

DEPUTY PRESIDENT JOHNSON: I'll take the appearances please for the applicant.

MR S.J. GATES: Yes, if it pleases the deputy president, GATES S.J. from the Tasmanian Chamber of Commerce and Industry.

5 DEPUTY PRESIDENT JOHNSON: Thank you, Mr Gates. For the respondent organisation?

MS P. SHELLEY: PAULINE SHELLEY, appearing on behalf of the Australian, Liquor, Hospitality and Miscellaneous Workers Union, Tasmanian branch.

DEPUTY PRESIDENT JOHNSON: Thank you, Ms Shelley. Mr Gates.

10 MR GATES: Yes, thank you, deputy president. If I could proceed first by seeking that the application be amended and I hand to you a revised Attachment A.

DEPUTY PRESIDENT JOHNSON: Do you need to briefly describe the amendments at all?

15 MR GATES: If, yes. The application that was submitted in this matter was the subject of discussions between myself and Ms Shelley of the ALHMWU. Subsequent to those discussions the - there was found to be some errors in relation to the clause referencing which has subsequently been renumbered. There was also found to be some problems with the percentages assigned for various categories of rates of pay and those have now been clarified. And you will note the most glaring difference is
20 the change from two decimal points to three decimal points so as to make it more accurate in its application, and the fairly significant change in public holidays for casual employees.

Do you wish to see if there's any opposition to the amendment of the application that is, or do you wish me to take it right through, deputy president?

25 DEPUTY PRESIDENT JOHNSON: Forgive me, Mr Gates. No, I don't think you need to go right through it. I was just contemplating whether I should raise the point that my associate Mrs Gillie raised with me in connection with the original Attachment A and it's still the same in your amendment, that is, that the application seeks to add
30 clause 8(4) - Hourly Wage Rates, and in terms of the structure of the award I wondered if there was some special or particular reason for this because I suppose as a matter of apparent logic it might better be clause 8(2) - Hourly Wage Rates. I don't know that I insist on that at all - it just occurs to me to raise the point.

35 MR GATES: Perhaps I was simply thinking of the publication through our office and required all these changes to our awards. 8(2) does sound logical to me and I don't have any problems with it being changed from 8(4) to 8(2) and the subsequent renumbering of 8(2) and (3).

DEPUTY PRESIDENT JOHNSON: Yes. All right. Thank you, Mr Gates.

40 Ms Shelley, have you had notice of these amendments and including the brief discussion I've just had with Mr Gates about the positioning - if that's the right word - of the suggested new clause if the application is approved as being numbered 8(2) instead of 8(4). Do you consent to the amendment?

MS SHELLEY: Yes, we do consent to the amendment to the application and it has been the subject of discussions and I have had opportunity to peruse it.

In relation to the numbering of the amendment to 8(2), I actually would be in favour of that because in looking at the clause earlier this afternoon it seemed to me that it would be much more user friendly if it was inserted where the actual amounts were and it could be that it - somebody reading the award may not follow across another four pages to the end of that clause. So I actually think it would sit much better as 8(2).

DEPUTY PRESIDENT JOHNSON: Right, Ms Shelley. Thank you. Mr Gates, the attached - amended Attachment A I think I will mark as exhibit.1, and - perhaps I should - beg your pardon - make that exhibit TCCI.1, and I will formerly order in the circumstances that the application as originally lodged be amended by substituting the Attachment A that accompanied the lodgment documents with Attachment A as reflected in exhibit TCCI.1 as submitted this day, and furthermore, that the references in Attachment A, as amended, to proposed clause 8.4 - I beg your pardon - to clause 8(2) - 8(4) be amended to reflect 8(2) and I formerly order to that effect.

Thank you, Mr Gates.

MR GATES: If I take you through the other aspects of the document for your information, deputy president, and so the parties have a clear understanding. The purpose of this application is to give a formal surety to the security industry as to the rates of pay which are attracted to employees in either a full time or part time or a casual position in the industry and in that regard the Attachment A sets out in very clear detail the - how the hourly wage rates are to be calculated.

