IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. Nos 143-150 of 1985

IN THE MATTER OF applications by the Chairman of Trustees for the Tasmanian Museum and Art Gallery to vary nominated awards

re inclusion of the Tasmanian Museum and Art Gallery as a controlling authority

FULL BENCH

DEPUTY PRESIDENT
COMMISSIONER GOZZI
COMMISSIONER WATLING

HOBART, 26 June 1987

TRANSCRIPT OF PROCEEDINGS

(RESUMPTION)
DEPUTY PRESIDENT: Thank you. Any changes in appearances?

MR EVANS: Well, I think actually, the record might show that I’ve appeared before, Mr Deputy President. Just to make sure that the record is accurate, A.H. EVANS, along with G. VINES and J. GEURSEN, appearing for the Tasmanian Public Service Association.

DEPUTY PRESIDENT: Thank you.

When we were last assembled we were advised that there was to be a section 66 application before the Federal Commission. Could we be advised - is there now any legal impediment to us proceeding today, or beyond if necessary?

MR EVANS: Is there any legal impediment?

DEPUTY PRESIDENT: Yes.

MR EVANS: Not that I’m aware of, Mr Deputy President.

DEPUTY PRESIDENT: Good. Thank you. Mr Willingham?

MR WILLINGHAM: Mr Deputy President, for the purposes of the record, the matter dealt with by the Conciliation and Arbitration Commission on Wednesday of this week, dismissed the section 66 restraining order application in the State Public Services Federation in respect of this matter.

DEPUTY PRESIDENT: Dismissed it?

MR WILLINGHAM: Yes, sir.

DEPUTY PRESIDENT: Thank you.

Well, we would like to resume, dealing with the draft award and to hear the parties on remaining clauses not addressed. We acknowledge that if anyone wants to go back a little and again comment on other clauses, because of the passage of time, you will still have the right to do that also. Mr Jarman?
Thank you, Mr Deputy President.

The Commission has been advised in other matters that there is another case running concurrently with this case. The other case, of course, is being run by the State Public Services Federation in the Federal Commission. That particular matter has been the subject of 41(1)(d) proceedings.

In those proceedings Tasmania, or the Government of Tasmania, appointed counsel to make submissions on its behalf. And those submissions contain a number of factors which we believe should be put before this Commission, because they are pertinent to the case before this Commission.

If I may, I'd like to read some excerpts from transcript in that matter.

Yes.

This particular proceeding, Mr Deputy President, is C. No. 9038 of 1987, and the date of the hearing was 13 May, 1987 in Melbourne. And I refer to page 112 of transcript. And, Mr Polites, appearing for the Minister for Public Administration had the following to say, as part of his submission. And he is in fact speaking to Commissioner Mansini, and I quote:

"You will see, sir, that controlling authority means in the case of a state employee who is a person employed under the Tasmanian State Service Act 1984, the minister administering that act. So the effect of that, sir, is that every time you come across the expression, "controlling authority" in the legislation itself you can read for that the Minister for Public Administration. That is
MR JARMAN: important when you get to section 38 ..."

And I end the quote, briefly, to indicate that he is referring to section 38 of the Industrial Relations Act. I again commence the quote:

"... when you get to section 38 to which I would ask you to turn now. Section 38 deals with the effect of an award. It says:

An award has effect according to its terms and, unless and to the extent that those terms expressly provide otherwise, the award extends to and binds-

(b) in the case of an award referred to in section 34

(i) all State employees employed in positions or classifications mentioned in the award; and

(ii) all controlling authorities employing those State employees,

and operates throughout Tasmania."

Mr Polites went on to say:

"So, the literal effect of that section, sir, is that where a state award - a state award binding on the minister binds the minister in respect of all his employees. It does not matter what department they are in because that is the effect of the broad definitions of "controlling authorities." I make that point now so that I do not have to come back to it later but its relevance will become clear."
MR JARMAN:

We say, sir, in summary on this point then there is in existence a state industrial authority which has ample jurisdiction to deal with all of the subject matters of this dispute."

I then move to page 115 and resume quoting Mr Polites' submission. Mr Polites says:

"Can I come then to the area which created some tension in respect of the evidence. That is the question as to whether or not the employees of the Tasmanian Museum and Art Gallery are presently covered by awards or whether they are award free.

Now, in our submission, as a matter of strict law they are presently covered by awards of the Tasmanian Industrial Commission. As I have put to you, sir, prior to the proclamation of the State Service Act these employees were, except for the attendants, award free. That was because as a matter of strict law they were not employed by the Crown as such. But they were employed by the trustees of the museum and art gallery who was not named as a respondent to State Public Service awards at the time.

The exception to that, as I think we have established clearly, was the attendants who were at that time covered by a different union and who happily were classified under the award of the insurance board and they had a special classification for them."

We then move to page 117 of transcript and continue the quote. Mr Polites had this to say to
MR JARMAN:

Commissioner Mansini:

"There was some negotiation with the Tasmanian Public Service Association through the early half of 1985 which culminated in an application being made to the State Industrial Commission on 13 June 1985 seeking an award to be known as the Tasmanian Museum and Art Galleries Award.

I am sorry, no, I withdraw that. In June 1985 application was made to make the museum and art gallery an employer respondent to major public awards."

