AUSCRIPT AUSTRALASIA PTY LTD
ABN 72 110 028 825

Suite 25, Trafalgar Centre 108 Collins St HOBART Tas 7000
Tel:(03) 6224-8284 Fax:(03) 6224-8293

TRANSCRIPT OF PROCEEDINGS

O/N 1671

TASMANIAN INDUSTRIAL COMMISSION

DEPUTY PRESIDENT P.C. SHELLEY

T No 11982 of 2005

ZINIFEX ROSEBERY (MINING) 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 mode, terms and conditions of employment

HOBART

11.00 AM, THURSDAY, 24 MARCH 2005

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

PN1

MR R. FLANAGAN: I appear for the Australian Workers Union, Tasmania Branch. With me is MR DIXON and MR C. LEWTAS.

PN2

MR P. FRASER: I appear for the Communications, Electrical and Plumbing Union, Tasmanian Branch.

PN3

MR R. WEST: I seek leave to appear on behalf of the company in this matter. With me is MR R. MURPHY.

PN4

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

PN5

MR M. WATSON: I appear on behalf of the Tasmanian Chamber of Commerce and Industry.

PN6

THE DEPUTY PRESIDENT: Thank you. Are there any objections to Mr West appearing?

PN7

MR FLANAGAN: Not that we intend to advance, Deputy President.

PN8

THE DEPUTY PRESIDENT: Thank you. I received correspondence from Mr West in which he foreshadowed that he was raising two threshold matters.

PN9

MR WEST: Yes.

PN10

THE DEPUTY PRESIDENT: So perhaps we could deal with those first.

PN11

MR WEST: Thank you, Deputy President. We wrote to you on 21 March setting out or foreshadowing two applications.

PN12

MR FLANAGAN: Excuse me, Deputy President. Sorry to cut off on Mr West, but I think, whilst I understand that it is appropriate to deal with the threshold issue first, I need to clarify the application. There was an error in the application which has been made, and I am seeking your leave to amend the application and I would seek to tender a replacement page to the application. I will just explain what that is.

PN13

THE DEPUTY PRESIDENT: Now, these pages aren't numbered and this doesn't indicate what clause it belongs to, so if you can tell me - - -

PN14

MR FLANAGAN: No. I was just looking for the actual application. It is in the wages section.

PN15

THE DEPUTY PRESIDENT: Oh, I see, yes.

PN16

MR FLANAGAN: At the moment it simply - in (c)(ii) it says "ranges" and it only has one figure, and it also identifies the date, 1 July 2003. I am seeking leave to amend that page, particularly in respect of (c)(ii) save that it identifies a minimum and maximum figure for that range. Now, just to explain how that works, under the current industrial agreement, what occurs is there is a range of payments. The actual figures which are identified for 1 July 2003 were then subsequently increased pursuant to the industrial agreement by three and a half per cent. So the figures which are there from level 1 to 5 reflect that.

PN17

So the intention of this application is to take the provisions of the current section 55 agreement and insert those provisions into the enterprise award. So that is what the intention of the application is. When I identified the error in (c)(ii), I contacted Mr West and provided him with the figures for the minimum payment in each of those bands yesterday. I just wanted to clarify that because otherwise it could have been taken that the application sought to change existing employment arrangements. Thank you.

PN18

THE DEPUTY PRESIDENT: Thank you. I take it there is no objection to the application being amended in that manner?

PN19

MR WEST: No. It might be appropriate perhaps to just mark the amendment.

PN20

THE DEPUTY PRESIDENT: Yes. We will mark that A1.

EXHIBIT #A1 AMENDMENT TO (c)(ii) OF THE AGREEMENT

PN21

THE DEPUTY PRESIDENT: Right. That is it, Mr Flanagan?

PN22

MR FLANAGAN: Yes.

PN23

THE DEPUTY PRESIDENT: Thank you. Back to you, Mr West.

PN24

MR WEST: Thank you, Deputy President. As I was saying, there was a letter forwarded to your office on 21 March, which was also served on the other parties to the proceedings. I wonder whether I may, just for the sake of the record, mark that letter, and if you are content to take it as read I can - - -

PN25

THE DEPUTY PRESIDENT: All right. I will mark that as R1.

EXHIBIT #R1 LETTER FORWARDED TO THE COMMISSION ON 21 MARCH AND SERVED ON OTHER PARTIES TO THE PROCEEDINGS

PN26

MR WEST: Thank you. You will see in the letter that I have foreshadowed two applications, one under section 21 and the other under section 24. If it pleases the Commission I propose to proceed to put the two matters to you together, but they do constitute quite separate applications. If you like, the application - the request that the matter be referred to the President, is really a conditional request on you determining against us on the first point. So it is put in that way if it pleases, Deputy President. I have put together a brief written note which may assist the Commission following my arguments. If I could just hand a copy of that up.

PN27

THE DEPUTY PRESIDENT: Thank you.

PN28

MR WEST: Again for the record I would ask that that also be marked.

PN29

THE DEPUTY PRESIDENT: Okay. That is R2.

EXHIBIT #R2 BRIEF WRITTEN NOTE TO ASSIST THE COMMISSION FOLLOWING MR WEST'S ARGUMENTS

PN30

MR WEST: And there is one correction to be made to the second page on the second paragraph. It says sections 24(4A) to sections 24(4D). That should really have been (4C). Deputy President, the first proposition that we wish to put to you today really relates to the exercise of a discretion available to you under section 21(2)(c) of the Act. No doubt you are well aware of the relevant provisions. The parts of the section which I wish to rely on is the provision that provides:

PN31

Without prejudice to the generality of subsection (1) -

PN32

which permits the Commission to regulate its own procedure -

PN33

the Commission may, in relation to a matter before it -

PN34

and then under subsection (c) relevantly and importantly -

PN35

at any stage of those proceedings, dismiss a matter or part of a matter, or refrain from further hearing, or determining, the matter or part if the Commission is satisfied: that the matter or part is trivial; that further proceedings are not necessary or desirable in the public interest; or that for any other reason the matter or part should be dismissed or the hearing of those proceedings should be discontinued, as the case may be.

PN36

We don't assert triviality in this case, but we do assert that it is an appropriate matter for you to refrain from hearing or to dismiss the whole of the matter on the basis that further proceedings are not necessary, and in particular not desirable in the public interest. Now, I have referred in the outline in exhibit R2 to the High Court decision in the Citicorp case. I am not sure whether the Commission is familiar with that; it is a Federal jurisdiction matter.

PN37

THE DEPUTY PRESIDENT: No.

PN38

MR WEST: If I could explain, there is an almost-identical provision in the current Workplace Relations Act in section 111(1)(g), and prior to 1998 in the Conciliation and Arbitration Act there was another provision, in again almost identical terms, 41(1)(d), and in the Citicorp case the employer sought to invoke that discretion prior to a dispute finding being found by the Commission. As you are well aware, Deputy President, the first step in Federal Commission proceedings is for the finding of a dispute, and it was sought to invoke the discretion prior to even a dispute finding being made, and the matter went off to the High Court and the High Court was satisfied that under section 41(1)(d) of the Conciliation and Arbitration Act, and also under section 111(1)(g) of the current Federal Act, that the discretion could be invoked at any stage, including a stage prior to the finding of a dispute.

PN39

We would submit that in the Citicorp case the relevant provisions of the Federal legislation did not include the words "at any stage of those proceedings" as is contained in section 21(2), and we would submit that that reinforces the point made in Citicorp, that it is a general discretion available for you to, even before starting to hear the matter, before you hear from the parties anything about it, you could look at the application on its face and form a view in the public interest that the matter ought not proceed. So it is on the basis of that assertion of your jurisdiction that we proceed.

PN40

Now, I have set out in the outline four principal grounds upon which we invite you to exercise that discretion, and I might take you to those in a little more detail. The application before you which is, as Mr Flanagan has acknowledged this morning, is an application that you effectively uplift an enterprise agreement or an enterprise bargaining agreement which is registered under the State Act under section 55, and that you incorporate its terms into an award. Not only that you do that, but the application in the terms filed requires you to extract from that agreement a number of matters which are currently part of the agreement now, and I will take you to those at this point, to point out to you that this is just not - this is just not a vanilla [sic] uplifting of the agreement - do you have a copy of the Pasminco Rosebery Mine 2002 Agreement?

PN41

THE DEPUTY PRESIDENT: No.

PN42

MR WEST: I may have a - - -

PN43

MR FLANAGAN: I have copies.

PN44

MR WEST: You have a copy to hand up? Good.

PN45

THE DEPUTY PRESIDENT: Well, I do actually in another file here, but - - -

PN46

MR WEST: Well, Mr Flanagan very helpfully has got a copy. Do you have a copy of the award itself?

PN47

THE DEPUTY PRESIDENT: Yes, I do.

PN48

MR WEST: The Rosebery Mining Award No 2 of 2004?

PN49

THE DEPUTY PRESIDENT: Yes, I do.

PN50

MR WEST: Good, okay. I might need to go between those and the application itself. Now, I have been through the exercise of comparing the application with the agreement and essentially the clauses in the agreement from clause 8 onwards line up with the variation as expressed from clause 34 onwards, in essence, but there are some differences. The first difference that is fundamental is that once you uplift an agreement into an award you change the legal rights of the parties in a very significant way, namely, the parties to an enterprise agreement are at liberty to retire from that agreement once it expires, and end the agreement under the Act.

PN51

The Act allows for that, and that is a right that can be exercised unilaterally. That is unlike the Federal system where there must be either consent or an order of the Commission, but in this State it is a unilateral right. Now, if these provisions are put into an award they become a matter for the custody of the Commission and the parties simply can't exercise that right. So that is a significant change of itself. Secondly, if you would look at clause 9 of the agreement and clause 36 of the variations.

PN52

THE DEPUTY PRESIDENT: Sorry, clause?

PN53

MR WEST: Clause 9 of the agreement - - -

PN54

THE DEPUTY PRESIDENT: And 36 of the variation.

PN55

MR WEST: - - - and 36 of the variation, you will see that there is omitted - you will see that clause 9 has paragraphs (a) through to (h) and clause 36 has paragraphs (a) through to (g). The clause that is missing from the agreement is 9(g), which requires objective performance reviews to be conducted on a regular basis, at least annually. That obligation is not reflected in the award and that is a

significant omission because the opportunity for a performance review and the relation of pay to performance is an issue that underpins the agreement and there is significance in that omission.

PN56

If you then come to clause 40 of the variation at the very end, there is subclause 40(a), which sets out Notice of Termination by the Company, and then 40(b), which is over the page. If we compare that to the relevant agreement clause, which is clause 13 of the agreement - if you look at clause 13(b) it says that:

PN57

> *The following additional notice provisions will only apply to the termination of employment due to redundancy throughout the life of this agreement.*

PN58

When it appears in 40(b) of the variation, the words "life of this agreement" becomes "throughout the life of this award". Now, the life of an award is indefinite; the life of an agreement is finite, so that change has significance. It is made more significant by the omission in the variation of paragraph (ii), which provides that:

PN59

> *This provision will cease to operate from the expiry of this agreement on 1 August 2004.*

PN60

There is also, under the classification table in clause 14(c) of the agreement a reference to apprentices, which for some reason which is not clear to me has also been omitted in the variation. That may or may not have significance. I have no real instructions about that. There is also an omission of clause 17(c) dealing with superannuation, which does not appear in the equivalent clause 44. There is also an omission in relation to the meal breaks clause in clause 19. The 45-minute meal break for 12-hour continuous shifts does not appear in the variation. There is also the admission of clauses 26, 27 and 28 of the agreement which relate to the grievance procedures, union notice boards and shop stewards.

PN61

The wage rates prescribed - this is also obviously of great significance - the wage rates referred to in the amended document handed up this morning in exhibit, I think, A1, are not the wage rates prescribed in the schedule to the agreement. You will see, for example, level 1, the upper limit is $95,050 in the agreement and under the variation is proposed to be 98,377, which is an increase of some $3320-odd, and you will see that all of the wage rates, for each of the levels, are similarly enhanced by a factor of about three and a half per cent, I think.

PN62

So when Mr Flanagan says that the application is to, in effect, uplift the agreement, that is not entirely accurate. It is uplifting some of the agreement, but not all, and in some respects uplifting an enhanced agreement. Now, it may be one thing to uplift an agreement - and I will come to that - but it is certainly another thing to uplift an enhanced agreement and ask the Commission to arbitrate on that. But really, fundamental to this really is the public interest served by the system of enterprise bargaining as it exists in this State and nationally, where the Commissions in each of the States and Federally have encouraged and

facilitated workplace bargaining by the adoption of an approach generally of arbitrating safety net awards which underpin enterprise bargaining and leaving it to the parties to negotiate actual terms and conditions above the safety net.

PN63

That general approach and structure has underpinned the whole approach to enterprise bargaining for a considerable period and is an approach generally adopted across the country, not just in this State. That general philosophy is reflected in the current wage-fixing principles of the State Commission here, which has, to a large extent, followed the lead from the Federal Commission in the levels and approach to wage fixing, and the wage-fixing principles make it clear at principle 3 that:

PN64

> *The Commission will continue to play an active role in encouraging and facilitating workplace bargaining.*

PN65

And it makes it clear in principle 4 that what it is about is setting safety net awards to underpin workplace bargaining. That, of course, is consistent with the statement set out in the preamble of the Act, which helpfully, Deputy President, you pointed out to me in other proceedings, that the preamble to the Industrial Relations Act in Tasmania refers to encouraging workplace bargaining as one of the purposes of the Industrial Relations Act.