The purpose - or the history behind this amendment to the - or the variation to the award goes back and has its genesis in T.No.1842 of 1989 which was dated the 8th June of 1989 which was a - I will say an interpretation - but I say that loosely which was published by the Government Printer which was an interpretation by the then President Koerbin who sought to provide a form of explanation as to how the rates of pay should be calculated for various employees for various days, and this application basically picks up those comments of President Koerbin.

There is one significant difference, and I'll highlight that with you now, and that relates to public holiday work. You'll see from Attachment A that for full time employees the payment for the first 11 hours is 6.578 per cent which equates to 250 per cent of an unloaded hourly wage rate and then there's a higher hourly wage rate if you work after the 11 hours.

Ms Shelley and I are in agreeance that casual employees should not be, as Koerbin had it in the decision, equivalent to some 170 per cent for the first 11 hours and have agreed that it be 250 per cent and then subsequently 300 per cent for casual employees.

So in effect a casual employee and a full time employee working a public holiday will both receive the same rate of pay.

Now if I take you in more detail through Attachment A, at points (a) to (h), those amendments are merely facilitative amendments to various clauses in the award and the effect of those is that where the award previously set out, for example, that overtime will be paid at double time and a half or time and a half or whatever, it now simply has a facilitative reference to what will be subclause 8(2) which is hourly wage rates.

So the effect of it is to remove the reference to double time or to percentages in the award and link it directly back to subclause 8(2) which, in our opinion, will make it far easier to operate in the industry and far easier to ensure compliance of the

award in the industry. And it's certainly much easier for both employers and employees to ensure that their rates of pay are in fact correct rates of pay.

5 If we take you to (i) on Attachment A, that is the proposed new subclause 8(2) - Hourly Wage Rates, there are two separate columns there and - or there are three
10 separate columns; the column on the left is a reference to the relevant clause in the award and where applicable provides a description so as to assist the use of it. In the second column, that is a reference to full time and part time employees. So the percentage which appears under that column is the percentage of the relevant or appropriate weekly wage rate. So for example, if you're a Level 1 then it's a percentage of the Level 1. If you're a Level 2 it's a percentage of a Level 2, and so on and so on.

For casual employees they appear in the third column and again it is a percentage of the appropriate weekly rate. So if you're Level 1, a Level 2, a Level 3, then it's a percentage of the various rates. So whatever the employees are on.

15 The percentages which have been allocated for casual employees, and if I take you to them at 10 - or sorry - the important thing which was - assisted in the compilation of this, is that where there is a penalty, the penalty is not cumulative upon another penalty, rather, it is simply an add-on, if that makes sense.

20 So it would not be 120 per cent multiplied by 115 per cent, it would simply be 135 per cent. So penalty rates aren't cumulative to that effect upon themselves.

So if we take you to the first one which is clause 10 - Casual Ordinary Time, 3.158 per cent equates to 120 per cent.

25 In the next one - Clause 21 - 3.947 equates to 150 per cent and 5.263 equates to 200 per cent. In 21(b), 5.263 per cent equates to 200 per cent, and the 7.895 equates to 300 per cent. In 30(a), 4.473 per cent equates to 170 per cent; 5.789 equates to 220 per cent and 7.1 equates to 270 per cent.

In clause 30(b) in the table, 5.789 again equates to 220 per cent, and 8.421 equates to 320 per cent. In 30(c) 6.578 equates to 250 per cent and 7.895 equates to 300 per cent.

30 Over the page, to 31(a) in the table, the three references to 3.552 per cent is - well equates to 135 per cent and 3.947 equates to 150 per cent. In 31(b) the 3.684 per cent equates to 140 per cent and 4.708 equates to 155 per cent. Now obviously the percentages which are attracted to full and part time employees will, where necessary, vary from those and take into account the absence of the loading.