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MR JARMAN: The Commissioner then says:

"That was to cover several awards, I think.

MR POLITES: Yes. What they were planning to do and what we now say is the fact of the matter is to slot the people in the museum and the art gallery into the relevant classifications in a number of public service awards.

Now, hearing commenced on that application as you can see from the chronology on 27 June and on 31 July 1985 the commission announced a decision that it was not going to do that.

It wanted to make a single award for TMAG employees and following that decision on 31 October, submissions commenced for a single award for TMAG employees. Now, as at 1 December 1985, the State Service Act and its relevant other acts were proclaimed and on 13 February 1986 the commission handed down an interim decision which refused an application by the parties to adjourn the matter sine die.

Now, the reason that application was made as the commission will see from the chronology was that using the now State Service Act the minister was quite happily and without any need for the commission to do anything in a position to be able to assign classifications from existing awards to the employees of the Tasmanian museum and art gallery and that is in fact what was done as is confirmed in exhibit P6."
MR JARMAN: If I may at this stage, Mr Deputy President, hand up some exhibits.

DEPUTY PRESIDENT: This is all very interesting. I am not quite sure what the relevance of it is.

MR JARMAN: Well, I think it will become relevant, sir, when we get to the end of our submission.

DEPUTY PRESIDENT: I must admit, I don’t know what number this exhibit should be.

MR GEURSEN: It’s quite a long way down the track, Mr Deputy President.

MR JARMAN: I believe it is probably J.11, but I stand corrected on that.

COMMISSIONER GOZZI: J.7, is it, Mr ...?

MR JARMAN: J.11, I think, but I stand corrected.

COMMISSIONER GOZZI: J.6 is the last one I can find.

MR JARMAN: Well, I am quite happy to ...

DEPUTY PRESIDENT: Perhaps if we start again and call the letter dated 29 April X.1, and the one dated 11 May, X.2.

MR JARMAN: Well, I thank you, sir.

I had interrupted the quote from transcript to tender Exhibits X.1 and X.2. And if we can just indicate briefly that these pieces of correspondence were handed up during the submissions before Commissioner Mansini to indicate to the Commissioner, that all Tasmanian Museum and Art Gallery employees are currently covered by existing State Service awards; classified under those awards and receiving conditions of service pertinent to the State service.

I continue the quote:

"Now, in respect to the reclassification of the
MR JARMAN: attendants in exhibit 29. P6 was the letter from the secretary of the Department of Administration which in effect confirmed where they that the minister was now classifying them where they previously were not classified by TMAG when it was the employer."

And at the bottom of page 118, I continue the quote from Mr Polites' submissions, and it goes as follows:

"As we have pointed out the effect of the combined proclamation of the State Service Act and the Industrial Relations Act is that the minister in his capacity as employee of all public servants is now respondent to all general awards and once he classifies somebody into a position in those awards, that person is properly classified and the award is applicable with respect to him by virtue of the operating section 38 of the act.

There can be no suggestion that that is the case. So they have been properly classified.

THE COMMISSIONER: So they are classified.

MR POLITES: They are classified and the award is binding upon them.

THE COMMISSIONER: Which award is binding upon them?

MR POLITES: The general awards of the Tasmanian service. These would be the Clerical Officers Award, the Scientific Officers Award and the Technical Officers Award and the General Officers
MR JARMAN: Award."

And I now quote from Mr Polites’ submission in rebuttal, and this was made on 14 May in Melbourne, and I refer to page 194 of transcript, and I quote:

"It is true, sir, that prior to the State Service Act being proclaimed, not passed by parliament but proclaimed, the employees of TMAG were, firstly, employed directly by TMAG, by the trustees of the - of TMAG who are under the statute, a body corporate and had the power to hire and fire and to pay wages and the like.

Now, with respect to the attendants, sir, the Miscellaneous Workers Union had sought and obtained in the private sector an award with respect to attendants. And because they had at that time membership in the Tasmanian Museum and Art Gallery, and because at that time it was perfectly possible to do so, to obtain a private sector award which had application in the public sector as well, they had used that vehicle to extend award coverage to their members; namely, the attendants in the Tasmanian Museum and Art Gallery.

So that was how you had the strange dichotomy. You had the dichotomy of everybody being employed by TMAG; of the attendants being covered by this private sector award which did have application in the public sector; namely, the Insurance Board Award, and the other employees being award-free because TMAG was not a respondent to any of
MR JARMAN: the Public Service awards. But administratively TMAG classified these people under various public sector awards.

In 1984, sir, TMAG decided that it desired to formalise this arrangement by obtaining respondency to an award of the commission and at that time it thought the best way to go would be to obtain its own award and that was the application it made following quite lengthy discussions with the TPSA in June of 1985.

So it went to the commission in June of 1985 and said please give us an award. Now in December 1985 the State Services Act which had been passed by Parliament but had sat around for some time while people got themselves organised, ... was eventually proclaimed and came into force. Now, on the proclamation of that act and as a result of the provisions of that act ... another act called the Tasmanian State Services Act Miscellaneous Amendments Act – as a result of that act the power of a lot of quangos and government departments to employ people directly was removed, including the power of the Tasmanian Museum and Art Gallery and as we heard in the evidence, sir, against the opposition – over the top of the opposition of a number of these bodies, their power to employ people was on that day removed and their employees by operation of the Transitional Provisions Act became employees of the Minister for Public Administration.