PN66

So my submission would be, in relation to that matter, that the whole approach to wage fixing in Tasmania, consistent with the approach around the country, is for the Commission's role to be to set by arbitration minimum safety net awards which underpin bargaining for actual terms and conditions at the workplace and for the Commission's role to be actively encouraging workplace bargaining by taking that approach.

PN67

The application before you is one which cuts completely across that; is entirely at odds with that whole approach. It is saying to the Commission, "We want the Commission to not only uplift what we have already got, but to give us something on top of that and to make that as an award." Now, from my research that is an unprecedented application; it is not an application which could properly be said to be made under the existing principles; it is clearly not a safety net adjustment under principle 5; it is not put, nor could it be put as a work-value change under principle 9, and it is certainly not a matter that could be regarded as a pay equity claim under principle 10.

PN68

It is completely, as someone described it the other day, "a left-field application". I am aware that in the State wage case of July 2000 that the Commission made comment regarding the incorporation of agreements into awards, and there is a passage at paragraph 47 which I will read. The Full Bench in that case said:

PN69

> *We turn now to the TTLCs submission that the wage-fixing principles should make provision for the Commission ...(reads)... such a determination could only be made after hearing the parties.*

PN70

Quite clearly, as a matter of general power under the Tasmanian legislation, there isn't the sorts of restrictions around arbitration that one finds in the Federal Act, for example. But there is a very clear statement of principle articulated by the Full Bench in the 2000 State wage case, to the effect that it is inappropriate for expired agreements to be uplifted into awards, and while it remains a possibility that that might be the case, as a matter of principle it is undesirable. So that is the first general ground upon which we ask that you dismiss this matter.

PN71

The second is a matter that I have agitated previously and I raise it again. I don't dwell on it because it is a matter upon which you have expressed your views in ruling, but it relates to the existence of bargaining periods in the Federal jurisdiction. For the sake of the record and to support this submission I would seek to tender for the record the evidence of service of bargaining notices in respect of each of the three unions. The first document was formerly an exhibit in some earlier proceedings, AMWU1, which is the record of service of a bargaining period on the applicant in this case, the AWU. The other two evidence service on the Federal office of the AMWU and the CEPU, both of whom are relevant unions at the Rosebery site.

PN72

THE DEPUTY PRESIDENT: We will mark those collectively, I think - - -

PN73

MR WEST: Yes, if that - - -

PN74

THE DEPUTY PRESIDENT: - - - as R3.

EXHIBIT #R3 EVIDENCE OF SERVICE OF BARGAINING NOTICES IN RESPECT OF AWU, AMWU AND CEPU

PN75

MR WEST: Now, I won't dwell on this argument - the Commission is familiar with it - but the assertion that we make is that where a party initiates a bargaining period, whether it be the union or an employer, that the service of the bargaining notice under the Federal Act enlivens a jurisdiction in the Federal Commission and sets in place a scheme under the Federal Act which is at odds with arbitration proceedings in this Commission, and it directly - the arbitration here over this issue directly conflicts with the provisions of section 170N of the Workplace Relations Act, which prohibits the Federal Commission from arbitrating during a bargaining period.

PN76

Now, we put to you, Deputy President, that that involves a jurisdictional issue, but it also involves a consideration for you around the public interest of these matters proceeding. The existence of section 170N reflects a public policy position under the Federal Act which we say resonates with the approach in this State as well that bargaining ought take place on the basis of minimum safety net protections without the intrusion of arbitration, and the Federal legislation has expressly included 170N to ensure that that occurs, so that the parties do not have recourse to arbitration and are required to bargain, and we say as a matter of - if

you don't accept the - if the jurisdictional argument is not accepted, then there is a public policy consideration about that as well that ought weigh on your consideration in the exercise of your discretion.

PN77

The next aspect of the matter we would raise is the fact that the application itself to vary this award is simply way outside anything that would be properly regarded as within the wage-fixing principles. This award that is sought to be varied came into operation on 23 August 2004. It is less than 12 months old. The wage rates are updated and up to date under the current minimum rates adjustment process, and the union now seeks to vary it with a claim to increase wages from around $600 a week up to $98,000 a year, very substantial wage increases on the award rates; to introduce the concept of annualised salaries into the award; to allow the Commission to - sorry, to permit and in fact require the cashing in of annual leave - a matter that is prohibited under most State legislation and a matter, as I understand it, has been a practice not encouraged by this Commission through its award system.

PN78

If you look to the relevant part of the variation - whether or not a provision of this kind is appropriate for an enterprise agreement is entirely another matter dealing with a specific issue at a specific site, but for the Commission to actually arbitrate on a provision that talks about the cashing in of annual leave is something that ought weigh on you, and that appears - I should colour code these papers. The paper is just out of order. It is clause 47(i). Further, it includes - so in addition to the substantial wage increases, the implementation of annualised salaries, the cashing in of annual leave, there is a provision of a claim for sick leave in clause 49. In effect, it provides for unlimited sick leave. It provides a remuneration:

PN79

Continuous plant shall operate so no loss of pay entitlement shall take place where an employee is absent from work due to sickness.

PN80

It doesn't put any limits on that, so it is, in effect, an unlimited sick leave provision. There is a completely new classification structure, totally different to the classification structure in the award, and there is a provision in section 47, which I will take you to in relation to the other matter I want to raise which provides for additional annual leave above the four-week standard that currently prevails under State awards. That is at clause 47(a) of the variation. It provides for 160 hours annual leave for day workers and 200 hours for shift workers, which is - - -

PN81

THE DEPUTY PRESIDENT: That is not unknown in State awards that shift workers have an additional two weeks leave.

PN82

MR WEST: No, that is four lots of 40. It is an additional two weeks leave above the four weeks.

PN83

THE DEPUTY PRESIDENT: Yes, I am just saying that that is common in State awards for shift workers; not unknown.

PN84

MR WEST: This is for day workers.

PN85

THE DEPUTY PRESIDENT: But workers who work shifts - - -

PN86

MR WEST: Yes, but this provides also for day workers.

PN87

THE DEPUTY PRESIDENT: Right.

PN88

MR WEST: It says, if you see 4(a)(iii) it says:

PN89

> *In addition, all employees accrue 80 hours block leisure leave for each 12 months of continuous service.*

PN90

Not just shift workers. The point I make is that the claim, when you take into account all of those matters, amounts to a complete departure from and a total moving away form the concept of a safety net award. We are talking about very substantial changes to established safety net standards, and in the public interest we would say that the Commission ought not entertain that sort of claim. It should discourage people making that sort of claim by refraining from hearing this matter.

PN91

The final point is one which is an important issue for the Commission to consider here. There is in existence an expired agreement, the Pasminco Rosebery Mine 2002 Agreement, which is registered under section 55 of the Act, that remains in operation. As the Commission is aware, under the Industrial Relations Act an expired agreement continues to operate indefinitely with either party at liberty to retire from the agreement on notice. The company has not sought to retire from the agreement and neither has the union. What is the effect then of that? Well, if you were to arbitrate an award as sought in the application, it would have no effect. Section 60 of the Industrial Relations Act says that the agreement which remains in place would override it. Section 60 says that:

PN92

> *While an industrial agreement remains in force with respect to an employer its provisions prevail over any provisions of an award that relate to the same subject matter as those first mentioned provisions and that apply to the persons in his employment.*

PN93

Well, this is an attempt to uplift, with modifications, what is in the agreement, so they have to deal with the same subject matter. So whatever you decide, whether it is to grant the union's claim in its entirety or some lesser aspect of the claim, it will have no legal effect because the agreement remains in place.

PN94

Now, that alone ought persuade you, we would submit, Deputy President, that you ought not be arbitrating. It would, of course, lead to a situation where, whatever the outcome of your arbitration, would then be affected by whatever the

parties unilaterally wanted to do. One presumes that if Mr Flanagan's members got a better deal out of the Commission's arbitration, they might be persuaded to retire from the agreement and thereby remove the impediment to the award operating.

PN95

It might be that the company, if they got a better outcome, might want to retire from the agreement to take advantage of that, too. The point is, the actual outcome of what happens to the employees is not going to be determined by your arbitration. It would be determined by whatever the parties chose to do, whether to accept or reject it. Now, we would submit, in the public interest, that is entirely inappropriate; that the Commission should be arbitrating an award which will have no legal effect until the parties decide how they are going to deal with it.

PN96

So we say for all those reasons that the sensible - that the course in the public interest for the Commission in this case is to refrain from further dealing with this matter and to dismiss it before it starts, and we invite you to exercise the discretion that you have available to you under the sections of the Act to do that. Now, if you are not minded to take that course, then we submit that this is an appropriate matter to be dealt with by a Full Bench and that then leads to our secondary application, if you like, that the matter be referred to the President for the purpose of considering that, and in this respect we rely on section 24 of the Act. I anticipate from discussions I might have had with Mr Flanagan that I will need to take you to section 24 in a little bit of detail because he has got some views about it that don't coincide with mine, surprisingly.

PN97

Section 24 sets out what happens in award hearings before a Commissioner sitting alone, and subsection (4) is the relevant part, and it really sets out three different ways, in my submission, that a matter can get to the President. Firstly:

PN98

The Commissioner -

PN99

and by that I assume it means any member of the Commission, including yourself, Deputy President -

PN100

who conducts the hearing of an application in relation to an award may refer the application to the President if the Commissioner considers that the application: directly affects another award; or, is so important that it is in the public interest to have the matter dealt with by a Full Bench.

PN101

So that is the first basis, if you form a view, quite independent of the parties, that this is a matter that either affects another award or is so important it should be - you can refer it to the President, of your own initiative. The second way in which the matter can go to the President arises under subsection (4A):

PN102

A party to the hearing of an application may request the Commissioner to refer the application to the President.

PN103

And subsection (4B) says that:

PN104

> *A party to the hearing of an application intending to request the Commissioner to refer the application to the President is to notify the Commissioner and the other parties to the hearing of that intention before the day on which the hearing is scheduled to commence.*

PN105

Now, that was the purpose of our letter of 21 March, which is exhibit R1 in these proceedings, to comply with the requirements of section (4B), to put you on notice of our intention and also to put the other parties on notice as well. Now:

PN106

> *Subject to subsection (4D), the Commissioner must refer to an application to the President if requested to do so by a party to the hearing of the application.*

PN107

Now, we would say that if - and it is subject to (4D), but - and I will come to (4D), but we would say that the second way in which it gets to the President is, notice is give under (4B), an application is made under (4A), and then you are required to then refer it by virtue of (4C), that the discretion available to you to decide for yourself whether to do so is not available.

PN108

THE DEPUTY PRESIDENT: But isn't that only if it satisfies the criteria of 4?

PN109

MR WEST: We would submit, no, that if the application is made for a reference, then it is a matter for the President to then - - -

PN110

THE DEPUTY PRESIDENT: No. If, in the Commissioner's opinion, issues have emerged which satisfy the criteria set out in subsection (4)(a).

PN111

MR WEST: Well, can I come to (4D) as the third basis?

PN112

THE DEPUTY PRESIDENT: Yes.

PN113

MR WEST: What we are submitting is that there is a qualification on the general position which relates to applications made after the commencement of the hearing. Once you get into the hearing, once Mr Flanagan has opened his case and we start the process, then a party can't have a right to the matter going to the President, it is a matter for your discretion, and what (4D) says:

PN114

> *The Commissioner may* -

PN115

ie, has a discretion -

PN116

refer an application to the President after the commencement of the hearing of the application only if, in the Commissioner's opinion, issues have emerged during the hearing which: could not reasonably have been foreseen at the commencement of the hearing; and, satisfy the criteria set out in subsection (4).

PN117

So clearly, we are making our application now before you commence the hearing, as a preliminary application, and we say that the discretion available or required of you under (4D) has not - circumstances have not yet arisen for the exercise of that discretion; that the application having been made now means that there is an obligation under (4C) that the Commissioner refer the matter to the President. No doubt the President will have regard to the matters in subsection (4) as to what the President decides to do with it, but - - -

PN118

THE DEPUTY PRESIDENT: And if she sends it back to a single Commissioner and the parties again say, "We request that it go back to the President," you would be on this endless cycle where nothing would ever get heard.

PN119

MR WEST: No, no, I think the Act quite sensibly deals with that situation. We come at the outset, before anything has happened, and say, "Look, we think this is an appropriate matter for a Full Bench. We ask the Commission to refer it to the President." The President considers that and says, "No, I'm not satisfied it is a Full Bench matter," it goes back to the member, and then if once the proceedings then start, someone stands up and says, "I want this to go back to the President," you would then say, "Well, this is a matter that could reasonably been foreseen before the outcome of the proceedings and I'm not going to refer it," or alternatively you could say, "This doesn't raise a matter of public interest, or this doesn't raise a matter relevant to another award as set out in subsection (4), I will exercise my discretion not to refer it to the President."