35 To further assist in this clause being user friendly both to employers and employees, at the end of the table and the end of that section we propose to include an example, and that is just so that someone who picks it up will simply know how to do the calculation.

40 So you can see there that we've, you know, attributed a relevant weekly wage which is a fictitious amount in this example and we multiply it by 3.158 per cent which is in accordance with clause 10 and we've then come up with the hourly rate which was \$12.63. So that's an example to assist the parties. It's not meant to be a rate from the award because we didn't wish to confuse any of the parties when they come to come to actually apply it.

45 It is intended that that would operate far better than the award in its current terms in the industry. The understanding of this application and this variation is if there are employees engaged under the Security Industry Award who may have been

overpaid in the past prior to this coming in, that that overpayment would subsequently not be removed from them. And furthermore, this variation is made on the understanding that the variation to the Security Award is based upon the individual circumstances in this award, it is based upon the words which are used
5 in this award, and it is based upon the history of what has actually occurred through this award. So in that regard it would not necessarily - well it would not flow across to other awards.

As to the question of operative date, deputy president, the operative date which we seek and which we understand you have a consent position to, is that it go back to
10 the date of T.1842 of 1989 which is - which was handed down on the 8th June, 1989. In that case we would seek an operative date being the first full pay period on or after 8th June 1989.

We understand that that will give retrospective effect to this variation to the award however it is the understanding of the parties that these are the rates which are to
15 be applied and these are the correct rates which should have been applied historically.

Section 37, subsection (5) of the act gives the commission power to vary an award retrospectively. In that regard we refer to paragraph (a) which says that if - well, I'll
20 paraphrase - that if the parties agree then the award can be so varied retrospectively.

Again, I say it is my understanding that it is agreed between the parties.

In closing, deputy president, it is our submission that this variation is not against the public interest. If it pleases.

DEPUTY PRESIDENT JOHNSON: I deal first with the application, Mr Gates. The
25 percentage figures which have explained in terms of their operation, I think you've said this in another way, but if I might use these different terms. Your submission to me, and perhaps your assurance to me, is that the percentages as calculated reflect the words in the current award that express penalty rates for different work at different times on holidays, Sundays or out of ordinary hours work - is that the
30 case?

MR GATES: Yes, deputy president. It is my understanding the question which has vexed this award as it has vexed numerous awards is the question of loading - of
casual loading - and that was determined by deputy president - well - President Koerbin in this particular matter.

The percentages which have been attributed to them are the same as for full time
35 employees, and in that regard they reflect the award. The only difference will be whether or not there is attached a 20 per cent loading between the casuals versus the full time rates or part time rates. That is the difference. But that, in our submission was contemplated - well, it is part of the award in its current form. So
40 this gives effect to what the award has as its current provision.

As we raise the only question which was arguably a spinner in the whole matter was that of public holidays when the award would say double time and a half, and I think it's then triple time after that, whereas Koerbin said casuals would 170 per
45 cent. And what we have agreed between Ms Shelley and myself is that that will be 250 per cent for a casual, and in that regard it would reflect exactly what the award had.

DEPUTY PRESIDENT JOHNSON: Is there some benefit do you think in attaching to the award, assuming that the application is approved, an appendix, or annexure

or whatever you, the parties, might choose to call it some statement that explains the basis of calculation of the percentages? I invite you to comment on that because it seems to me that the adequacy of your explanation and whatever I might choose to write in a decision is not going to be in the award and it is the nature of things that humans either die or move on to other places, and my experience suggests that the manner in which the parties apparently quite cordially are approaching this change will not always be the parties in charge of the award and there is a tendency for people to forget what has been done, and I suppose this arises most usually and historically in the roll up of allowances into annualised salaries, and somewhere down the track the components are forgotten and claims arise once again for elements that are already incorporated in the wage rate.

MR GATES: Yes.