And that is all the
employees, both the attendants and the clerical and administrative people and the scientific officers and even the director. And after that, sir, when it was realised that that would happen it was considered by the parties that there was — I am sorry — and because, sir, the operation of the same acts effectively made the Minister for Public Administration who was now the employer of everybody parties to all of the Public Service Awards in lieu of the Public Service Board.

Because that happened it was thought that there was really no need for an award now to be made in relation to TMAG, because since the minister was already party to the award they could just be popped in in appropriate places within those existing awards. Now, sir, at that time not only did we hold the view that was what could be done and should be done, but — and in fact was done — but in fact so did TPSA and so we jointly went along to the commission and said in 1985 on 16 December, please, sir, will you adjourn this matter sine die."
MR JARMAN: May it please the Commission.

Those were some of the submissions made before the Federal Commission, with respect to the 41(1)(d) proceedings.

My instructions ...

DEPUTY PRESIDENT: This would be much the same submissions which were made to us ...

MR JARMAN: Quite so, sir.

DEPUTY PRESIDENT: ... at the same time.

MR JARMAN: And I must inform this Commission at this point in time that my instructions are from the Department of Public Administration that our position remains the same.

We do not want an award for the Tasmanian Museum and Art Gallery, it is not necessary. And we believe the Commission should reserve its earlier decision.

And I would now go on to make submissions on those points.

Prior to making submissions on those points, we wish to make some comment on the Commission's decision of 3 December 1986.

At this stage, I would indicate there are a number of issues in the Commission's decision which are either irrelevant or inaccurate. However, we do not wish to enter into debate on those matters, only the reasons which the Commission puts forward in defence of its position to make an award.

If I could refer to point 1) of the Commission's interim decision, found on page 18 ...

DEPUTY PRESIDENT: Which interim decision?

MR JARMAN: This is the interim decision, sir, of 3 December 1986.
Thank you.

Point 1) says and I quote:

"The Tasmanian Museum and Art Gallery's operations and work requirements are of a distinctive nature and differ from ordinary public sector agencies operating under different awards."

And go on to say that:

"The fact that it operates 7 days per week is but one example of the differences which exist."

Well, we certainly beg to differ with the Commission's position with respect to item 1). Each State agency could be said to be distinctive in function.

The D.M.R., for instance, builds roads.

The Housing Department, builds, rents ... builds houses, rents houses and sells houses.

Builds rents as well.

The Treasury manages Government's finances.

And we can go on with respect to each and every Government agency. Each agency has its own administrative function as well as its functions for offering specific services to the public. Yet we seem to have managed for years with a certain set of public sector awards, managing or operating and working for employees in all of the agencies.

The fact that the Museum is open 7 days a week, is not a significant factor. Other agencies operate over a 7-day period, and their employees occupy positions covered by major public sector awards.
MR JARMAN: In any event, the 7-day operation applies only to the attendants who are now appropriately covered by the General Officers Award, classified under that award and receive their conditions by the General Conditions of Service Award. This type of coverage presents no problems, it’s considered appropriate and is extended to other employees in the State service who work over a 7-day period.

And if I could go to item 2 of the reasons for decision, on page 19 ...

DEPUTY PRESIDENT: Before you leave that, we said (if I recall) that our view coincided precisely with that of the old Public Service Board.

MR JARMAN: Quite right, sir, so you did. And unless I’m labouring under some misaprehension, the Public Service Board no longer exists. The Public Service Board was agent for the Governor, the Governor who was the employer.

When the State service legislation was proclaimed we had a different managerial concept in place in the Tasmanian public sector.

The Minister for Public Administration became the employer. The concepts behind the Tasmanian State service legislation were, as far as management of the State service is concerned, to work towards uniformity, consistency and to eliminate wherever possible costly and excess duplication.

The fact that somebody in the Public Service Board in 1984, made passing comment that it may be appropriate for a single award to be made for Tasmanian Museum and Art Gallery employees is certainly not relevant in today’s circumstances. And that’s what we’re talking about, today’s circumstances not circumstances which may have prevailed in 1984.
MR JARMAN: And if I could go to item 2 for the reasons for decision, and I quote:

"To place the Tasmanian Museum and Art Gallery under existing awards which contain substantially higher salary levels than currently applies is not justified on merit or within the Principles of Wage Fixation adopted by this Commission."

Item 2, of course, on page 19, ignores not only the right of the employer, but the concept of the State service. The employer has a right to appoint people to positions appropriately classified under classification scales in State service awards.

The right to establish classification levels for those positions rests with the secretary of the Department of Public Administration and/or the head of agency.

If this Commission believes otherwise, then it should carefully view the provisions of the State Service Act and consider the obvious intent of the legislators when the statute was framed.

DEPUTY PRESIDENT: What part are you talking about now?

MR JARMAN: I'm talking about ...

DEPUTY PRESIDENT: Are you talking about intent?

MR JARMAN: I'm talking about sections of the State Service Act which allow the Minister to appoint and employ, and also those parts which go to the classification of employees. We've raised them before in this matter.

DEPUTY PRESIDENT: What's the function of this Commission? I've asked that time and time again too. It's never been satisfactorily answered.