PN120

So the party only gets one chance to go to the President. After that it is a matter for the Commission to decide whether it is appropriate to do so. So I think the Act has actually catered for that situation, Deputy President. So this is really the only opportunity, it seems, for us to have the matter referred, if you like, as of right, to put it in those sort of terms, and that is why we raise it now.

PN121

THE DEPUTY PRESIDENT: But the system is saying - (4B) says "if a party intends to request before the hearing" - - -

PN122

MR WEST: Yes.

PN123

THE DEPUTY PRESIDENT: - - - then it says, "The Commissioner must still consider subsection (4D)," and you are saying that (4D) only applies after the commencement of the hearing, that is ridiculous.

PN124

MR WEST: Why?

PN125

THE DEPUTY PRESIDENT: Because it is totally inconsistent, because how can you take into account subsection (4D) before the hearing if it only applies after the hearing has commenced?

PN126

MR WEST: No, no. Well, because - what the Act says is that first under (4) you can elect at any time to refer a matter to the Full Bench if those criteria are satisfied in your opinion. Quite independent of what we say, you can decide that. (4A), (4B) and (4C) deal with the situation where a party wants it to go to the President, and if a party gives notice under (4B), which we have done, and makes the application which we now make, then you are required to refer it to the President by (4C).

PN127

If we make the application after the hearing commences, then (4D) kicks in and we don't have an automatic right for you to refer it to the President. You then have a discretion as to whether you accept that application or not, and you are directed by the statute to look at certain factors before doing so, and one of those is whether we could have foreseen this at the start. Quite clearly the Act is saying that if you have got an issue you want raised with the President, do it at the start before the parties start running the case; don't delay it until the thing starts, because if you do, the Commissioner is entitled to say, "No, I'm not going to refer it."

PN128

So the scheme is perfectly understandable and it is - I should add that the requirement that upon receiving an application for referral that it be made by the Commissioner is one that exists in other legislation as well, that effectively the right of a party as a procedural step to ask for a Full Bench, effectively, by asking for it to be referred to the President, is one that is a non-discretionary matter in other legislation. But it quite clearly here, in the circumstances that we are making it, I think the Act is quite clear on that point. Mr Flanagan may have something else to say about that, but we put that to you, that it is really - there is no doubt about the situation.

PN129

Now, I set out in writing the basic grounds under which we think it is appropriate for a Full Bench - in effect, it is not for us to argue - if you accept my last contention, it is not really for us to argue to you what grounds there should be for the appointment of a Full Bench; it is really a matter for the President. But the way in which - - -

PN130

THE DEPUTY PRESIDENT: Well, let us suppose I don't accept that argument, you can put the next ones.

PN131

MR WEST: Well, I will put them to you anyway in case you don't, but I would submit very strongly that you should. But we set out in the note the grounds so that the President will be aware of why we have asked for it to be referred. There is no opportunity for a hearing before the President about these matters, so we set

out here why we say that. If you are against me on that point, they are issues that we submit should commend you to making the reference, even if you have a discretion, and they are these: section 35 of the Act reserves to a Full Bench certain matters which are at issue in these proceedings. Section 35, which is headed Certain Matters to be Dealt with by a Full Bench:

PN132

The Powers of the Commission to make an award or to approve an industrial agreement is exercisable only by a Full Bench ...(reads)... or the manner in which rates or wages generally are to be ascertained.

PN133

Now, we would say that all of those matters are at issue in this application. The nature of the claim here is a claim that is altering the minimum wages in the award in a way which is not covered in general principles, and I will draw your attention, Deputy President to subsection (2), which says:

PN134

Subsection (1) does not apply where provisions of, or an alteration in, an award or industrial agreement gives effect to matters, or is in accordance with principles, determined by a Full Bench.

PN135

Now, the wages claim alone here doesn't fall under any of the principles established by a Full Bench. The alteration to hours of work, the changes to annual leave for day workers, as I have already referred to, and the provisions of this award generally are not in accordance with established Full Bench principles. On that basis we would say that section 35 says that only a Full Bench can deal with them, quite apart from whether it is in the public interest to do so, legally that it can only do so.

PN136

Secondly, as a matter of public interest, this application is so outside the general scope of the scheme for regulating wage fixing in the State, as expressed in the wage fixing principles, as expressed in the Act itself, the idea of encouraging workplace bargaining, that this is a matter that ought properly be dealt with by a Full Bench, because there are no guiding principles. We are to face a very significant claim here. Mr Flanagan is to put a case in relation to a very significant claim, and there are no guiding principles for us to determine what the Commission expects of us.

PN137

Now, that is not a desirable situation; it is something that requires, in our submission, a Full Bench to consider, what is going to be the attitude of this Commission generally to this sort of claim, because this will resonate elsewhere than just at the Zinifex Rosebery Mine. If an application of this kind were granted it has implications following on for the wage fixing in this State generally and we would submit that something of that kind is very appropriately a matter for a Full Bench and traditionally would be the sort of matter that Full Benches would seize the opportunity to deal with.

PN138

If we add to that the comments in the July 2000 State wage case, that uplifting general - uplifting agreements into awards is inappropriate and might possibly be available only in exceptional cases, then clearly the Full Bench had in mind that

this is not a desirable exercise unless there is some special reason why it should occur, and it should be for the Full Bench to give the guidance as to what is that special reason, we would submit.

PN139

The existence of the special bargaining periods raises a significant jurisdictional point and a point which is worthy of the Full Bench's consideration and we would advance that. We also advance the public interest in this situation where arbitration is proposed in circumstances where there is a certified agreement in effect which would override whatever the outcome of that arbitration will be. We think there is a matter of public policy involved in that. That ought to be considered by a Full Bench and warrants the President establishing a Full Bench for that purpose. And so, for all of those reasons - - -

PN140

THE DEPUTY PRESIDENT: But wouldn't that argument be raised every time an application was made for a section 55 industrial agreement that was underpinned by a common law award of the Commission, for example, or any other award of the Commission? They could raise the argument that it shouldn't be raised because at the expiration of that either party could choose to withdraw and therefore the Commission was being asked to register an agreement that could be determined by one party unilaterally?

PN141

MR WEST: Well, there are two fundamental reasons why that is different to this. First, agreements are - the scheme under which that operates is specifically contemplated by the Act, that there will be agreements which are approved by the Commission and then the parties can extinguish them if they wish at the end. The Act says all of that. Secondly, it is a consent arrangement. The parties have agreed that they want those conditions.

PN142

THE DEPUTY PRESIDENT: But that argument could be advanced to prevent any award from ever being varied by arbitration, because there would happen to be some agreement for that on top of it that would expire eventually.

PN143

MR WEST: Yes, but my submission is quite plainly this, Deputy President, that I don't think it is appropriate that the Commission should be asked to arbitrate and act as the - perform its public function of resolving the dispute between the parties and determining as a matter of public - exercise of public office what ought to be the situation. That is what arbitration is about. The Commission is vested with the public responsibility to take two competing positions and determine, this is the proper outcome. And then in circumstances where that determination has no legal effect and it can be altered unilaterally by either party, different - altering that outcome by agreement.

PN144

I mean, that is what the system allows for, but where the people involved in the argument before the Commission are not necessarily going to be bound by the outcome of what the Commission decides, because there is already in place an industrial instrument which negates the effect of the arbitration. So it diminishes the Commission and makes it really no more than a tool of bargaining. In my submission, that is inappropriate for that Commission to be put in that position,

and we say the application shouldn't go in for that reason, because it just - parties can look at it and say, "Oh, well, I like the outcome, I will take it. I don't like the outcome, I won't take it."

PN145

And so the existence of that agreement is fundamental in a lot of respects. But just on the general point about arbitration, I mean, I would submit that under the general scheme of the way in which the Act is being administered under the wage fixing principles here, it is essentially - the role of arbitration for the Commission is primarily and foremost the fixing of minimum safety net of work conditions. Its arbitration role is extended by the wage fixing principles to allow for pay equity claims, and its arbitration role is also extended under the principles to do with work value changes, clear principles about those.

PN146

Outside that, there may be some role for the flowing on of sort of test case standards on issues like redundancy and leave and so forth, because they are part of the safety net, but there need to be very exceptional circumstances which would warrant the Commission arbitrating other than that. For it to readily agree to arbitrate in these sorts of circumstances is to take this system back to another time, and that is not what the legislature wants, because of the amendments that have progressively been made to increase the options for enterprise agreements, for putting in the encouragement for decision making, and it is not what I read in the principles that the Commission is articulating in the wage cases, and it is not what the general direction of the way industrial relations is currently practised around the country.

PN147

Our submission is that the Commission should resist very strongly endeavours to be brought into playing an active role in setting actual terms and conditions through arbitration if it has got an objective to encourage enterprise bargaining. That is the way we put it. Now, registering an agreement is another matter. The parties have already consented to that. The Act contemplates it. Totally different exercise of power, in our submission. So for those reasons, we would urge on - they are the reasons we would urge on the President for establishing a Full Bench, and we say that by having made the application in the proper way at the time we have made it, that we have a right to have that matter put to the President.

PN148

If you determine that you have a discretion - which we say you don't have - then notwithstanding that we say this is a proper matter because of the public interest issues, that you should nevertheless take it to the President and it is then for the President obviously to decide what she does with it, but we would submit that either way it ought go to the President. But coming back to my primary submission, we think the proper course today is that you should see the application for what it is, and that you ought say, "This is not a proper matter that I ought to be arbitrating, and I will decline to do so." And you certainly have that power under section 21 if you wish to exercise it. If it pleases the Commission.

PN149

THE DEPUTY PRESIDENT: Thank you. Mr FitzGerald?

PN150

MR FITZGERALD: Thanks, Deputy President. I will be much briefer. Mr West obviously has covered his submissions very comprehensively and also responded to questions from yourself, but I would support the submissions generally of Mr West. As you are aware, AMMA is a party to the award and is also party to a number of other awards, including a recently made Metalliferous, Mining and Processing Award. It certainly is - this whole application - Mr West has actually alluded to me referring to the matter being out of left field. It was me who said that, and I still maintain that this application by the AWU is totally out of left field, as it runs quite counter to the wage fixing principles and also the provisions of the Act in terms of section 35.

PN151

So we would generally support the submissions, both the - the two-part submissions. Firstly, that the matter should be dismissed in the first instance, and then secondly if you don't feel inclined to accept that submission, that the matter should be, under section 24(4C), referred as a mandatory obligation on you to the President to refer it to a Full Bench. We would support the submission of Mr West in respect to the flow on in the mining sector particularly. For many years, this award existed as the only State award in this sector. Many others were regulated by the Federal jurisdiction, and recently, as you are aware, the - - -

PN152

THE DEPUTY PRESIDENT: It was argued that it should apply as an industry award, and that was given the flick.

PN153

MR FITZGERALD: It was, and that was rejected by the President, and quite rightly so, in our view. But we say that this award is obviously a prominent award, a mining award.

PN154

THE DEPUTY PRESIDENT: Well, it is an enterprise award.

PN155

MR FITZGERALD: It is an enterprise award, but it is a - - -

PN156

THE DEPUTY PRESIDENT: And it has been determined.

PN157

MR FITZGERALD: It has been, but it is still a prominent award which would have some precedent aspect if you were inclined to accept the application. So in respect to the mining sector, we say that if you were inclined to accept the application, that would have an implication for others subject to the Metalliferous, Mining and Processing Award, and indeed other awards. Mr Watson obviously will speak about that generally, but there are other awards which AMMA are party to, and we see that clearly there is a flow on of potential for that to occur. So for those reasons, Deputy President, we wholeheartedly support the submissions - very comprehensive submissions - of Mr West, and we ask that you dismiss the matter in the first instance, and if you are not inclined, to refer the matter to the Full Bench via the President. If it pleases.

PN158

THE DEPUTY PRESIDENT: Well, there would be - if it was determined by a Full Bench, it would have a greater flow on potential than if it was determined by a Commissioner alone.

PN159

MR FITZGERALD: I understand your view there, but we say it is a matter which should be properly before the Full Bench.

PN160

THE DEPUTY PRESIDENT: Mr Watson?

PN161

MR WATSON: Thank you, Deputy President. At the outset, I would advise that we certainly support the submissions of Mr West - very comprehensive submissions and very convincing submissions in our view, which really from our point of view, I think make it absolutely clear where this matter should go to. Just in relation to the matter generally, I think it is certainly unprecedented in this Tribunal, where the Commission would be arbitrating what is in effect an agreement between the parties, albeit ratified by the Commission, but completely different circumstances as to how those section 55 agreements are negotiated and concluded.

PN162

And we would say that it is absolutely inappropriate for the Commission to be arbitrating on top of an agreement which has been negotiated between the parties in good faith, and in some cases obviously a lot of without prejudice positions being exchanged between the parties to come to a document which comes to the Commission and is therefore ratified. In relation to the general principle of the safety net of awards, we would say that both the principles and the long title of the Act certainly encourage the parties to - sorry, the Commission would encourage the parties to workplace bargain, so to speak.