DEPUTY PRESIDENT JOHNSON: I'm not forcing it upon you; I am simply inviting you to comment on the usefulness of taking such an approach.

MR GATES: Yes. Perhaps if I answer it in three parts. The first would be that the decision of the president in T.1842 was issued by the government printer and we have a copy in our historical file on the matter. So there is a historical explanation as to it. On that basis I wouldn't believe it necessary to be restating what has already occurred.

The second is that prior to this application being submitted to yourself for variation to the award, we investigated the rates of pay in the industry through our members, and I'm also aware as to the hourly wage sheets which are distributed by the union although I can't exactly speak for them, but my understanding that the rates of pay which we have both had on our hourly wage rates sheets reflect the rates calculated by the application of the formulas in this current application. So this application simply reflects the rates of pay which are already in existence in the industry.

So it's not as if we're changing anything. What we're doing is clarifying what is there, and so on that basis I wouldn't believe it to be necessary.

The third reason why I'd say I don't believe it would be necessary, is this is really our organisation and the ALHMWU moving forward in a progressive manner and ... upon the continuous improvement and modernisation process in the awards and saying, well are there things that can be improved; yes, obviously this is one of those areas and this is part of that continuous improvement throughout the award. So on that basis I don't believe it would be necessary.

DEPUTY PRESIDENT JOHNSON: When you say that the wage rates are the same, I don't think I doubt you, but the difference between the Koerbin interpretation and the award on its face, as it currently expresses the entitlements of employees, is different as the methodology of calculation of the entitlements. And that's what you're changing or seeking to change by this application.

MR GATES: Well yes, I suppose we're just simply seeking to make it easier, so that it's absolutely clear and unambiguous - that all you have to do now is you take a weekly wage rate and to that you put it through a formula.

DEPUTY PRESIDENT JOHNSON: I think what I'm getting at, Mr Gates - perhaps I can express it even more simply and hopefully accurately - that the employers in the industry and the union applied the Koerbin approach from the time of his interpretation even though he apparently never issued a declaration to make that interpretation legally binding.

MR GATES: Well that is my understanding. The only -

MS SHELLEY: Excuse me, not quite in all respects, because insofar as public holidays are concerned, we didn't.

MR GATES: No, it would appear that employers have paid the 250 per cent for public holidays, and that is one of the reasons why Ms Shelley and myself have agreed that it be 250 per cent.

DEPUTY PRESIDENT JOHNSON: All right, before you sit down, so that having approached the former president for an interpretation and having obtained that interpretation subject to the modification about public holidays, the parties in industry went ahead and applied that methodology and have continued to apply it and that practice is what you say in terms of the public interest is that in the circumstances that is why it is not contrary to the public interest, and in those circumstances if I can put words into your mouth which you didn't say in terms of the submission, that not only do the parties agree to the retrospective effect, but that in the circumstances one would expect you to also submit that the circumstances make it fair and right to do so in terms of paragraph (b). Is that what you would also?

MR GATES: I couldn't put it better, deputy president.

DEPUTY PRESIDENT JOHNSON: Yes. Now finally, and I don't know that you would have the answer to this at all, but I probably need to ask the question. The former president concluded his interpretation with a statement saying that whilst reluctant to make a declaration and I don't say that I understand why he formed that view because he doesn't appear to me to explain it, nonetheless he said he would do so if requested.

Now presumably, given the approach the parties adopted, one would have thought that they had jointly responsibility to request the then president to make the declaration. Are you possessed of any knowledge to know whether such a request was made, and if so, why it was not acted upon?

MR GATES: Unfortunately I was not in existence at that time. In fact I would have just joined the army, I think, when that declaration was handed down. And I don't have knowledge of what occurred at that point in time other than to say that the parties accepted it on the face of the decision -

DEPUTY PRESIDENT JOHNSON: Yes. I suppose that there -

MR GATES: - and continued to apply it from that date.

DEPUTY PRESIDENT JOHNSON: - a public interest question, that's it. But I don't know at this stage how far I can pursue it.

