

MR BAKER: All I can say is I'm glad Mr Adams is not here this morning. But if I do just take you back to a submission which I did make - just get the words accurate - I did say to you that our application today whilst encompassing the work of the RACT and indeed it could be said being definitive of the work is not exclusively pertaining to it. And that brings us to the application that we've made. Mr Clues has said we're sort of having a rerun for the third time.

Well, in fact, we're not having a rerun of the same issue. There have been three distinctly different applications made to this commission. One dealt with the application and the operation of the agreement registered under section 55 of the act, and you brought a decision in January of this year which - which dismissed the matter.

Indeed one of the things which was in that decision, of course, sir, was the fact that the submission put by the TCI at the time was that our rules not provide for the coverage of the persons involved, including, I presume, mechanics.

We then lodged an application which was dismissed by yourself but it sought to do two things. One was it sought to make an award on the basis that section 60 of the act could in fact override the agreement. You said in your decision, sir, that that was correct. You dismissed the application on the basis that - that the scope clause which we proposed was in fact deficient and that it didn't meet the test as far as section

33(1)(a) of the act was concerned and so that brought us to round three where we sought to amend, if you like, our application.

We've taken cognizance of your comments in relation to section 60 of the act and thus framed a new application. So there have been three separate and succinct applications that have been made. Insofar as the comments made by Mr Clues in the operation of this - of the proposed structure that we've proposed, is that in as far as auto - auto service people are concerned, by their own submissions both the TCI and the TACC have indicated that it applies to other people. Those persons that he says are currently covered by the application of the Automotive Industries Award.

And again, sir, I'd suggest to you, that that again is another 180 degree twist on the submissions which were made back some 12, 18 months ago now. That being the case, sir, we would submit that it does in fact have application. Insofar as the driving school instructors are concerned we were treated to quite a lengthy argument explaining in fact that those people were in fact subcontractors and not - and not employees within the meaning of the act, but the valid point remains that in fact that there are employees engaged in driving instruction activities in the industries. The point is irrefutable. Even Mr Clues agrees that there are employees involved in the industry, therefore the - our application -

COMMISSIONER IMLACH: Excuse me, could I interrupt on Mr Clues' behalf -

MR BAKER: Yes.

COMMISSIONER IMLACH: - so he doesn't do it himself. I think Mr Clues was saying that they were not employees.

MR BAKER: He was saying that they were not employees outside of the RACT.

COMMISSIONER IMLACH: That's correct, yes.

MR BAKER: To be specific -

COMMISSIONER IMLACH: Those outside the employee - outside the RACT were not to be considered as employees, Mr Clues said - they were contractors.

MR BAKER: Yes.

COMMISSIONER IMLACH: Right.

MR BAKER: And obviously from the material which he has submitted I think it would be very difficult to argue in fact that they were deemed to be a subcontractor. But, as I made

the point, those employees who are - there are employees in the industry who are employed by the - the Royal Automobile Club of Tasmania. So there are that section of employees.

Insofar as Mr Clues' perception that really the driving people don't really belong under this award and he highlighted that by the fact that the - those people who sell tyres have been removed from the award in order to clearly delineate between the operation of the Rubber Trades Award and the Automotive Industries Award. I think it ought to be, you know, at least pointed out to the commission, if the commission doesn't already - sorry, I'll rephrase that - if the commission is aware of the situation, that there are employers in - who operate under the Automotive Industries Award that actively sell tyres and sell a great deal of them.

But - and in fact sell many and varied product. I mean the K mart, for example, is a classic example, who in fact have their own section under the award. So there are - while it's true to say that there has been an exclusion clause put in the bottom of the award, it was certainly done for purposes other than to take people who sell tyres out of the award.

Mr Clues also went on to, sort of, at some length to indicate the issue that - that we had assaulted the employer through obsessive applications and what have you. I may be misquoting Mr - Mr Clues there, but I think I've got the thrust of it correct.

It will be our intention to pursue the matter so long as our members - and I repeat, we still have membership there and former members, request to us to seek to represent those employees, and I note that this agreement expires on 28th September 1993, so approximately 1 year away from its expiratory and I simply make the point that I think it's about time people actually faced up to what is going on, rather than frustrating this process and creating this ongoing farce that - that needs some resolution and, you know, the sooner that is done, the sooner these applications of the like will come to an end.

But I hope, sir, that our application today will be successful and it will assist in the - in the resolution of this ongoing problem. Thank you, sir.

COMMISSIONER IMLACH: Yes, thanks, Mr Barker - Mr Baker. Yes, and you're saying are you, Mr Baker, that even though the only employees concerned in this matter, if that were the case, are those employed by the RACT, I should still proceed?

MR BAKER: I think there are two categories of employees. There are those that are employed in roadside service, and indeed, there are - as Mr Clues has indicated - two companies who directly supply that type of service.

COMMISSIONER IMLACH: Yes.

MR BAKER: And insofar as the driving instructors are concerned by way of evidence which has been tendered, it - it would appear as though the only employees in the industry are those employed by the RACT.

COMMISSIONER IMLACH: Yes, Mr Baker, you heard me put it directly to Mr Clues, I put the same to you; it may come down to that quotation from page 4 of TCI.2, where the only reason for putting these - the - what you are seeking into the award is that point that I made, putting in a base or a floor. And -

MR BAKER: That's right.

COMMISSIONER IMLACH: - Mr Clues was quite adamant or was quite definite that that wasn't a good enough reason. What do you say?

MR BAKER: Well I suppose in the arguments that I've put to you already this morning, was that in our opinion the - that is sufficient reason, so long as it meets the test of public interest.

COMMISSIONER IMLACH: Yes, all right. Thanks, Mr Baker.

MR BAKER: Thank you, sir.

COMMISSIONER IMLACH: Before I close, I'd like to make a point with the parties that I'm aware - well aware of the three sessions that we've had, well aware, that in some aspects it could be regarded - could be said, and in truth Mr Clues did submit that the RACT was suffering repeated harassment - my words - but I believe that's what Mr Clues was saying - in this series of applications and that was a factor that ought to be considered.

Well, I just want to make the point now that I'm aware of that and I'll seek to comment on it in my decision without saying now what the end result will be. But I want to make the point that I am aware that it must be rather difficult for the RACT to operate, knowing that the MEWU is going to have another go, but all I'm saying is I'm aware of it and make that comment. Nevertheless any decision arising out of that will be adjourned as will the full decision in this matter.

HEARING CONCLUDED