MR EVANS: I'll tell you in a while.

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DEPUTY PRESIDENT: If I ask you, you might.

MR EVANS: You certainly will.

DEPUTY PRESIDENT: Will what?

MR EVANS: Ask me.

DEPUTY PRESIDENT: I may not.

MR EVANS: Oh, okay. We'll see.

MR JARMAN: Mr Deputy President...

DEPUTY PRESIDENT: Yes, we will see. I'm not going to take any impertinence from the likes of you.

MR EVANS: With the likes of what?

DEPUTY PRESIDENT: From the likes of you.

MR EVANS: Well, Mr Commissioners...

DEPUTY PRESIDENT: Or anyone else.

MR EVANS: ... and Mr Deputy President...

DEPUTY PRESIDENT: Or anyone else.

MR EVANS: I thought the Commission itself had set the tone of these proceedings when it abused one of my officers, and that's why I'm here.

DEPUTY PRESIDENT: Abused one of your officers?

MR EVANS: Yes.

And the terms I find, I have never seen in a Commission in any jurisdiction I've appeared on.

DEPUTY PRESIDENT: I have never abused one of your officers.

MR EVANS: Well, this Commission did, sir.

DEPUTY PRESIDENT: I had some remarks to make about the conduct of the Tasmanian Public Service Association, and I stand by them. And if you're here to defend the action of people walking out of the hearing, taking their bat and ball home because they get a ruling.
DEPUTY PRESIDENT: That they don't like. My comment was, "The Tasmanian Public Service Association wants to make up its mind whether it's going to work within this system or not."

MR EVANS: I can say this, Mr Deputy President. I have had more experience in more jurisdictions than any members of this Bench here. I have never seen previously at any of those jurisdictions remarks made to a representative of an organization — other than to one and that was the B.L.F. And if you are couching the P.S.A. in the same form and terms as the B.L.F. ...

DEPUTY PRESIDENT: I think the analogy has got some relevance.

MR EVANS: So you consider the P.S.A. acts in a similar vein as the B.L.F.?

DEPUTY PRESIDENT: Yes.

MR EVANS: Thank you. That will be duly reported.

DEPUTY PRESIDENT: I hope it is. It's about time you started telling your members the truth.

COMMISSIONER GOZZI: Mr Evans, while you're on your feet. I certainly took strong exception to Mr Geursen saying that he's under instruction from your organization to pack up his bags and leave proceedings, simply because you didn't like (or the association didn't like) a ruling of this Commission.

Now you say that you've had all the experience under the sun. Then your experience ought to enable you to make the assessment that some go against you and some go for you. And simply in this exercise, which is tied up with a whole range of other exercises that you and I have been part of in other proceedings, is simply a difference of opinion of how State employees ought to be regulated.
in the system. It's nothing more or nothing less than that.

Now our point of view has been expressed, in test case decisions, it's been expressed in these proceedings, and what we have is a difference of opinion. And quite frankly, to say 'Well, I don't like that' that is your right. But I have never seen in all my time people pack up their bags and go out, except in some exceptional circumstances.
COMMISSIONER GOZZI: And they are the unions that you object to being aligned with?

MR EVANS: Well, I can certainly say, sir, I have and I have never worked for a union which has been considered radical in any sense. And I would say this, sir, that I was quite prepared to give a view, and I will give a view of the role of this Commission in the industrial relations field in the public sector in Tasmania.

That is my intention, if I am invited, to do so. If I'm not invited, then I will use other forums to give my views of the role of the Commission. But I'm quite prepared to do it within this forum. But as I said, I have never ... Mr Geursen was appearing on behalf of the P.S.A. and under instructions, and I considered some of those remarks that were made to him were personal.

Now, if a person appears on behalf of an organization and has remarks directed to them which cast aspersions on their behaviour, then I find that most regrettable. And I'm quite prepared to stand here and answer for any actions I undertake or any instructions I give and that is why I am here.

COMMISSIONER GOZZI: Mr Evans, the point simply is, that there was no personal attack on Mr Geursen. There was a simple statement of fact, that the T.P.S.A. ought to make up its mind where it wants to be. It's not the first time that the T.P.S.A. have walked out of proceedings, as you well know.

MR EVANS: No, and it won't be the last probably.

COMMISSIONER GOZZI: Well, I think, if that is your attitude, then you've got to cop the consequences of that. I mean, the consequences simply are the bottom line, Mr Evans - simply is, that proceedings will continue, with or
COMMISSIONER GOZZI: without you being here.

MR EVANS: No, there are more consequences than that, Mr Commissioner.

COMMISSIONER GOZZI: There may well be.

MR EVANS: I think, probably it is appropriate if I am invited, I canvass this matter fully, because I think what we're seeing in this case is a fundamental problem of the relationships between a union and the Commission, which if are not addressed and dealt with, can only lead to serious problems in the industrial jurisdiction in this State, which may have grave consequences for all.

COMMISSIONER GOZZI: Yes. I think what you're seeing and what you're alluding to, is I suppose, a determination by this Commission to regulate, in the wages sense, the remuneration parameters applicable to certain State employees, and that's what this is all about.

Now, we heard Mr Jarman talk about the philosophy of the Tasmanian State Service Act, and this is all old ground because we've been through it all before.