All right, Mr Gates, thank you. And Ms Shelley, among other things you might like to let me know if you know anything about the actions of the parties at the time in connection with the -

MS SHELLEY: Well I think I can clarify it a little, because I wasn't actually in the army then, I was - I was with the union. Mr Kerry O'Brien had the carriage of this case at the time and the union had argued a different position to that of President Koerbin's decision and as a result of that, because he declined to actually make a declaration, we weren't inclined to seek that he do so in relation to a position that was contrary to ours at the time. However, because there was an interpretation we did advise our members, and it's only that advice that this is our view of what they should expect to be paid by way of the pay sheets that we issue to the membership.

Now it's subsequent to that just in recent months that we have now reached a position where we are in agreement with the employers as to where we're going into the future which does reflect almost all of what President Koerbin said in his interpretation at the time, except for that difference of public holidays.

5 So the interpretation didn't - did not reflect an agreed position at the time. We have subsequently reached an agreement to apply the interpretation except in respect of public holidays. So that's why the parties did not insist upon a declaration being made because the parties weren't actually in agreement at that stage. So that's the -

DEPUTY PRESIDENT JOHNSON: I suppose what speaks against that -

10 MS SHELLEY: - a little bit of the history -

DEPUTY PRESIDENT JOHNSON: - of course is your own admission that the union officer concerned at the time nonetheless went ahead with the apparently joint approach to apply the Koerbin interpretation.

15 MS SHELLEY: Well that's correct although we would have liked a different interpretation. And what the parties are seeking to do now is to make - is to simplify the award; that it is a very complex award and people have had great difficulty in understanding it and I think the president himself makes reference on a few spots to the difficulty in actually interpreting all of the different penalty rates and how they apply to casual workers. I mean there's about three different rates for Saturday work
20 for example.

So we have reached a situation where we do have agreement that in the main does apply the reasoning that was arrived at by the then president, and that's what's before you today. And I'd like - if I - are you ready to move on from that point?

DEPUTY PRESIDENT JOHNSON: Yes, certainly.

25 MS SHELLEY: Okay.

DEPUTY PRESIDENT JOHNSON: I still have some questions but -

MS SHELLEY: Right.

DEPUTY PRESIDENT JOHNSON: - when you've finished your submissions.

30 MS SHELLEY: In relation to your comment as to whether or not there would be a benefit to annexing some statement which might contain an explanation of the method of calculation, I think that that would probably be quite helpful. This method of expressing rates is actually already in the Cleaning and Property Services Award of this commission, and whilst it is a simplified method, people are pretty perplexed when they first look at it. It is a much easier application than searching
35 through the words within the award. What we have now is a system where you in fact, rather than the words, you have a reference back to - back to this - this chart which is much easier, but I think it would be of assistance when people first coming up against this if there was some way that they could - it could be clearly explained.

40 I'd also suggest that there be - and it might be a little late, but a further amendment to the application in terms of Attachment A just to completely - so - remove ambiguity, and where it says 'example' on the second page, I think it should actually say 'example only', because people could otherwise perhaps read that as being the hourly wage rate for the casual employee. And I don't mind if they do that at this stage because they'd be getting an over award payment, but as the award rate is
45 increased we might then have a problem with it.

DEPUTY PRESIDENT JOHNSON: Do you have any objection to that, Mr Gates?

MR GATES: I think the way that it's calculated shouldn't be an example only. Perhaps - perhaps we rectify the whole thing by attaching an appendix at the back of it in the form of 'this is how you go about calculating someone's hourly wage rate',
5 and just removing that example from it, then perhaps that's the easiest way around it.

DEPUTY PRESIDENT JOHNSON: But that still doesn't cause you to suggest that some explanation of the methodology ought to be included.

MR GATES: No, I don't believe that should be - I mean explanation as to how to
10 use the table, yes, I absolutely agree, but an explanation as to how the table is arrived at, I don't believe that's necessary.