PN163

However, that is workplace bargaining on top of a safety net of award conditions and pay rates. If we are going to have a situation where section 55 agreements make their way into awards, then one would wonder as to where the system is going to head as to what the safety net actually becomes. In terms of the actual principles of section 55 agreements, I think it is fair to say that that system has worked quite well in the State jurisdiction. Hundreds and hundreds of agreements have been ratified by the Commission, and I think the parties discipline themselves to that system and do quite well to work within the parameters. What we have today, in my view, is a new ball-game as to outside those parameters, which in my view should not be entertained by the Commission, and at the very least should be referred to the President as per Mr West's submissions.

PN164

This matter actually deals with a particular award, but obviously as party to all State awards, we have a broader view in relation to the matter, and obviously section 55 agreements come to this Commission for all industries. Hundreds of employers and a number of unions are parties to those agreements, and they are all negotiated based on the specific circumstances of that particular agreement. Now, to have a situation where potentially all those section 55 agreements may make their way into awards - if this matter is determined against Mr West's

submissions and in favour of Mr Flanagan, we believe would totally turn over the system that we have at the moment with safety net of awards, and then agreements on top of that.

PN165

As far as the approach from here is concerned, I mean, perhaps if I can just put maybe a layman's submission to you, and say that it would seem to me to be quite a common-sense approach for you to refer the matter to the President, particularly given the Full Bench's observations in the 2000 review of the wage fixing principles which Mr West has already quoted to you. And I would suggest that the Full Bench were making it quite clear there in that decision that it is not appropriate to put enterprise agreements, whether expired or not, into awards. They do say that there would be circumstances possibly where there may be exceptions to that, but certainly they would have to be exceptional circumstances in our view.

PN166

For those reasons, Deputy President, we certainly support the submissions of Mr West, particularly the first submission, that you refrain from hearing the matter, and secondly, if you are not disposed of that, that certainly you would refer a matter of this magnitude to the President to convene a Full Bench to deal with the matter to at least set principles, if the Full Bench is minded to Mr Flanagan's position on this matter, so the parties do know how they can deal with this sort of thing in the future, because it will certainly determine how employers face section 55 agreement negotiations on the basis that there may potentially be the option that those outcomes might find their way into awards.

PN167

THE DEPUTY PRESIDENT: Noticing any difference between the fact that it is an enterprise award, rather than an industry award?

PN168

MR WATSON: I don't believe - well, I don't speak for the company in this case, Deputy President, but - - -

PN169

THE DEPUTY PRESIDENT: No, but I am talking generally, in terms of the points you have made.

PN170

MR WATSON: But my observation would be that - and you know, this is my view, not the company's view - that had the company thought that this outcome was going to make its way into the award, they might well have adopted a different approach to the agreement negotiations if they had an agreement at all. If it pleases.

PN171

THE DEPUTY PRESIDENT: Thank you. Mr Flanagan?

PN172

MR FLANAGAN: Thank you, Deputy President. Deputy President, I wonder if we may be able to have a brief adjournment, perhaps 10 minutes? Mr Fraser needs to fix a parking arrangement, and that will give me an opportunity to think of a structured response to what has been put. So if we could just have a brief adjournment?

PN173

THE DEPUTY PRESIDENT: Certainly. We will reconvene at 25 to 1.

SHORT ADJOURNMENT [12.25pm]

RESUMED [12.40pm]

PN174

THE DEPUTY PRESIDENT: Mr Flanagan?

PN175

MR FLANAGAN: Thank you, Deputy President, firstly for that adjournment. I believe we have successfully stopped Hobart City Council from obtaining unnecessary revenue. Now, Deputy President, in respect of the submissions which have been put to you by Mr West, Mr FitzGerald and Mr Watson, we would urge the Commission to reject the proposition that either the application should be dismissed or that the application be referred to a Full Bench. And I think essentially at the heart of this matter is the nature of the application which is before you.

PN176

As I indicated very briefly when we commenced this afternoon, the intention of this application is to take the existing section 55 agreement and incorporate that existing section 55 agreement into the award. It is not the intention of the application to enhance or alter the employment arrangements which are in place at the moment. Now, in terms of the application, Mr West took you to a number of variances which he contends are in place with the application, compared to the existing section 55 application. And I will come back to that later on and respond to those positions in the submissions that he put, but I think the critical thing is for the Commission to understand that the intention is simply that the existing conditions within the section 55 agreement are incorporated into the enterprise award.

PN177

Now, what we say is that the incorporation of the existing section 55 agreement into the award is in fact consistent with and comprehended by the existing wage fixing principles. We say that there is nothing raised by this application which requires further consideration or review of the wage fixing principles at all, and that on that basis there is no reason why the Commission ought to refer the matter to the President. We also reject the interpretation that Mr West, as supported by Mr FitzGerald and Mr Watson, has put on section 24 of the Act.

PN178

What we say in relation to section 24 is if read correctly together with other statutory obligations which are contained within the Act, particularly in section 20, there is not, as is asserted by Mr West, a mandatory requirement for you to refer this application to the President. So dealing firstly - with having outlined to you the intention of the application, I think it is necessary to have a look at where the application fits in the context of the existing wage fixing principles, and I seek to provide the Commission with a copy of those principles.

PN179

THE DEPUTY PRESIDENT: We will mark that A2.

EXHIBIT #A2 WAGE FIXING PRINCIPLES

PN180

MR FLANAGAN: In A2, the first principle that I would take you to is principle 3, and what principle 3 requires is:

PN181

> *The Commission will continue to play an active role in encouraging and facilitating workplace bargaining.*

PN182

In that regard, in the exercise of its statutory responsibilities pursuant to section 36 of the Industrial Relations Act 1984:

PN183

> *The Commission will act to ensure that the proposed award or agreement does not -*

PN184

and it goes on to identify a number of issues. But it is clear from the expression "proposed award or agreement" that the Full Bench, in developing these principles, comprehended the possibility of an award being one of the mechanisms which would encourage and facilitate workplace bargaining. And we are here dealing with an application to vary an enterprise award, an enterprise award which has application to only one employer, and that is the respondent to the section 55 agreement that we seek to incorporate into that enterprise award. The next principle which is relevant is principle 4, the award safety net. Now, principle 4 says that:

PN185

> *Existing wages and conditions in the relevant award or awards of the Commission shall constitute the safety net underpinning workplace bargaining.*

PN186

So the word "safety net" is really quite significant, because this is an application to ensure that the safety net in the enterprise award is a relevant safety net. The principle continues:

PN187

> *The award safety net may -*

PN188

and that is the award safety net -

PN189

> *may on application be reviewed and adjusted from time to time to ensure its relevance.*

PN190

So what we are seeking to do, consistent with this principle and our rights under the Act, is to adjust the award to ensure its relevance to underpin workplace bargaining. The principle then goes on and says:

PN191

Generally, the detailed nature and timing of any adjustments -

PN192

and it doesn't say "salary adjustments", it says "any adjustments" -

PN193

will be determined in the context of specific applications and in the light of prevailing economic, social and industrial circumstances.

PN194

Now, the reference to "industrial circumstances" in the context of this application is, in our submission, a very relevant consideration for the Commission. I am of course, when I refer to the industrial circumstances, referring to the other proceedings in the Commission which are recorded in matter number T11939 of '05. Now, those industrial circumstances are not, in our submissions - and I don't intend to go back to them; the Commission is aware of them, Mr West is intimately aware of them, Mr FitzGerald and Mr Watson may not be - but in any event, there are industrial circumstances which are relevant to the application of principle 4, in our submission.

PN195

Now, given that the application is consistent with the wage fixing principles, we submit that it is not a matter which should either be dismissed or a matter which requires further consideration by a Full Bench. Now, it would be different, I would submit, if as a part of this application the union was actually seeking to increase rates of pay above and beyond the rates contained within the current section 55 agreement. In that situation, yes, a Full Bench would be required to consider such an application. But it is not the intention, and I don't believe it can be interpreted that the intention of this application or its effect is actually to increase the rates of pay.

PN196

In his submissions, Mr West pointed out to the Commission that the rates of pay identified in the union's application are in excess of the rates of pay for the relevant band which are contained in the section 55 agreement. That is a reflection of a very simple reality, and that is in the section 55 agreement where it identifies the rate of pay, that rates of pay in accordance with the enterprise agreement - industrial agreement, I beg your pardon - was subject to a further three and a half per cent wages outcome, which lifted both the minimum and maximum rate for each band.

PN197

THE DEPUTY PRESIDENT: So you are saying - make sure I get this right - that the wage rates in A1 are the wage rates that are currently being paid and are what is being paid as a result of the existing section 55 agreement?

PN198

MR FLANAGAN: That is correct. Yes, and it can simply be looked at in this sense: if one goes to the industrial agreement to page 21, it identifies under the

heading 1 July 2003 a lower and upper amount. Now, the agreement also provided for an increase of three and a half per cent. So that is all that we have done. Now, if the - - -

PN199

THE DEPUTY PRESIDENT: Okay. So when was the three and a half per cent applied?

PN200

MR FLANAGAN: I will just go to that, Deputy President. Okay. I am sorry - okay, it appears that the rate on page 21 is in fact adjusted to reflect the three and a half per cent. So I can understand then why the submission has been put that the matter should be referred to a Full Bench. However, there has been an error in the development of the application before you. It appears from examination now that in fact the figures that we have identified in A1 - which was in fact supposed to fix another problem - would provide for a wages outcome. That is not our intention and never has been our intention. We will provide to the Commission a further substitute for A1 in terms of the rates which are currently provided for in the agreement.

PN201

THE DEPUTY PRESIDENT: But what it will reflect is the actual rates paid at present?

PN202

MR FLANAGAN: That is correct. What we have done, Deputy President, is we have conducted a survey of rates of pay being applied to employees. We don't have all of the surveys back at this stage, but we have a substantial number of them back. And what they indicate is the rates of payment - pay that are being made to the employees, are within the range which is identified in the industrial agreement. And we are not seeking to alter that. We are not seeking to actually lift the rates by this application.

PN203

THE DEPUTY PRESIDENT: Some employees have received an increase of 2 per cent at least, haven't they? Are they included in the survey?

PN204

MR FLANAGAN: They are included in the survey, but we only have one of that area's forms back, and we intend to get the rest of them from the employees so that we can ensure that the effect of this application is not to disadvantage employees. But in terms of the nature of the application, the nature of the application is simply to translate the existing employment arrangements in the industrial agreement into the award so that the award is a relevant safety net award as provided for in principle 4.

PN205

THE DEPUTY PRESIDENT: But aren't you saying that the rates that are currently being paid are actually in excess of the rates that were provided for in the existing agreement?

PN206

MR FLANAGAN: No. No, I am not saying that. What I am saying is they are consistent with that. For example, in the industrial agreement, it identifies in level 1, rates of pay between $75,050 up to 95,050. Our survey indicates that

there are three employees on $95,050 and then employees range from 77,000 through to the 95,000. So by making an award with the rates which are contained within the industrial agreement, there is no change in fact.

PN207

THE DEPUTY PRESIDENT: So the new replacement page for your application will have the rates that are in page 21 of the agreement?

PN208

MR FLANAGAN: Yes, that is right. I regret any confusion that may have caused to the company. So that is the nature of the application, and such an application is not unique to this Commission. As Mr FitzGerald in particular would be aware, I will provide the Commission with a copy of a decision by Commissioner Imlach as he then was in relation to the Temco Enterprise Award which, like this award, is an award which applied only to one employer and is an enterprise award.

PN209

THE DEPUTY PRESIDENT: Thank you. That is A3.

EXHIBIT #A3 DECISION BY COMMISSIONER IMLACH IN RELATION TO TEMCO ENTERPRISE AWARD

PN210

MR FLANAGAN: And you will see, interestingly enough, Deputy President, that it was an application by the Australian Mines and Metals Association. And you will see that in paragraph 2 of the reasons for decision, Commissioner Imlach states:

PN211

> *In particular, the application sought to transfer into the award the rates of pay, shift allowances and travel expenses presently specified in the Temco Workplace Agreement 1996. The association -*

PN212

and that is referring to the Australian Mines and Metals Association -

PN213

> *submitted in support of its application that it did not offend the requirements of the Act, nor the principles of the Commission and its approval was in the public interest.*

PN214

Now, the only distinction between what occurred on this occasion and what the union is seeking to achieve on the application which is before you is that in the case of Commissioner Imlach's matter, there was consent. On this occasion there is no consent, but whether there is consent or not does not change whether the process we are applying is consistent with the requirements of the Act or the principles of the Commission. If it was consistent with those requirements for the Temco Enterprise Award at that time, we would submit it is also consistent on this occasion. I would also seek to submit - - -

PN215

THE DEPUTY PRESIDENT: Although of course the principles in 1998 would be different to the principles in 2005.

PN216

MR FLANAGAN: They were, I acknowledge that. But I will also provide you with a further decision if I may. It is a decision of Commissioner Abey in May of last year in the context of the current wage fixing principles, and it relates also to the Temco Enterprise Award.

PN217

THE DEPUTY PRESIDENT: Well, that is A4.