It's certainly my understanding, and I'll say this again, that when the Tasmanian State Service Act was introduced that that was not a licence for the Department of Public Administration to assume the functions of the pre-existing Public Service Board. And what we really have, in my view, and I've heard nothing to the contrary, is a continual pursuit of the objective that it is the right of the employer to exercise his right within the Act. And we are saying, 'Yes, he can do that, but we will set the parameters of the awards' which we regard as our function and our duty.

That is a fundamental difference and I must say, I don't think that any of
COMMISSIONER GOZZI:  the parties in the system have been disadvantaged with that view that the Commission has adopted and expressed in various test case decisions.

In fact, my assessment is that the Commission has regulated the employment situation in this State very well indeed and, quite frankly, I don't see what all the fuss is about.

MR EVANS:  Well, there is quite a deal of fuss and I would think, rather than me go on because I could go on for some time, that Mr Jarman continue, and if I'm invited I will make it clear what our view of the system is.

COMMISSIONER GOZZI:  Mr Jarman?

MR JARMAN:  Thank you, sir.

I just go back to the point that you raised, because you did, I think, pose a question to me which went to the role of the Commission. And if I can just say briefly, because I think it will become clearer as I conclude my submission, that we don't see, in this matter that the Commission has a role to perform.

The classification scales are in place. That is the framework which currently applies to State service agencies. We are not seeking to vary them; we are not seeking to do anything with them at all, only apply them in the way they were intended to be applied.

COMMISSIONER GOZZI:  Mr Jarman, can I just pick you up on that point. Look, nobody pretends to misunderstand the point that you are driving at. It's an obvious view to adopt and ...

MR JARMAN:  Well, if it's so obvious, why do we have so much difficulty getting across to the Commission.

COMMISSIONER GOZZI:  ... in a lot of circumstances, what you're advocating is in fact happening. But I'll put this to you,
COMMISSIONER GOZZI: Isn't it also a function of this Commission to make awards in respect of particular classes of employees who are State employees. And why wouldn't the Commission, when it has made up its mind, (and let's take this example) constituted as a Full Bench, having looked at the situation and said, "In respect of these employees, this is what we intend to do."

Now, isn't that also what I've said to Mr Evans - isn't this also the case here that, yes, you mightn't like the decision, but at the end of the day that is the decision that has been made.

MR JARMAN: That may very well be the case, although I would put to you, Commissioner, that the final decision has yet to be made and whether or not that is in the terms that you've just couched, well, so be it.

COMMISSIONER GOZZI: Yes, of course.

MR JARMAN: As you quite rightly pointed out, we don't have to accept, with all good grace, any decision handed down by this Commission ... 

COMMISSIONER GOZZI: None of us ever have.

MR JARMAN: ... because it's clear in this circumstance that we don't.

COMMISSIONER GOZZI: Well, none of us ever have, have we?

I mean, if you lose them - you don't really like to lose them, do you?

MR JARMAN: Quite so.

COMMISSIONER GOZZI: None of us do.

MR JARMAN: But I say to you, as I've said to you time and time again, that in this case, regardless of what the role of the Commission may be normally (that is making awards to cover classifications) in this instance it is not necessary because the awards are in place and so are the

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MR JARMAN: classifications.

If we could go on to point 2, we were talking about the intent of the legislation or the State service legislation, and I follow those comments with these: that the State service is a career service; this is an institution which permits people to seek more responsible positions and increased financial rewards in accordance with the established scales which operate in the State service, that is the classification scales.

That's a fact of life. Whether we like it or not, the State service, like any other public service, is a career service. It enables people to start at the bottom and go through to the top.

The framework for classification scales is found in the major awards of the State service. And I know this Commission has a dislike for the words "parent award", but we prefer it because that is exactly what they are. They are parent awards.

COMMISSIONER GOZZI: And ought to apply, you say?

MR JARMAN: Well, sir, we say that the State service is based on the concept of uniformity, consistency, efficiency and effectiveness.

COMMISSIONER GOZZI: Yes, I heard what you said but, Mr Jarmen, you're saying that the infrastructure is in place in the public sector ...

MR JARMAN: Quite so.

COMMISSIONER GOZZI: ... and therefore, State employees ought to be classified under existing awards.

MR JARMAN: Quite so.

COMMISSIONER GOZZI: Yes, well, that of course raises a fairly interesting point in respect of all those other employees who are State employees who are currently

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COMMISSIONER GOZZI: covered by private sector awards. And I thought we had a fairly clear undertaking on transcript, that there was no intent by any of the parties to disrupt the status quo in terms of conditions of employment or rates of pay.

Are you now saying something different?

MR JARMAN: I'm arguing a case here which is pertinent to employees of the Tasmanian Museum and Art Gallery. I don't remember raising anything concerning the phantom army, as the Commission refers to it.

COMMISSIONER GOZZI: You don't want to go beyond that concept?

MR JARMAN: No, because I don't think we're talking about private sector awards.

COMMISSIONER GOZZI: Well, I thought I prefaced my question fairly clearly.

MR JARMAN: Well, if you did, then I must have missed the point somewhere because I certainly ...

COMMISSIONER GOZZI: Well, I'll go over it again. I said that you say that there are awards currently in place in the public sector which provide the infrastructure for employees to be classified under - all State employees.