DEPUTY PRESIDENT JOHNSON: And if you were to put such an attachment and such an explanation in, then if it's to be of benefit, presumably it would be constructed on the basis of setting out a range of examples that cover particular -

MR GATES: Yes, yes, absolutely. For example, you might have - 1), you have a casual employee who has worked, you know, eight ordinary hours on one day then worked three overtime hours, and on the next day worked Saturday on shift work, or whatever, and then you'd say, and this is how you would calculate it, bla-bla-bla, and then -

DEPUTY PRESIDENT JOHNSON: Yes.

MR GATES: - and then do one for a full time and then one for a part time employee.

DEPUTY PRESIDENT JOHNSON: All right, Mr Gates. What do you think of that, Ms Shelley? I should say that the explanatory notes that I've been talking about -
25 this is a consent situation, as I understand it, unless you're going to surprise me somewhere down the line. In those circumstances, I'm not prepared to force or press upon the views of the parties. I think if you like to take it up with Mr Gates and are successful, well and good in terms of the part I've been talking about, but given his opposition I don't think I should in a consent matter pretend to do a mini little arbitration on something like that.
30

In terms of the explanatory notes that he's talking about, in the context of examples of calculation, I think it has some merit and it would go a long way towards avoiding all together the sort of ambiguity that you rightly talk about, I think, in the one single example.

MS SHELLEY: I think it would be a good thing to include some attachment that had a number of different examples, if, as Mr Gates suggests. Anything that will help people to understand the award, including officers of our own organisation, that would be most welcome in fact.

I have checked the figures, but we're all fallible so I guess any order that you make
40 would of course be subject to errors and omissions.

In respect of the question of retrospectivity, as Mr Gates rightly pointed out, there may be a number of employers that have actually been applying the view of the award that we first - that we put forward at the time of the interpretation, which in effect is that the - there's a multiplier effect which applies to casual employees
45 rather than the agreed position that we now have which is that you add the 20 per cent loading on at the end but only base that 20 per cent on the base rate.

Now there may be - there may be some circumstances where the multiplier approach has been used and I think I'd like to clearly have it on the record, as Mr Gates has already done, that the - our understanding is, or agreements are, that if that has happened there's not an intention that - that those employees would have to give back any money or would have their rates reduced.

DEPUTY PRESIDENT JOHNSON: I think Mr Gates' undertaking was quite clear on that point.

MS SHELLEY: Yes. Fine. And I actually have nothing more to add apart from to say that we do agree and if we have - if we have succeeded in making easier to understand a very difficult to understand award, then I think the parties are to be congratulated.

DEPUTY PRESIDENT JOHNSON: Well I suppose - and once again this is not precisely what Mr Gates said, but you would say as he inferred that in terms of the public interest, in any event setting aside the specific issues here, this is an exercise that might rightly be seen as being part of the current state wages obligation on the parties to review their award.

MS SHELLEY: awards, 7.1.2.1.2.3 or whatever it -

DEPUTY PRESIDENT JOHNSON: Some such - yes.

MS SHELLEY: Yes.

MR GATES: We know that one well.

DEPUTY PRESIDENT JOHNSON: Yes. Now, Ms Shelley, perhaps I should deal with section 37(5) first and I don't know that I should be putting words in your mouth, but you didn't deal with it and I think you should, that is the position that the union in terms of the public interest requirements and the submission that Mr Gates made in respect of section 37(5) of the act.

MS SHELLEY: I - nothing more to say apart from that I concur with the sentiments expressed by Mr Gates - so well expressed by Mr Gates - in relation to section 37(5)(a) of the act in terms of retrospectivity and the public interest.

DEPUTY PRESIDENT JOHNSON: And therefore you - your organisation consents or agrees to this considerable measure of retrospectivity and in doing so it is your submission that the circumstances of this case make it fair and right to do so.