EXHIBIT #A4 DECISION BY COMMISSIONER ABEY IN RELATION TO THE TEMCO ENTERPRISE AWARD

PN218

MR FLANAGAN: Now, you will see it is again the Temco Enterprise Award. The decision is dated 1 May 2003, and you will see in paragraph 2 that Mr FitzGerald appeared on behalf of the company on that occasion. You will see in paragraph 3, it says:

PN219

> *Mr Flanagan explained wage rates and conditions of employment for employees of Temco is subject to an agreement registered pursuant to section 55 of the Act.*

PN220

Paragraph 4 states:

PN221

> *In accordance with the past custom and practice, the purpose of this application was to transfer into the enterprise-specific award salaries applicable under the previously expired agreement, effectively providing a safety net in the event that either party sought to retire from the existing agreement.*

PN222

And in paragraph 7 Commissioner Abey states:

PN223

> *I am satisfied that the application is consistent with both the wage fixing principles and the public interest requirements of the Act.*

PN224

Now, we say that those two decisions clearly demonstrate that the application which is before you, which is to roll into an enterprise-specific award with one respondent employer the terms of a section 55 agreement, in order that the enterprise award continues to be a relevant award safety net as comprehended by principle 4 of the wage fixing principles. And for that reason, the Commission should reject the assertions of Mr West that this application in some way offends the public interest.

PN225

Now, it has been put to you on a number of bases that firstly the matter should be referred to the Full Bench, and secondly - or firstly it should be dismissed, I think was the application, and secondly, if you won't dismiss it that it should be referred to the Full Bench. Now, I think in terms of the matter being dismissed, it is on the basis, as I understand it, in section 21(1) - (2) that the matter:

PN226

> *Further proceedings are not necessary or desirable in the public interest; or that, for any other reason, the matter should be dismissed or the hearing of those proceedings should be discontinued.*

PN227

In relation to that, having regard for the nature of the application, having regard to the practice of this Commission in relation to enterprise awards and the role of those awards as underpinning or enterprise bargaining, we should say that that submission should be rejected by the Commission. In relation to the proposition that the matter should be referred to the Full Bench, we reject the proposition by Mr West that the effect of the Act as it is currently structured is that you are compelled to refer the application to the President. And I think it was put that the effect of section (4C) is such that there is no discretion with the Commission.

PN228

What we say is that on its proper construction, that is not the effect of subsection (4C) of section 24, and that when read in conjunction with section 20(1)(a) that in fact the Commission is not required to embark upon the course proposed by Mr West. Now, in our submission, being construed correctly, the effect of section 24 is that if the Commission forms the view that another award would be directly affected by this application or that it is so important to the public interest, then in those circumstances it is appropriate for the matter to be referred to a Full Bench.

PN229

Clearly, in those circumstances there would be matters which extend beyond and involve considerations other than considerations which relate to one specific enterprise, and that is not the nature of the application which is before you. The nature of the application, as I have already detailed, relates to one specific employer. It has no effect on any other award of this Commission and it does not raise public interest considerations, as suggested by Mr West and supported by the other employers. What we say is that you can't read section 24 in isolation of section 20. Section 20 requires in subsection (1):

PN230

> *In the exercise of its jurisdiction under this Act, the Commission (a) shall act according to equity, good conscience and the merits of the case without regard to technicality or legal form.*

PN231

Now, the meaning of that expression is a matter which was considered by a Full Bench of this Commission in 1999, and I would seek to provide the Commission with a copy of that decision.

PN232

THE DEPUTY PRESIDENT: That will be A5.

EXHIBIT #A5 DECISION BY THE FULL BENCH IN RELATION TO SECTION 20(1) OF THE INDUSTRIAL RELATIONS ACT 1984

PN233

MR FLANAGAN: If I can take you to page 35 of that decision.

PN234

MR WATSON: What page was that?

PN235

MR FLANAGAN: Page 35.

PN236

MR WATSON: 35, thank you.

PN237

MR FLANAGAN: If I can take you to the second paragraph, the Commission states:

PN238

> *Like issues of public interest, the Commission's obligation to act according to equity, good conscience and the merits of the case is also a statutory duty.*

PN239

And then in the following paragraph, the Commission states:

PN240

> *In our view, the meaning of equity, as an expression of fairness, is not a matter subject to judgement by reference to abstract principles, whether they be of a broad or narrow application. Rather, we believe the concept must derive its meaning from objective appreciation of all the surrounding facts and circumstances of each particular case.*

PN241

So - and I guess the other relevant observation in fact is that which you were previously taken to in the review of the wage fixing principles in July 2000, and you were taken to page 47. Now, if I can take you back there again. And if can take you to - - -

PN242

THE DEPUTY PRESIDENT: Hang on. The review of the wage fixing principles in July 2000, I don't think a copy has been handed up.

PN243

MR FLANAGAN: I see. Well, I can't provide you with a copy.

PN244

THE DEPUTY PRESIDENT: No, I started to print one out in our adjournment, but it was 68 pages or something, and - - -

PN245

MR WATSON: Yes. That must be a compliment.

PN246

THE DEPUTY PRESIDENT: It is probably sitting there in the printer right now, so we could get it.

PN247

MR FLANAGAN: I can take you to the relevant extracts.

PN248

MR WATSON: I think we can get you a copy. It is 6 July 2000 - - -

PN249

MR FLANAGAN: Yes, that is the one.

PN250

THE DEPUTY PRESIDENT: And that was the review of the wage fixing principles that was actually really independent of the State wage case that - - -

PN251

MR FLANAGAN: That is right.

PN252

THE DEPUTY PRESIDENT: Yes, that was the consequence of - but it was an independent - it happened some months later.

PN253

MR WATSON: Deputy President, if I can assist, my recollection was that the matter was actually raised in the 1999 State wage case, and the Commission determined that they would not - the review of the principles with the State wage case, and they would view it in - - -

PN254

THE DEPUTY PRESIDENT: That is right.

PN255

MR FLANAGAN: We don't like to do it, but we agree with what Mr Watson just said.

PN256

THE DEPUTY PRESIDENT: Yes. I remember the exercise. Okay, thank you for that.

PN257

MR FLANAGAN: So if I can take you to page 47.

PN258

THE DEPUTY PRESIDENT: Now, is this a copy for me to keep or do you want it back?

PN259

MR WATSON: No, you can have that, Deputy President.

PN260

THE DEPUTY PRESIDENT: I mean - well, we will mark these, even though they are decisions of the Commission. That just makes things easier. And we will call this one A6. Now, what page number are we going to?

PN261

MR FLANAGAN: Page 47.

PN262

THE DEPUTY PRESIDENT: Okay.

EXHIBIT #A6 REVIEW OF WAGE FIXING PRINCIPLES, DATED 06/07/2000

PN263

MR FLANAGAN: Now, you have been taken in the third paragraph on that page which starts:

PN264

We will now turn to TTLCs submissions.

PN265

Do you have that paragraph?

PN266

THE DEPUTY PRESIDENT: Yes.

PN267

MR FLANAGAN: Now, you have been taken to the statement. As a matter of general principle, we believe it would be inappropriate to vary the Commission's awards to incorporate agreements, whether expired or not. However, we cannot say that there could never be any circumstances that might constitute an exception to that general statement. Such a determination could only be made after hearing the parties. In any event, for reasons already discussed, it is not open to the Commission by means of wage fixing principles to purport to prevent parties making such applications pursuant to the provisions of section 23 - which this application is - 24 and 25 of the Industrial Relations Act 1984.

PN268

So what we submit to the Commission is this. One, that when you are considering the exercise of your powers under section 24, it must be done in conjunction with the obligations under section 20, which have been fleshed out by a Full Bench of this Commission, and in the case of page 6, there is a clear recognition of the rights of the parties under the Act to make an application to vary an award, and there is a clear recognition that there might be exceptional circumstances such that it is appropriate for the application which is before you to be heard and approved by the Commission.

PN269

And those exceptional circumstances, if they be needed, are the conduct of the employer in the negotiations which have taken place, and those negotiations were of course the subjects of the dispute proceedings which were T11939 of '05. And that takes us I think - because in those proceedings, we made it clear that we regarded the conduct of Zinifex as an act of thuggery, as an act of tyranny and oppressive conduct, and that we will not accept a position where employees should be punished for acting collectively. That was the union's view.

PN270

MR WATSON: I remember thuggery, but I don't recall tyranny.

PN271

MR FLANAGAN: It was definitely tyranny.

PN272

THE DEPUTY PRESIDENT: There was three.

PN273

MR WATSON: Was there? Tyranny was in there, was it?

PN274

MR FLANAGAN: An examination of the dictionary I think will illuminate the accuracy of that terminology.

PN275

MR WATSON: I will read the transcript.

PN276

MR FLANAGAN: So as a matter of public policy, it is true that the Federal jurisdiction is concerned with the operation of cohesion of one party compelling another party to accept their terms as a part of the new employment arrangement. The Workplace Relations Act, as Mr West has taken you to, provides a codified process for protective industrial action, the negotiation and certification of agreements under that Act. But there is a clear contrast to be made between the focus of industrial warfare, which is a public policy position that has been incorporated by the Federal Government into the Federal Act, a clear policy difference when you contrast that to the State Act.

PN277

The State Act is not an Act structured - and nor has it ever been - around the concept of industrial warfare. It is structured around the concept of law and order, on the orderly resolution of disputes, on the role of the Commission in ensuring that the parties act in accordance with law and order. So there are some very different policy positions which are adopted by the State Government as compared to the policy position adopted by the Federal Government.

PN278

So as a matter of public interest and public policy, the Commission should, in our submission, embark upon a course which encourages and facilitates a lawful and orderly workplace bargain. And this application is consistent with the Commission encouraging that approach. We are not, in this application, asking the Commission to insert into the enterprise award matters which are not already contained within the expired section 55 agreement. We would have - - -

PN279

THE DEPUTY PRESIDENT: What about the omissions?

PN280

MR FLANAGAN: Well, there are - well, I need to have a look at them. For example, there were a number of clauses - - -

PN281

THE DEPUTY PRESIDENT: Performance reviews - - -

PN282

MR FLANAGAN: There were a number of clauses which were deleted deliberately because they replicated clauses which are currently in division 1 - as

we would propose to call it - of the existing award. The shop stewards, notice boards, they are already in the award. So they haven't been duplicated. The superannuation difference, I can't recall, but if I go to the list of the issues that were raised by Mr West there - I think the first thing was that we seek to change the rates of pay to convert the award from $600 a week to $98,000 a year like explained, the intention there, to the extent that the application doesn't reflect that intention. We will provide you with an amended application. There is some discussion about cashing in of sick leave in clause 47 of the application.

PN283

THE DEPUTY PRESIDENT: The cashing in of annual leave, which is at (h)(i), I think, not (i).

PN284

MR WEST: If it would assist Mr Flanagan and the Commission, I am happy to quickly highlight those changes again. There was the issue of the omission of paragraph (g) from clause 19, which dealt with performance reviews, clause 36 - - -

PN285

MR FLANAGAN: If I could just pull Mr West up there. Are you working off the agreement or the award application?

PN286

MR WEST: I refer to the variation, Deputy President, and in clause 36 of the variation there is the omission of what was paragraph (g) of clause 19, which is the bit that relates to performance reviews.

PN287

THE DEPUTY PRESIDENT: Now, is that duplicated in the award?

PN288

MR FLANAGAN: Yes. And look, that is deliberately removed because that aspect of the current agreement relates to how you get pay increases.

PN289

THE DEPUTY PRESIDENT: Sorry?

PN290

MR FLANAGAN: It relates to how you get a pay increase.

PN291

THE DEPUTY PRESIDENT: Yes?

PN292

MR FLANAGAN: This application doesn't seek to achieve pay increase, and the arrangements were in place for the life of the agreement, which was that two-year period.

PN293

MR WEST: The next change was paragraph 40 of the variation, changes to the words of paragraph (b):

PN294

The following additional notice provisions will only apply to the termination of employment due to redundancy throughout the life of this agreement.

PN295

That has been changed to "throughout the life of the award". So that is changing a definite period to an indefinite period. And also the deletion of (ii) - paragraph - - -

PN296

MR FLANAGAN: What was that, sorry?

PN297

MR WEST: In the agreement, it says:

PN298

This provision will cease to operate from the expiry of this agreement on 1 August 2004.

PN299

And that subclause - or paragraph - has been deleted in the award. So that whole provision in fact has ceased to operate under the terms of the agreement. So anything that is put there is not in accordance with the agreement as it currently stands.

PN300

MR FLANAGAN: I will have a look at that.

PN301

MR WEST: At the bottom of - sorry, under Classification Structure at clause 41 of the variation, which relates to clause 14 of the EBA, there is a deletion of references to apprentices. Some of these aren't necessarily against the company's interest, I might add, Deputy President. I was just pointing out the differences.

PN302

THE DEPUTY PRESIDENT: Yes.

PN303

MR WEST: Deletion of apprentices, paragraph (c). Got that?

PN304

MR FLANAGAN: No, I am unclear about it. I have actually got an apprentices provision which I thought was the - - -

PN305

MR WEST: Maybe it has been moved. I am just pointing out the differences.

PN306

MR FLANAGAN: All right.

PN307

MR WEST: There is no paragraph (c) in clause 41 of the variation, and there is a paragraph (c) in clause 14 of the agreement, and that clause deals with apprentices. There may be a reason for it, but - - -

PN308

MR FLANAGAN: No. I would suggest that that is an oversight. Whatever the current arrangement is with apprentices, we would seek to continue.