MR JARMAN: Yes.

COMMISSIONER GOZZI: Well, doesn't that mean then all State employees - all those other State employees who are currently regulated by virtue of a private sector award?

MR JARMAN: Well ...

COMMISSIONER GOZZI: And what would be the implications of that, Mr Jarmen?

MR JARMAN: Well, let's look at this particular case, because we had, if you like, a
MR JARMAN: group of employees who were covered by private sector awards. Those individuals are now covered by public sector awards.

COMMISSIONER GOZZI: The point that I want to clarify with you, Mr Jarman, is that you are confining your comments when you make your submission, to the Tasmanian Museum, or are you saying that your comments ought to have general application across the board of the whole of the State service?

MR JARMAN: I am saying to you, Commissioner, that each case ought to be determined on its merits and I'm arguing before you about a case concerning Tasmanian Museum and Art Gallery employees.

COMMISSIONER GOZZI: All right. As long as we are clear that we are looking at each case on its merits. I'm quite happy to accept that.
them to our satisfaction is very much a part of public interest considerations."

It can, and should be argued, that to make an award simply on what appears to be a whim, is hardly in the public interest.

Duplication of something which is already in place can hardly be said to be in the public interest, both logically and financially.

It is this type of attitude that leads to public criticism of the bureaucracy and its fondness for over-kill and red tape.

There is no need for an award, and there never has been, because nothing is going to change.

The Government, by pursuing this course, is not saying we are going to allow T.M.A.G. to change the course of the State service. What it is saying is that there is a need to unify, create consistency, remove excess and duplication, create effectiveness and efficiency.

There exists in the State service a series of classifications, and a conditions of employment framework, which may be applied to the State service as a whole.

These provisions are not subject to change, because T.M.A.G. employees are now embraced by them.

Any retrograde changes to the existing system through decisions of this tribunal, must be seen as an impingement on the Government's personnel and organizational management of the State service.

It will not, and should not, embarrass this Commission to reverse its decision to make an award.

In truth, when one looks at this case, it is the logical and proper
I think what we are saying, again, is that there are certain concepts which led to the creation of the State service and, in fact, as Commissioner Gozzi has pointed out, there is an infrastructure in place. And in fact, that is why we have indicated to this Commission in the past that we are pursuing the demise of the derivative awards.

And we certainly intend to do just that. To come to this Commission and put cases before this Commission — and each case, again, on its merits — to decide whether or not certain awards should be in place, when there is no recognizable need for them.

And we are not, as the Commission seems to indicate, by covering the Tasmanian Museum and Art Gallery employees under existing awards, breaching the wage-fixing Principles — as suggested by this Commission.

What we are doing is effecting personnel administration, consistent with that practiced throughout the rest of the State service.

As far as the extent of the salaries scales go, as previously indicated, we do not seek to alter those in existence. In fact to the contrary.

We do say, however, that should the Tasmanian Museum and Art Gallery wish to create a new position which carries a higher salary than the most senior position in a particular salary scale, then it is currently open for it to do so.

If we can now go to item 3) of the interim decision, and I quote:

"On evidence before us as already dealt with the granting of the application would be against the public interest. In saying this we point out that the adoption of the Principles and the continued compliance with
thing to do.

The Commission may have thought during the running of this case, that it was appropriate to make a separate award. However, as this case has continued, and other factors have been introduced, it has become obvious that an award is not required.

We say that this Commission has a responsibility to find accordingly.

If, however, this Commission is intent on pursuing this exercise in futility, then in the making of any award there can only be one resolution - an award for Tasmanian Museum and Art Gallery employees must reflect that which is currently in place.

That means, total classification scales, cross-reference to general conditions of service, and the Tasmanian State service regulations.

Any adjustment either way, would be an infringement of the wage-fixing Principles, and not as this Commission is so fond of saying, "in the public interest".

This being the case, the status quo would be retained, and obviously it points out that there is no requirement for a separate award for Tasmanian Museum and Art Gallery employees.

It leads us, gentlemen, to the one and only conclusion in this matter, that an award is not necessary. Neither should one be made. The Commission should have no difficulty in reaching that conclusion.

If the Commission pleases.

DEPUTY PRESIDENT: Mr Jarmen, I congratulate you on your eloquence.

Is there anything which you have put to us today which is new and fresh
DEPUTY PRESIDENT: that we haven't considered before - with respect - so that we can identify it?

MR JARMAN: I would say that the points that I have made today just reinforce our earlier submissions, and we don't seem to have had much success with this Commission throughout this matter because, with respect, sir, it appears that scant regard has been given by this Commission to the agreements reached between the parties in this matter. And I don't think that makes way for good industrial relations.

But all that aside, it would appear that we can only put to this Commission, once more, a submission which says you do not need to make an award, because there is no need for an award.

And I think, you know ...

DEPUTY PRESIDENT: But have you answered my question, have you?

MR JARMAN: I think I have. I think I have already said to you that ...

DEPUTY PRESIDENT: Well, is there new ...?

MR JARMAN: ... we are reinforcing our earlier submissions.

DEPUTY PRESIDENT: I see.

MR JARMAN: And we are saying to you there is no need to make an award, and you should reverse your earlier decision.

DEPUTY PRESIDENT: Yes, I understand what you are saying.