MS SHELLEY: Yes, that is the case.

DEPUTY PRESIDENT JOHNSON: And again in particular, point of the union's interest, that is, the interests of its members - and here again I'm committing the sin of putting words in your mouth, but I don't know how to do it any other way - your submission so far as you're obliged at law to care for the interests of your members is that this degree of retrospectivity does not disadvantage the members because of the parties' decision so many years ago to apply the Koerbin interpretation. Now that's how it -

MS SHELLEY: Yes.

DEPUTY PRESIDENT JOHNSON: - seems to me. Is that correct?

MS SHELLEY: Yes, I think that that was what - what I was intending to convey to the commission; that at the time of the Koerbin decision we did issue pay sheets and

our understanding is that our members would have been paid from that date of the interpretation at that rate excepting, as I said, for the public holiday where we - we've always said that it should be at double time and a half for the first 11 hours and treble time thereafter. So there - it's our understanding that our members
5 would not be disadvantaged, as you say, by this considerable amount of retrospectivity. It sounds a bit scary actually. But given the understandings that have been put on record today, that if there are employees who may have had the rates applied using a different method of calculation, they will not be disadvantaged.

DEPUTY PRESIDENT JOHNSON: Yes. And if - I suppose if were wishes beggars
10 would be kings - but still, if there were an interpretation today by the current president and a declaration issued, the force of the act would apply the declaration from the commencement date of the award. Is that the correct understanding - so the same result would be achieved.

MS SHELLEY: Can you repeat that please?

DEPUTY PRESIDENT JOHNSON: I think if - it's my understanding and perhaps,
15 Mr Gates, you might correct me if I'm wrong - but if the president were to issue an interpretation and follow it with a declaration as required by the act, then the effect of the declaration would apply as to that particular interpretation from the commencement date of operation of the award. Is that your understanding of -

MS SHELLEY: That sounds logical. I think - isn't it interpreting what the words
20 mean and must therefore always have meant.

DEPUTY PRESIDENT JOHNSON: Yes. Yes, that's - I think that's the theory of the argument.

MR GATES: Yes.

DEPUTY PRESIDENT JOHNSON: I'm not trying to trap anyone, Mr Gates, I'm
25 simply -

MR GATES: Yes, I appreciate that. I mean you could decide either prospectively or retrospectively. It would be open to

DEPUTY PRESIDENT JOHNSON: Yes.

MR GATES: The only - the only point which I haven't raised and I apologise for not
30 having raised anything, but I'd certainly like Ms Shelley's comments on it, is as we've conversely said that no employee was disadvantaged, should an employer have applied the public holiday rates to this point in time, then they might be disadvantaged on account of having paid 170 per cent as we've now agreed that the
35 rate be 250 per cent. A sting in the tail.

MS SHELLEY: Well I feel a little bit ambushed there.

MR GATES: Rightly so.

MS SHELLEY: And I'm not - unaware of what - what you may - what the TCCI
40 may have put in their advices that they provide to employers in respect of public holidays.

I think that what we - what we came here today with was an agreed position that tallied with what we might Koerbin position, except that we agreed that we didn't agree with Koerbin and respective public holidays we agreed that it was 250 per cent and 300 per cent and that's the agreement that we have.

DEPUTY PRESIDENT JOHNSON: I'd be reluctant to, as you've already heard, Mr Gates, to disturb any consent arrangements in the circumstances, but the caveat that both of you have expressed earlier about double counting, if I can briefly call it that, and this latest issue, does raise something in my mind, and I wonder how you
5 would propose to deal with it, and again I'm forced to say, if an employee were to - no, I beg your pardon - I'll withdraw that. I think logically when I follow it through it doesn't make sense.

MR GATES: Perhaps if I - if I know the train of thought that you're on. If there is entitlement to be paid by an employee and they have been underpaid, then that
10 claim for underpayment would still exist.

DEPUTY PRESIDENT JOHNSON: Yes.