PN309

MR WEST: Mr Flanagan has already addressed the issue of wage rates in the rates table, so that is another difference. Salary adjustments has been deleted. That was clause 15, presumably because at the time - - -

PN310

MR FLANAGAN: As it currently stands - it is the same as the redundancy provision - it has no current application.

PN311

MR WEST: Under Superannuation, subclause (c) of clause 17 of the agreement is deleted.

PN312

MR FLANAGAN: Could you tell us what paragraph (c) actually says?

PN313

MR WEST: It says:

PN314

> *From 1 July the company will make contributions consistent with the definitions of ordinary time earnings under section 6(1) of the Superannuation Guarantee Administration.*

PN315

MR FLANAGAN: That is an oversight.

PN316

MR WEST: Under Meal Breaks, clause 46 of the variation, which is clause 19 of the agreement, there is no provision for meal breaks for 12-hour continuous shift workers.

PN317

MR FLANAGAN: Again, we would seek to maintain the existing arrangement there.

PN318

MR WEST: And as you have pointed out already, there are clauses 26, 27 and 28 of the agreement deleted. They are references to grievance process and notice boards and shop stewards - - -

PN319

THE DEPUTY PRESIDENT: They are already in the award.

PN320

MR WEST: - - - which are - presumably because they are in the award.

PN321

THE DEPUTY PRESIDENT: So in effect, Mr Flanagan, everything is the same excepting for those things that are already dealt with in the existing award and those things that can have no application. For example, the method of determining wage increases.

PN322

MR FLANAGAN: That is right. What we have attempted to do, and not very well, I can see - is we have simply attempted to take that 55 as it stands and put it into the agreement, where there is - put it into the enterprise award - where there is duplication, we could see no reason to continue duplication. Where matters no longer have operation, such as the additional - or the location allowance and the performance reviews, because they don't have any current application, that was removed. But the relocation allowance should have been as well. So we don't seek to actually change what is in place at the moment.

PN323

THE DEPUTY PRESIDENT: Are going to put in a further amended application?

PN324

MR FLANAGAN: Yes, to reflect that. Okay. So in summary, what we say is with the application properly understood, then - and for the reasons we have detailed - there is no obligation for the Commission, on the basis suggested by Mr West, that the application should be dismissed or that it should be referred to the Full Bench. Now, it was asserted by Mr FitzGerald that the application was inconsistent with wage fixing principles. As we have indicated, we reject that entirely. It was asserted that it should be referred. For the reasons we have detailed, we say it should not.

PN325

Mr FitzGerald said that this is a prominent award and it would have some precedent or implication for other awards. Well, in our submission, it is not a prominent award. It was a prominent award when the unions were of the view that it represented the industry award. We now have an industry award. It is now very much an enterprise award specific to one enterprise, and carries with it no precedent value and no implication for any award of this Commission. Mr Watson put it to you that the submissions of Mr West were "comprehensive and convincing". They were certainly comprehensive. We reject the proposition that they were convincing.

PN326

Mr Watson put it to you that the application before you was unprecedented, that it was unprecedented for a Commission to arbitrate. What we say to you is the application before you, for the reasons we have detailed this afternoon, are consistent with the wage fixing principles, comprehended by the Full Bench, reflects a practice applied elsewhere to an enterprise award. The only distinction between this application and the case and circumstances of Temco is in the case of Temco, where it was put by Mr FitzGerald that it was consistent with both the wage fixing principles and the Act. The only difference is that on this occasion we don't have consent. That is the only difference. So it is not - - -

PN327

THE DEPUTY PRESIDENT: Well, actually, that hasn't been formally put to me yet, that there is no consent to this application.

PN328

MR FLANAGAN: Well, I have presumed that, but - - -

PN329

MR WEST: We can clarify that in the twinkling of - - -

PN330

MR FLANAGAN: Okay. It has also been put to you that the Commission should encourage - by Mr Watson - should encourage parties to bargain. And we accept that proposition, but this in fact is an exercise in the Commission's role, its responsibility to ensure that enterprise awards are relevant safety net awards for the purposes of enterprise bargaining. That is all this application seeks to achieve. It has also been suggested to you that if section 55s were rolled into the award, that in some way this is going to dramatically change the system of industrial relations in Tasmania.

PN331

We would submit that that is not the case. There are only a small number of enterprise awards which could find themselves in situations similar to this. There is the Goliath Cement Award, Temco, the Zinifex Rosebery; Zinifex Hobart Smelter is not an enterprise award in the context of one employer, we would assert. Some may have a problem with that.

PN332

THE DEPUTY PRESIDENT: Impact Fertilisers.

PN333

MR FLANAGAN: Impact - there is a very limited number. Certainly it would be difficult to see how a section 55 would be rolled into the Metal and Engineering Industry Award. It is simply an incorrect assertion, we would say, by Mr Watson that the face of industrial relations in Tasmania will change as a consequence of the Commission dealing with this application in relation to this enterprise award. And in those circumstances, it is not a new ball-game, and it is not outside the parameters - - -

PN334

THE DEPUTY PRESIDENT: Is it from left field, though?

PN335

MR FLANAGAN: Well, I am not often accused of that, I can assure you, Deputy President, but - except by Mr FitzGerald. It is not an application which creates a new environment. If the application actually sought as a part of the process to increase rates of pay above and beyond what employees are currently earning - and that is not what the application seeks to do - but if it did seek to do that, then in those circumstances, yes, it would be outside the parameters, arguably, of the wage fixing principles. So in that situation you may need to have further consideration of the issue by a Full Bench. In any event, that is hypothetical. The reality is this application is not of that nature. It is simply seeking to insert the existing conditions of employment. Now, Mr West had a fair bit more to say than Mr FitzGerald or Mr Watson, so I have left him until last.

PN336

THE DEPUTY PRESIDENT: Okay. Now, how much longer do you think your submissions are going to take, Mr Flanagan? People are probably ready - - -

PN337

MR FLANAGAN: Well, I have probably got to find - look - - -

PN338

THE DEPUTY PRESIDENT: A while?

PN339

MR FLANAGAN: Well, I am not entirely sure. I will have to basically go through each point that he has made.

PN340

THE DEPUTY PRESIDENT: Well, I suggest that we adjourn and have a break at this stage.

PN341

MR FLANAGAN: Yes, that is fine.

PN342

THE DEPUTY PRESIDENT: I don't really like to cut people off mid-submission, but in view of the time - - -

PN343

MR FLANAGAN: No, I am content with that.

PN344

THE DEPUTY PRESIDENT: - - - I suggest that before you go on to Mr West's points that we adjourn until a quarter to 3.

PN345

MR FLANAGAN: Thank you, Deputy President.

PN346

MR WEST: Deputy President, I wonder if - I am conscious that Mr Flanagan is going to address all of my points and there are flights, could we have a shorter adjournment than that so that - can I make a suggestion, say about a quarter past or half past 2? Just enough time to grab a sandwich.

PN347

THE DEPUTY PRESIDENT: And that is because you want to get a flight?

PN348

MR WEST: I have got a flight home. It is Good Friday tomorrow and there aren't many available alternatives, and if he goes too long - and he might do that on purpose. He wouldn't, I suppose, but I just - you know, if we could maximise the time we have got after the adjournment, I would be grateful to the Commission for their indulgence. So I would suggest a quarter past 2, but - - -

PN349

THE DEPUTY PRESIDENT: Well, it had actually been my intention to make a decision on these threshold matters today, and to - depending upon how long the submissions took - to have an adjournment in a couple of hours and then reconvene after then. That would throw out your Easter - - -

PN350

MR WEST: Well, I would - - -

PN351

THE DEPUTY PRESIDENT: - - - which is not necessarily a consideration, but I might be sympathetic.

PN352

MR WEST: Well, Deputy President, it would be unfortunate for you to form that view without hearing my reply, for a start. Secondly, well, we would want to reserve our positions to make submissions about what you did when and if you make that decision. If that be the case, so be it. I am merely asking for a shorter adjournment now, that is all.

PN353

THE DEPUTY PRESIDENT: You are asking for a shorter adjournment so that the day could finish earlier. I am merely making the point that I was considering making the decision today to indicate that it wouldn't be an early finish in any event. Given how long this has taken, it is beginning to look as though it might not be possible for me to have those couple of hours in which to consider what has been said today before arriving at a decision.

PN354

MR FLANAGAN: Perhaps before we break, if I can just have a quick look at what has been put. I mean, it may not take so long. Deputy President, we would support the application for a briefer adjournment. If the matter could come back on at 2.15 then it may be that I can move through this reasonably quickly, in which case you will have your couple of hours. It may be that it takes longer, in which case nothing would turn on it anyway.

PN355

THE DEPUTY PRESIDENT: We will adjourn until 2.15.

LUNCHEON ADJOURNMENT **[1.40pm]**

RESUMED **[2.20pm]**

PN356

MR FITZGERALD: Deputy President, Mr Watson has been delayed and he should be back by about 3 o'clock, but he has asked me to pass on his apologies.

PN357

THE DEPUTY PRESIDENT: Thank you, Mr FitzGerald. Okay. Now, my last note from my bench book says, "Mr West said," so you were about to quote from Mr West.

PN358

MR FLANAGAN: Yes, that is right, Deputy President. Can I make this observation? It has become clear during the course of the proceedings today that much of the company's submissions were predicated on - and I don't want to put words into their mouth - but appear to be predicated on their understanding that the nature of the application was one which was designed to actually increase in real terms by three and a half per cent the bands which are currently in place. As I have indicated that wasn't the intention. So to some extent there may be parts of the submissions which were put by the company which, in the context of what is now clearly understood as a status-quo application, may not be so relevant.

PN359

I think that the first point there is that Mr West identified a number of issues which he saw as uplifting or enhanced arrangements on the existing agreement, and as I had indicated on transcript, that is not the intention. So in that context of the proposition that we were pursuing enhanced arrangements, I just confirm that we are simply seeking the status quo, in real terms as it currently exists, and clearly there were a couple of provisions in terms of a relocation allowance and also performance reviews which, whilst in the body of the agreement, no longer actually have effect, so for that reason are deleted.

PN360

Now, it has been put to you by Mr West that the role of the Commission is to encourage and facilitate enterprise bargaining; that there are wage fixing principles which guide the Commission on how that should occur, and we accept that, and in fact we say, contrary to the assertion of Mr West, that this application is not consistent with principle 4; we say in fact it is consistent with principle 4.

PN361

Mr West also took you to section 170N - well, he didn't take you to it, but referred to section 170N of the Federal Act and indicated that under that legislative framework the Federal Commission was not entitled to arbitrate outcomes from enterprise bargaining; that that approach represented the public interest and public policy, and as a consequence this Commission should not involve itself in an arbitral process.

PN362

Again we would go back to the position that we put previously, and that is that there is a clear distinction between public policy at a Federal level and public policy at a State level, and that in encouraging enterprise bargaining in the context of the Tasmanian jurisdiction, the obligation on the Commission in principle 4 is to adjust the award safety net, on application, from time to time, having regard to a number of factors, including industrial considerations. We say that in the context of this application it is clearly appropriate for the Commission to grant a status quo variation to the existing safety net enterprise award.

PN363

Now, Mr West put submissions to you in relation to the fact that at the moment, whilst the section 55 is expired, neither of the parties have sought to retire from it and that in those circumstances the making of a status quo award, or a variation of the award to achieve that effect would in fact have no effect. But we say that in adjusting the award, in varying it as discussed today, to give effect to the status quo, in fact that is making the safety net award a relevant safety net award: relevant in the circumstances where either party does in fact take that step of retiring from the enterprise agreement, and also very relevant in the context of the Federal Act.

PN364

Mr West has put it to the Commission on a previous occasion that - and indeed referred to it again today - that the company have filed certain documents to initiate a bargaining notice to pursue an agreement, I think from recollection under division 2 of the Workplace Relations Act. At the end of the day, whilst we don't concede or accept that there is any operative Federal jurisdiction at play - but, if hypothetically we found ourselves in the situation where there was to be a certified agreement registered, or certified in the Federal Commission, there is an

obligation under that Act which is called the no disadvantage test - and I just provide the Commission with a copy or an extract of what I believe is the current relevant provision of the Act, but that Act has been subject to some substantial amendment and rumours of further substantial amendment. The relevant - - -

PN365

THE DEPUTY PRESIDENT: We will call this A7.

EXHIBIT #A7 EXTRACT OF CURRENT RELEVANT PROVISION OF THE FEDERAL ACT RE THE NO DISADVANTAGE TEST

PN366

MR FLANAGAN: The relevant parts of this extract on the no disadvantage test are that it defines "award", towards the bottom of the page, the third-last definition:

PN367

Award includes a State Award.

PN368

And that is not unimportant. If I can then take you over to section 170XA. It states:

PN369

An agreement passes the no disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment.

PN370

It then continues in subsection (2):

PN371

Subject to sections -

PN372

and I won't go through them -

PN373

an agreement disadvantages employees in relation to their terms and conditions of employment, ie, if its approval or certification would result in a reduction in the overall terms and conditions of employment of those employees under relevant awards or designated awards.

PN374

So the application which is before you does in fact serve a very real purpose in the context of the State jurisdiction. If the parties retire from a section 55 agreement, then there will be a safety net there for employees. It doesn't go so far as to provide employees with a wages outcome, or actual improvements in conditions of employment. That would be left to the enterprise bargaining process, or in the absence of a satisfactory result by that approach, other applications that the parties may seek to make to vary the award in accordance with the Act.