MR JARMAN: Thank you.

COMMISSIONER GOZZI: Mr Jarman, you did say "agreement between the parties". Is there agreement between the parties that there should be a Federal award?

MR JARMAN: No, there certainly is not.

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COMMISSIONER GOZZI: Well, what agreement between the parties? I thought the agreement between the parties was simply one to withdraw the application. But one of the parties I thought was saying that there should be a Federal award.

MR JARMAN: Well, I’d let my colleagues on the right answer that question.

COMMISSIONER GOZZI: Well, where does your agreement between the parties ... What are the parameters of that agreement?

MR JARMAN: I think we’ve approached you on at least two occasions now, Commissioner, with a position which has not been objected to by the parties on the other end of this bench.

COMMISSIONER GOZZI: What, the agreement to withdraw the application?

MR JARMAN: Quite so.

COMMISSIONER GOZZI: I see.

DEPUTY PRESIDENT: Mr Willingham, anything to add?

MR WILLINGHAM: Mr Deputy President, I don’t believe that I can add anything of significance, other than to endorse, with the greatest of respect, the submissions that Mr Jarmann has made. And to ask you, with great respect, and as earnestly as I can, to consider the point that Mr Jarmann has made.

That, in all of the circumstances, and upon reflection of this very long and drawn out matter, that perhaps the point that he has raised, that in fact there is not a necessity for a discrete award with Tasmanian Museum and Art Gallery, has merit.

But other than that ... If the Commission pleases.

DEPUTY PRESIDENT: Of course the exercise today had been flagged as one on which we were going to proceed on our course, and invite
DEPUTY PRESIDENT: the parties to make submissions on the draft clauses.

MR WILLINGHAM: Indeed, Mr Deputy President. I understand that, but our instructions are, and it is our fervent wish, that you will take one last opportunity to reconsider those points that we've raised, if your decision is (having considered those matters) to proceed on that course, then of course we will accept that.

DEPUTY PRESIDENT: Fine, thank you. The T.P.S.A?
Mr Evans?

Thank you, Mr Deputy President. I'll just take a small moment to ... I may be here for a while, I feel.

Well, in actual fact, Mr Morrison - my clerk's wife has passed away and the funeral is today and with your co-operation, we would like to adjourn at 12 o'clock.

Could I express, at this stage, sir, and whatever acrimony may have been occurring before, I find that news most saddening. I was unaware of it. So, I would like to put on the record this organization's condolences for your clerk. That's most unfortunate. Indeed, I'll make sure we adjourn at 12.00.

Mr Deputy President, members of the Commission, I make a return appearance in these proceedings on the basis, sir, that I was concerned at developments that occurred the last time this organization was represented before this Bench on this matter, not only for the effect upon the individual but for the effect upon the organization.

Because, sir, if there is any breakdown in the relationship between the T.P.S.A. and this Commission, then this very case, I think, contributes in large measure to any faltering in that relationship and it does so for these reasons and I think it is very germane to the point, that our view of the system in which we operate is predicated on the activities and the actions of all the parties in the industrial relations system.

We appear before you here in these proceedings by virtue of provisions of the Industrial Relations Act, which defines roles, functions, responsibilities, regulatory requirements but, sir, we had always seen that moving from the old jurisdiction we previously operated,
MR EVANS: into the Tasmanian Industrial Commission's jurisdiction, that there would be some changes in the relationships that we previously enjoyed or had with other parties, but we also saw that there was coming into being a body which would assist the parties in the prevention and settlement of disputes that may occur between them.

What we found in this instance was, that whilst in a technical sense there was a dispute between the parties, in fact, that dispute had been settled in a manner which did no violence to any regulations or legislative requirements, which did no violence to any Principles in force at the time, but to our amazement we found that that agreement between the parties which settled the dispute was not one which the referee was prepared to accept.

As we saw it, what we had was the referee telling us, "Well, we don't like the way you've actually carried out the fight and we are going to change the rules of the fight and change the ring, indeed."

So, we went from a point, sir, where the parties were agreed to a situation where they are not agreed and indeed, I have to say this, sir, that this Commission in itself actually provoke disputes by its actions.

DEPUTY PRESIDENT: Well, I hope you're going to get to the point and which specific actions you're talking about.

MR EVANS: Well, sir, as I said, there was before you proceedings which had the parties jointly making representations on the resolution of those. That was not able to be obtained, so what in fact happened is, the fight did move to another ring - not one that the Commission chose, but one that one of the parties chose - and there are now proceedings in the Conciliation and
Arbitration Commission and again, in a technical sense, there is a dispute. That dispute has been found and there are further proceedings.

Now, it’s not a question of us wanting to change the ring because we didn’t like the one we were in at the start, in a sense. The reason why we pursued that course, was that the referee, as I termed you, told us that the way we were fighting was not appropriate and ‘I am going to change the rules.’

The parties found no difficulty with operating under those rules. They said it didn’t do violence to any legislative requirements or regulatory requirements or, indeed, industrial Principles in force at the time and in fact I was going to seek today, from this Commission, a further adjournment because the fight, having been taken into another arena, it may well be that on Monday of the coming week, that will be determined as well and that is because the Commission, as constituted by Commissioner Mansini in that jurisdiction, intends to hand down a decision on an application by our opponents in respect of section 41(1)(d) matters.