MR GATES: Yes.

DEPUTY PRESIDENT JOHNSON: Yes, all right, thank you. Yes, well, one of my old
15 colleagues in the federal commission who now unfortunately has gone from us would have - Mr Justice Coldham - would have said to you, well that's a very felicitous explanation, Mr Gates. I think that's praiseworthy but I might revise that at some time.

Now I - one further question, Ms Shelley, and I really should have asked it of Mr Gates too, so that you can take it on notice, Mr Gates, and when Ms Shelley is
20 offered a response you might do so too. Do you have any considered reason for why it's taken so long to formerly put this change into place in terms of the agreement that you've come to with the employer?

MS SHELLEY: We, at the time, in 1989, as I said, we didn't agree with the
25 interpretation, but nonetheless, in order to avoid a number of problems that could potentially arise, we did, as I said, and issued our pay sheets on that basis, and left it there. I mean the - it wasn't - it wasn't in - I guess it wasn't part of our agenda to take it any further at that stage, so it resurfaced when the employers, I guess, for their own reasons deemed it an appropriate time to make an application to vary accordingly, so perhaps that question should be addressed to the TCCI.

MR GATES: Yes, perhaps if I answer it, deputy president. Since - since my time at
30 TCI, this is a matter which has reared its head on several occasions. There has been that sort of ambiguity, if you will, and everyone would say various things and at the end of the day everyone would basically retreat from the position and not push it to its final conclusion. What we have done is that the problems keep on reappearing
35 and so we've decided to put the matter to bed once and for all and clearly state what is the position for this particular award. So - but that is why the application has been made.

DEPUTY PRESIDENT JOHNSON: Mr Gates, given the commitments that you have,
40 if I were to - well, perhaps I should withdraw those words too, and start again. On the basis of the parties' submissions and the answers given to my questions, I see no reason in the public interest or in terms of the Wage Fixing Principles why I should not approve this application. The submissions make it quite clear to me that it is an application that reflects fair dealing; that there are no undertones of devious
45 practices connected with the application; the application seeks really to put in place as a matter of law, the practices that the parties have adopted as a consequence of guidance offered by the then president of the commission in an interpretation issued and published on the 8th June, 1989 in relation to matter T.No.1842 of 1989.

Now perhaps I should, having done that, do something I ought to have done a few moments ago, and that is to formally amend the Attachment A, submitted in the

form of exhibit TCCI.1 today by deleting therefrom the example on the final page of that appendix and further ordering that the - I beg your pardon - Attachment A - and by further ordering that there accompany this order such page or pages as the parties deem necessary, setting out examples of calculations to be applied for various classes of employee in relation to particular times of the day or week or holidays on which the work is performed.

Now I can say, Mr Gates, given the commitments of the parties at this time of the year, if I were to formally go ahead and decide to amend - I beg your pardon - vary the award in terms of the application, I would want to do so in the context that the parties will submit those explanatory notes to me by, say, the close of business next Friday. Now that's something I've snatched out of the air. If that's unreasonable please tell me otherwise I will make a different time period that suits the parties. I'm simply being cautious that in the nature of things, people get busy and I don't want to be left having written the decision but suffering an incapacity to issue an order because there some part of it missing. That's a bit longwinded but the short answer is, is that a reasonable time?

MR GATES: It is for me.

DEPUTY PRESIDENT JOHNSON: Ms Shelley?

MS SHELLEY: Yes.

DEPUTY PRESIDENT JOHNSON: In those circumstances then, subject to my receipt of the proposed explanatory notes by the close of business next Friday, and I don't have a date in front of me, it is my intention vary this award in terms of the application, as amended, in these proceedings today as expressed in exhibit TCCI.1 and subsequently in the order that I have given to further amend that document in relation to the examples and explanatory notes.

My reasons for this decision and the consequent order will issue in due course.

That concludes the hearing of matter T.No.6553 of 1996.

HEARING CONCLUDED