PN375

So in the context of the State jurisdiction an underpinning safety net award is very important. In the context of the Federal jurisdiction - and I affirm that it is not our intention to go there, but in the context of the Federal jurisdiction, the award safety net is also very important for the purposes of the no disadvantage test under that Act.

PN376

Now, one of the submissions that Mr West made was that - and I think this was put in the context of his understanding at that time - that the effect of the application was to increase rates of pay by three and a half per cent. He said, though, that this application can change the nature of wage fixing in this State; that in those circumstances it would require a Full Bench consideration of the issue, and really, he questioned the role of the Commission in that context, asserting that arbitration in that sense would take us back to another time in industrial relations.

PN377

We don't concede that it would take us back to another time. What we assert, and assert very strongly, is that under the Act there are processes for the orderly and lawful resolution of industrial differences, and if that relates to the terms and conditions of employment, then the Commission has the authority under the Act to vary awards, to respond to applications that parties make.

PN378

So I think that really they are the only issues that Mr West has raised that I haven't dealt with already in the submissions I made earlier today, Deputy President. So in those circumstances we would simply say, one, that the application should not be dismissed; secondly, the matter should not be referred to a Full Bench. It is well within the scope of the Commission as it is currently constituted to hear this matter. The proposition contained in his written submissions in relation to section 35 also should be rejected. Section 35(1)(c) requires that a Full Bench, in respect of making provisions for, or altering provisions for the amount of annual leave, the payment of wages during annual leave, and a range of other matters - but in subsection (2), as was pointed out by Mr West:

PN379

> *Subsection (1) does not apply where a provision of, or an alteration in, an award or industrial agreement gives effect to matters, or is in accordance with principles, determined by a Full Bench.*

PN380

As I indicated, this application, in our view, is an application in accordance with principle 4 of the wage fixing principles, therefore section 35(2) is applicable to the matter which is before you. I would simply leave our submissions at that, thank you, Deputy President.

PN381

THE DEPUTY PRESIDENT: Thank you. Mr Fraser?

PN382

MR FRASER: Thank you, Deputy President. Deputy President, the CEPU - we don't have any further to add to what Mr Flanagan has already said. Suffice to say that the CEPU supports Mr Flanagan in his application. Thank you.

PN383

THE DEPUTY PRESIDENT: Thank you. Mr West?

PN384

MR WEST: Yes. Well, what has emerged from Mr Flanagan's submissions is a different application to the one filed in this Commission. The application as filed made provision for, significantly, a three and a half per cent pay increase. Mr Flanagan has attributed that to a mistake on the part of the union. Nevertheless, understandably the employer reads an application in its terms and sees, in the context in which this matter has arisen, an uplifting of its existing EBA terms and conditions, plus 3 per cent on the rates and makes the understandable assumption that this a wage claim being pursued. That is the first thing I want to say.

PN385

It appears from the exchange between Mr Flanagan and I in relation to the differences that were apparent in the application and the existing EBA that there is some further work for the union to do in reconciling the two. So if this matter is to proceed beyond today by whatever means, whether to be heard by you or to be referred to the President, then we would be submitting very strongly that the union ought to be filing a properly-amended application. Having said that, Deputy President, you observed at one point during Mr Flanagan's submissions that the company hadn't indicated that it wasn't prepared to consent to the application. Well, I confirm that it doesn't consent to this application.

PN386

THE DEPUTY PRESIDENT: Will it consent to an application that simply reflected the current conditions?

PN387

MR WEST: No. No, it won't, and there are a number of reasons for that. But, I mean, the purpose of the application before you is not to debate the merits of this particular application the union are making, it is to press an application on our part that you refrain from dealing with a matter or dismiss it, or alternatively, that you refer it to the Full Bench. There is a fundamental flaw in what Mr Flanagan has spoken to you about. The issue here is not about whether there is an award or there is not an award; that is by and large irrelevant. The Temco cases that he referred to were consent applications, quite plainly on the decision they were consent applications, to convert an expired agreement into an award.

PN388

Commissioner Abey, I think, dealt with those applications which satisfied that they did not conflict with the wage fixing principles. I have no difficulty with that. Enterprise bargaining is a matter of reaching agreement between the parties, and the way in which that agreement is given legal effect is a matter for the parties, and there are various options available. There are section 55 agreements, there are common rule agreements, there are agreed policies that can be applied, there are consent awards which are very common in every jurisdiction that I am aware of. Consent awards are a common way of consummating agreements.

PN389

The issue here is about consent. The vice that we complain of is not whether there is an award or not an award, it is whether or not the union can come to this Commission and have a result imposed on us that we do not consent to. That is the issue. That is the issue that infringes the wage fixing principles. To have us -

if we are prepared to agree to a particular arrangement, that is our business. The Act gives us an ability to reflect that. But if we do not agree, then the union is asking the Commission to tell us we must do things, and in order to do that, it must comply with the Act and we would submit, comply with the principles established by Full Benches for the handling of that, and that is the essential difference.

PN390

Now, it doesn't alter our primary submissions about this at all, that the union is now saying all they seek in the agreement is an uplifting of the existing EBA conditions without any variation. And if that is properly considered, what their application is, we would still oppose it. I pointed out that the first fundamental difference in the nature of the application was the fact that you convert an agreement into an award and you change legal rights substantially. The award then becomes the property of the Commission, not of the parties. The rights accorded to the parties to retire or not retire from agreements, to amend and vary and so forth, are not available in the same way under an award as they are under an agreement, and in those circumstances, that change of itself is enough for us to object to it.

PN391

But Mr Flanagan's submissions, in my submission, weakened the union's case not strengthened it. There is no suggestion here that any tangible outcome will result for the employees. This is an argument about the form of the instrument governing the employment. It is not an argument - there is no - and this comes to a further consideration that has only emerged in the course of the proceedings. The jurisdiction to make an award depends on the existence of a dispute, and it has got to be a dispute about the modes and terms and conditions of employment, if I recollect the provision.

PN392

THE DEPUTY PRESIDENT: I don't think that is the case in this Act, unless you can - - -

PN393

MR WEST: Well, just hang on.

PN394

THE DEPUTY PRESIDENT: Section 23 has got reasons in there.

PN395

MR WEST: Well, I won't go into it as - I won't put it to you as a jurisdictional point. I will simply reserve on that point, because I haven't had time to properly develop the argument. But I will put it to you more as a discretion point. The purpose of making agreements, by and large, is to resolve issues about terms and conditions of employment. And this is a matter that has been raised in argument in other matters that I have been involved in before you, Deputy President, about matters affecting terms and conditions of employees' employment. There is no issue here about that. There is no disagreement.

PN396

We have got an agreement in a written document registered by this Commission resolving that, and the union's application is not to change anything in that; it is just simply an argument about whether it is in one statutory instrument or another. Now, the statutory instrument that is already in place has two very important

features about it. One is that it does give legal enforceability to all those terms and conditions as is. There is no necessity to do anything in order to ensure that those employees at Rosebery Mine enjoy those terms and conditions. They are already there in an instrument registered in this Commission.

PN397

THE DEPUTY PRESIDENT: But you yourself pointed out that either party could choose to retire at any time, and an industrial matter actually relates to - or the dispute relates to actual or impending or threatened, etcetera. So there could be a dispute if the company for example chose to retire from the agreement.

PN398

MR WEST: Well, theoretically.

PN399

THE DEPUTY PRESIDENT: I mean, you have raised this hypothetical situation with a party retiring from an agreement.

PN400

MR WEST: I am not raising anything hypothetical. I am raising an absolute, ascertainable fact. There is a 55 agreement in place. It regulates terms and conditions of employment. It is an enforceable industrial instrument. My instructions are that the company has no intention to withdraw from it. I didn't hear Mr Flanagan say he was going to. And so yes, hypothetically - but I had assumed that this Commission didn't work on the basis of hypotheticals. I had assumed it would work on the basis of facts, and the facts are it is there, we are honouring it, there is no stated intention to remove from it, and while it remains there, any award you make is of no legal effect. Section 60 says that agreement overrides it. The award only has work to do if the agreement goes.

PN401

There is a provision in the Act that requires one month's notice to be given of any party retiring. Now, if one or other of the parties retire, and the agreement ceases to be a legal instrument in a month's time, well, maybe in that hypothetical circumstance, hypothetically the union could apply to do what it is doing now. But the point is, that is not the case, and the fact is that if you proceed to make an award, it won't have any legal effect. Now, why would the Commission do that? Mr Flanagan raises, as a sort of a justification, "Oh, it is a safety net." That submission totally misconstrues the nature of what a safety net award is.

PN402

As this Commission well knows, the sort of safety net that is talked about in State wage fixing principles is not entrenching people's actual wages and conditions. It is about a fair underpinning set of conditions leaving scope for adequate bargaining. And the idea that you would uplift all of the terms in the current registered agreement, put them in the award in the name of updating the safety net is just totally and utterly inconsistent with the whole concept of a safety net. The fact that you would do it, as invited by Mr Flanagan, for the purpose of providing a more appropriate comparative for the no disadvantage test in the hypothetical circumstance, according to Mr Flanagan, that there would be a Federal certified agreement, that submission invites you to go into error.

PN403

It is not available to you - to this Commission - to be exercising its powers under the Tasmanian Industrial Relations Act to provide the union with an advantage in

the Federal system. It has got no legislative charter to dabble in that at all. It is about encouraging enterprise bargaining under the State system, and that means supporting section 55 agreements. So the idea that, you know, if the union got the section 55 agreement converted to an award it would have a better award for the no disadvantage test Federally is a totally - is a purpose totally outside the purpose conferring power on this Commission and you would not even give consideration to that.

PN404

Now, the issue of public policy was raised and somehow Mr Flanagan, for his own reasons, sought to characterise that as some sort of, you know, debate about whether or not the Federal Government's attitudes politically are the same as the State Government's attitudes politically. The political debate is entirely a furphy. The public policy that I talked about in my submissions is the public policy to be discerned from the terms of the Tasmanian Industrial Relations Act and the public policy to be discerned from the State wage fixing principles set down by this Commission.

PN405

It is not about whether, you know, Mr Abbott or Mr Reith or Mr Andrews has got particular views, or whether the State Government have or not. That is not what public policy is about. Public policy is about looking at the objectives of the Act and the body established under the Act, what it purports, and those policies are quite clear. The Act is to encourage enterprise bargaining, the principles are established under the Stage wage fixing system to encourage enterprise bargaining and to set minimum safety nets. That is the public policy I am talking about, and to try to characterise this as some sort of, you know, Federal political debate over industrial relations is not what we are on about at all.

PN406

Now, to come back to another submission about the nature of the reference to a Full Bench, or the request for the reference of the matter to the President is the appropriate application we make. It is for the President to make a decision about whether it is a Full Bench or not. We simply ask the President to do that. Mr Flanagan seems to suggest that you should read down the wording of section 24(4C) in light of section 20(1)(a). Now, that is just a preposterous piece of statutory construction. Section 20(1)(a) talks about what you can do within your jurisdiction:

PN407

> *In the exercise of your jurisdiction under the Act you can act according to equity and good conscience and the merits of the case.*

PN408

I mean, that is standard fare for industrial tribunals. You don't - that you get to the merits of the case the best way possible. You don't get stuck in all the technicalities of applying courts of law, but that is not a licence, as Mr Flanagan seems to think, for just ignoring the provisions of the Act, because those things occur in the proper exercise of jurisdiction where jurisdiction is determined by the Act, and the Act is quite clear.

PN409

The debate about the meaning of the word "must" in contradistinction of the use of the word "may" is one that has been had and resolved eons ago. If the Act

talks about someone "must" do something, and in another section it says they "may" do something, it quite clearly indicates that where "must" is used, it is compulsory, or there is no discretion, and where the word "may" is used, it is discretionary. Section (4C) says:

PN410

The Commission must refer an application to the President if requested by a party.

PN411

THE DEPUTY PRESIDENT: Can you just take me back to your argument before where you were saying that (4C) only applies in respect of - if the application for a reference to the President is made before the commencement of the hearing, but not - in effect you were saying that the reference in (4C) to it being subject to subsection (4D) - - -

PN412

MR WEST: Yes.

PN413

THE DEPUTY PRESIDENT: - - - doesn't apply because you had notified your intentions before the commencement of this hearing. Now, (4C) doesn't say that it is subject to anything other than (4D). So it doesn't say that that only applies in respect of an application made before a hearing or after a hearing or during the hearing or whatever.

PN414

MR WEST: That is right.

PN415

THE DEPUTY PRESIDENT: The only thing that it is subject to - - -

PN416

MR WEST: Is (4D).

PN417

THE DEPUTY PRESIDENT: - - - is (4D).

PN418

MR WEST: But the thing is, (4D) is limited to what happens after the commencement of the hearing. You see, (4D) is not - the discretion under (4D) is not at large. The discretion under (4D) is available once the hearing has commenced, and that makes sense to me. I understand that you wouldn't have references being made to the President as of right once the hearing gets under way. I mean, the onus is on the parties before you start dealing with the matter to raise those sorts of issues at the outset. Now, if something emerges during the course of a hearing, as if something emerges during the course of this discussion today, then it may be that there is still a basis to refer it to the President, but that is a matter for the member then to decide.