Now, if the decision is a certain way, then I presume my friends will exercise their rights and if the decision is a particular way which disadvantages us, then we may well, I think, at this stage say, ‘Well, that’s giving us a message; we understand what’s being said and we will retire from that ring.’

But what we’ve now got, in fact, is us operating in two rings, where we didn’t really want to be in either, quite frankly, but we were forced by actions of this Commission to continue on in both arenas - both rings.

Sir, as I see it, the role of the Industrial Commission, whilst it’s
MR EVANS: not spelt out in the headnotes of the Act, is to prevent and settle industrial disputes by a variety of means.

DEPUTY PRESIDENT: You're not suggesting we should agree with every agreement?

MR EVANS: No, sir. And I'm not suggesting that, but what I am suggesting, sir, is that where general Principles are laid down, or where certain actions are precluded by legislative requirements, then one would not expect this Commission to agree to agreements between the parties, but where they are not precluded, then I would expect this Commission to recognize the differences between the parties have been resolved and providing it does no violence to those three factors, then they should not seek to enforce or impose upon them their own views.

But in this particular instance, and I would support the remarks made by my friend, Mr Jarman, what this Commission is seeking to do, in fact, goes further than imposing upon the parties its own views but, indeed, is intruding very significantly into the area of managerial prerogative and I thought from statements from this Commission that was not an action that they would contemplate readily.

DEPUTY PRESIDENT: Well, we would disagree with that, of course.

MR EVANS: Well, I would suggest you ... whilst you might disagree with it, sir, you would need to look at a number of factors to make sure that that disagreement is well founded.

For example, there is the Tasmanian Industrial Commission Act, but there is the State Service Act and that State Service Act, we believe, in conjunction with the Tasmanian Industrial Commission Act, specifically precludes this Commission from interfering in the assignation of classifications to

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MR EVANS: individuals in the employ of the State.

DEPUTY PRESIDENT: We've only ever been talking in the terms of setting scales.

MR EVANS: Well, sir, we believe that by that action, you may well, either knowingly or unknowingly, enter into that arena of setting classifications on a personal basis - assigning them to individuals.

Because where the employer, that is the State, determines that it will employ people under particular awards, or classifications, then if that award or classification does not allow the employer to exercise their managerial prerogative to employ whomsoever they see fit to carry out the duties for which there is an appropriate remuneration already established, then you are interfering in the managerial prerogative of that employer.

DEPUTY PRESIDENT: Are you saying that the managerial prerogative is absolute and this Commission shouldn't interfere with management prerogative ever?

MR EVANS: It should not interfere with it lightly, Mr Deputy President.

DEPUTY PRESIDENT: Not lightly?

MR EVANS: Not lightly.

DEPUTY PRESIDENT: Are you conceding that maybe there would be circumstances when it would and it should?

MR EVANS: I would think, sir, there would be circumstances, where the managerial prerogative has been exercised either unfairly or unjustly, that it may be appropriate that the Commission considers whether it should interfere or not.

DEPUTY PRESIDENT: Right.

MR EVANS: But I think the circumstances which extend beyond that are very
debatable, though, I would say this, that as an organization representing employees, we have a view about the extent to which we can seek to intrude in the managerial prerogative, which this Commission at times tells us is inappropriate. The employer tells us it is inappropriate every day but, nevertheless, it is something we will continue to debate and pursue with the employer.

But we believe, sir, that what is happening in this case is the fact that, as I said, disputes are being created by the actions of the Commission.
MR EVANS: There is an intrusion into managerial prerogative, because the Commission could well be assigning individual classifications to individual personnel, which would completely remove from the employer the right - as provided for in the State Service Act - to regulate the classification of employees, within the context of awards established by this Commission.

That I acknowledge.

Now, I am not necessarily going to agree with my friend, Mr Jarman, at this stage, that the submissions which Mr Polites made in another matter hold true.

But if a determination is made in that jurisdiction that they do, then we may well have to accept them, and the argument is ended on that point.

And then we come back to the original basis of understanding between ourselves and the employer, as to the resolution of this dispute.

But I would say, at this stage sir, it is entirely appropriate that the matter be adjourned at least until after Monday, so that this Commission, by its own actions, does not add to any disputation which may exist between the parties.

But by adjourning until, as I said, at least until after Monday, then one of the elements of dispute between ourselves and the employer may well be removed.

DEPUTY PRESIDENT: Well, without conferring with my colleagues, it would seem that the proceedings of today have been occupied with a submission on the one hand that we should reconsider our previous decision; on the other, that we should adjourn.

Well, if we are to give an answer to the submission put up by Mr Jarman, it will take us a little bit of time.
DEPUTY PRESIDENT:

anyway.

We would like to take a few minutes to just consider the thrust of what has been put to us before we return. We will only be about 5 minutes.

...

DEPUTY PRESIDENT:

Well, in the brief adjournment, in the discussions that we've had, we have decided that we would like some more time still to consider the submission of Mr Jarman, and we will therefore reserve our decision on that.

I can hardly call it a `threshold question' at this stage, but on the material put forward today, we will give our earnest consideration, and give the usual further interim decision - or final - as the case may be.

We will adjourn to a date to be fixed.

HEARING ADJOURNED