PN419

What (4A), (4B) and (4C) do is confer on a party the right to ask that a matter go to the President. So subsection (4) itself says that the Commission can do it of its own initiation if the circumstances in subparagraphs (a) and (b) are satisfied, and a party can initiate an application itself, but it has got to do something; it has got

to serve a notice on the Commission to tell the Commission - put the Commission on notice, and the parties, that it is going to make that application.

PN420

But having done that in the Commission - unless the circumstances talked about in (4D) are involved, the Commission is required to refer it to the President, and the circumstances in (4D) are that the matter must have - the hearing must have commenced, and once the hearing of the case is - the hearing of the application itself has commenced, and quite rightly, then the Commission can then exercise a discretion, whether it is appropriate to refer a part-heard matter to the President, bearing in mind the factors that are referred to.

PN421

Now, I think that the construction of that is perfectly straightforward and the idea that in any way that is qualified by the discretion available to the Commission to act in equity and good conscience is just really a nonsense. So - - -

PN422

THE DEPUTY PRESIDENT: Look, I would agree with you there, that the requirement to act according to equity and good conscience does not override the requirement to comply with what the Act says that the Commission must do.

PN423

MR WEST: Yes.

PN424

THE DEPUTY PRESIDENT: I am not aware of this having been tested before, what this section 24(4), (4A), (4B), (4C) and (4D) actually mean. I am not aware of any other cases or it having been argued before in this jurisdiction at least, and I am not even aware whether similar provisions apply in other jurisdictions.

PN425

MR WEST: Yes, well, there are - - -

PN426

THE DEPUTY PRESIDENT: I mean, on the face of it, it does say in (4C) that if you have requested - if a party has requested a reference to the President, then the Commissioner must comply with that request.

PN427

MR WEST: That is what we would say the Act means. There is an almost identical - there is a provision in the Federal Act with the same result - if you would bear with me I would be able to find it - which enables a party in proceedings before the Federal Commission to ask that the matter be referred to the President, and that is mandatory as well.

PN428

THE DEPUTY PRESIDENT: I still don't know why (4C) says that it is subject to (4D).

PN429

MR WEST: Because (4D) gives the Commissioner discretion to say no if the hearing is already commenced, and that is - Deputy President, that seems to me perfectly understandable. If the matter hasn't started yet, then it goes to the President. If the matter is part heard and the parties are already into the case and someone stands up and says, "I want this to go to the President," it seems to me

perfectly logical that that would be a matter for the member to decide, because as you say, it is open to abuse.

PN430

I mean, if you have got no discretion, then I could jump up all the way through a part-heard matter and keep referring it to the President, and you would just have to keep taking it there, if that makes sense. Equally, though, if the application is made before the hearing in the way we are asking, the issue about who deals with it from the outset is appropriately the President, and so if a party asks for it, it should go to the President, the President then decides, because ultimately the role of the President under the Act is to make the decisions about who deals with particular matters. So to me it all hangs together perfectly logically.

PN431

THE DEPUTY PRESIDENT: But the President may well send it straight back to me.

PN432

MR WEST: Well, that is, of course, a decision for the President. We don't say that the Commission - sorry, the President, is bound to do anything.

PN433

THE DEPUTY PRESIDENT: There is no requirement for the President to have a hearing or anything of that nature before making that decision.

PN434

MR WEST: No, and similar to the provision of - - -

PN435

THE DEPUTY PRESIDENT: It is just simply a matter of the allocation of the files, or the application.

PN436

MR WEST: That is right. The President - and that is the reason why I set out in an exhibit the - lest you wanted to take it to the President today and there were no transcript available, for example, that at least the President would have some idea of the reasons why we are asking for a Full Bench. But, I mean, we are not really asking it to go to the President; we are not really asking for it to go to a Full Bench. What we are asking that the matter not proceed at all.

PN437

THE DEPUTY PRESIDENT: Yes.

PN438

MR WEST: What we are saying is, if it does - - -

PN439

THE DEPUTY PRESIDENT: That is your secondary argument.

PN440

MR WEST: Well, we say that if this has to be heard by the Commission, if there has to be an arbitration trying to impose on us what we would otherwise - we have otherwise agreed to, then it is appropriate to be dealt with by a Full Bench, because this is not proceeding as a consent matter. It is not the Temco case; it is a situation where we do not want an award and we are content to remain with the agreement and we say the idea that the Commission would impose that on us, and

all that goes with it, all the consequences of an imposed set of conditions that we are not agreeing to in that form, is a matter that goes to the nature of safety net awards, the role of enterprise bargaining, the arbitration during a bargaining period issue with the Federal bargaining periods in place, and the other matters that I have put to you.

PN441

We would rather not have to argue it; we would rather not have the Full Bench to deal with it, and that is why we have taken the step of inviting you to refrain from it beforehand. And we say, in these circumstances, as revealed now, this is not an application which will have any practical effect on the employees because it is not - it seeks no change to their conditions. It seeks the making of an instrument which will have no legal effect, in circumstances where, if the status quo is changed it has to be changed on four weeks' notice, and on four weeks' notice the parties have - it is up to the parties what they do, but it just can't happen like that, suddenly the employees lose the benefit of their agreement. The Act gives that protection. Either party has to give four weeks' notice to terminate; service notice, four weeks later - - -

PN442

THE DEPUTY PRESIDENT: If the agreement is in place for four weeks and you say that therefore the award would have no effect, and after four weeks and one day the - - -

PN443

MR WEST: We would revert to the safety net award.

PN444

THE DEPUTY PRESIDENT: Yes, you go back to the Pasminco Mining Award that is currently in existence, and so if the union then seeks to have an enterprise award made at that stage, the principle 4 which they rely upon - - -

PN445

MR WEST: Have it varied.

PN446

THE DEPUTY PRESIDENT: - - - which is the existing wages and conditions, what are the existing wages and conditions in that circumstance?

PN447

MR WEST: Well, presumably if they wanted to pursue the - and we are not here to advise the union what to do, but presumably they would apply with the same sort of application, that the terms and conditions that they used to enjoy under the expired 55 agreement be put into the award. I presume that is what they would do, but - - -

PN448

THE DEPUTY PRESIDENT: Wouldn't that create real industrial difficulties, disputation, uncertainty and the like?

PN449

MR WEST: Perhaps you should take that concern up with the Parliament, because what the Parliament did was set up an Act for that very result. That is what the Act contemplates, that there is a safety net award, or there needn't necessarily be a safety net award, and when an agreement expires that it can be -

those conditions can lapse and the parties are left without those conditions. That is what is contemplated by section 55.

PN450

Now, no one is saying that we are going to do that and that is why - but the point is, if your motivation were - in hearing the application were to entrench the agreement conditions in the award to cover off on the hypothetical situation that, say, the agreement might - someone might retire from it and disappear, my submission to that would be that that is contrary to what the Act has intended and it is effectively the Commission arbitrating to defeat what is a clear legislative intent; namely, that you do an agreement, it has a period of operation, and either party has the ability to get out of that agreement at the end by retiring from it, and it would not be proper for the Commission, solely for that reason, to arbitrate those conditions into the safety net to stop that happening.

PN451

THE DEPUTY PRESIDENT: A public interest argument, if that was going to create those industrial difficulties?

PN452

MR WEST: But the Commission is then in a position to deal with whatever the actual industrial issues factually are at the time, because the Act contemplates and allows for and requires that situation, and that is where the public interest comes from, what the Act requires, the scheme of the Act. Now, it may be that there is a need for the Commission's involvement if in actual fact, on the facts, something emerges, but it is not for the Commission to be arbitrating to deal with hypothetical possibilities.

PN453

So for reasons that have emerged subsequent to when I opened our case on this, I think - I submit to you that it is compelling that the Commission should say to the union, "This application is unnecessary; that it is not appropriate that the Commission embark on an arbitration which is going to impose a result on an employer against their wishes without the proper support of wage fixing principles underlying it, in circumstances where there will be no - the ultimate outcome, if the union get what they want, will have no effect on the employees, and in circumstances where there is already a mechanism built in by Parliament into the Act which says, 'if either of us want to get out of this agreement we have got to give the other party a month's notice, and a month is a long time to take other action if that is what we wish to do.'"

PN454

Now, I am standing here saying, I have no instructions that the company has got any intention of walking away from the agreement, and as I understand from Mr Flanagan neither has Mr Flanagan, and in those circumstances the scheme of the Act under section 55 should be allowed to run its course and let us see where it goes. But all you are being asked to do here is to make a non-enforceable award to deal with what hypothetically might happen, and the Commission is a tribunal of fact, not hypothesis. So that is my submission.

PN455

THE DEPUTY PRESIDENT: Thank you. Mr FitzGerald?

PN456

MR FITZGERALD: Yes, I will be very brief in response. I would certainly support the submissions in reply by Mr West. We say that in the context of the awards which AMMA is party to, this one particularly and also the Metalliferous, Mining and Processing Award and other awards which AMMA is respondent to, we simply say that it has very significant implications if this application did proceed further in respect of those awards.

PN457

In respect to the matter of Temco, just to reiterate, I again adopt the submissions of Mr West there, but I can say that AMMA was involved, as you know, given the decision, and back in 1998 the company, for the same reason as Mr West said, chose to enterprise bargain in that way.

PN458

THE DEPUTY PRESIDENT: Yes, but, Mr FitzGerald, in both those matters, both in which AMMA was involved, the parties have quite clearly submitted that importing the terms of a section 55 agreement into an enterprise award did not offend the principles or the requirements of the Act.

PN459

MR FITZGERALD: I understand that, but the matters - the issue was consent in that issue.

PN460

THE DEPUTY PRESIDENT: Yes.

PN461

MR FITZGERALD: Quite clearly it has to be differentiated. Mr Flanagan has made light of that, but that is quite a significant differentiation between the circumstances here. In any event, they were long-standing customs and practice at that particular site. For the same reasons it chose to enterprise bargain in that way. It has a number of unions which are party to that agreement, including the CFMEU, the CEPU, the AWU and AMWU. The other enterprise award which - - -

PN462

THE DEPUTY PRESIDENT: You agree with the submissions that you made at the time, that a section 55 agreement being imported into an Act [sic] does not offend the principles?

PN463

MR FITZGERALD: In the context that it was a consent matter, and quite - - -

PN464

THE DEPUTY PRESIDENT: But why would that make any difference if there was consent?

PN465

MR FLANAGAN: Well, what - I don't want to reiterate the submissions of Mr West, but clearly it is not something which has been imposed by arbitration. That is the distinction factor here. The other thing I should say about enterprise awards which I am aware of, this particular award and the Zinifex Hobart Smelter Award and the - I think it is now called the Australian Cement Award, and Impact Fertiliser Award, there is no similar arrangements of consent to allow those

uplifting of conditions into the enterprise award. So again I just simply note that for the record. I have no further submissions.

PN466

THE DEPUTY PRESIDENT: There was no consent when the Impact Fertiliser Enterprise Award application came before the Commission. It ended up being a consent position.

PN467

MR FITZGERALD: But that was through the award.

PN468

THE DEPUTY PRESIDENT: Aren't we putting the cart before the horse a little bit here, too, because a lot of what has been said is predicated upon what the Commission might decide down the track, and we all know that matters that start off being arbitrated often end up by being consent matters in any event.

PN469

MR FITZGERALD: I certainly take your point. Those awards - leaving aside the Impact Fertiliser Award - but those other awards, there is no arrangement in place similar to what there is in Temco to uplift those conditions in the agreements into their enterprise - respective enterprise award. So I am just simply saying that Temco do it for their own reasons. Other companies have other reasons and do it their own way and that should be recognised by the Commission.

PN470

THE DEPUTY PRESIDENT: Yes. Well, I was just going to note that it is going to the statement that was clearly made by AMMA at the time that it didn't offend the principles to have the wages and conditions from an enterprise agreement placed within - - -

PN471

MR FITZGERALD: Look, Deputy President, I don't want to reiterate. I think I have already said that, but the reason why we consented to that - the reason why we said that it didn't offend the principles is because it was a consent matter, simply that.

PN472

THE DEPUTY PRESIDENT: Mr Watson?

PN473

MR WATSON: Thank you, Deputy President, and I do apologise for my absence, a bit of work and family. Deputy President, I didn't hear the submissions in reply by Mr West, so I really can't make any comments on those, unfortunately, but obviously they will stand as per the submissions made. I don't have anything further in reply, if it please.

PN474

THE DEPUTY PRESIDENT: All right. Thank you. Well, as I indicated earlier it had been my intention to actually make a decision in respect of these threshold matters this afternoon, so that if proceedings are to go ahead they are not delayed unduly. Can we just go off the record?

OFF THE RECORD **[3.15pm]**

RESUMED **[3.24pm]**

PN475

THE DEPUTY PRESIDENT: I indicate that I reserve my decision. It will be issued in writing as soon as possible, possibly - Easter is in the way - but within two weeks, and the matter is adjourned sine die.

ADJOURNED INDEFINITELY **[3.25pm]**

INDEX

LIST OF WITNESSES, EXHIBITS AND MFIs