

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 1092

TASMANIAN INDUSTRIAL COMMISSION

PRESIDENT P.L. LEARY

T No 10817 of 2003

**BUILDING AND CONSTRUCTION INDUSTRY AWARD
DAIRY PROCESSING AWARD
FISH AQUACULTURE AND MARINE PRODUCTS AWARD
MEAT PROCESSING INDUSTRY AWARD
SHELLFISH INDUSTRY 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 awards re to increase the casual
loading and alter arrangements in relation to casual
employment**

HOBART

2.15 PM, TUESDAY, 24 AUGUST 2004

**Continued from 12.6.04 before a Full Bench
comprising President Leary, Deputy President
Watling and Commissioner Abey**

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

HEARING COMMENCED

[2.15pm]

PN78

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

PN79

MR B. WHITE: I seek leave to appear for the CFMEU, Tasmania Branch.

PN80

THE PRESIDENT: Which awards do you have - - -

PN81

MR WHITE: Sorry, in relation to the Building Construction Industry Award.

PN82

THE PRESIDENT: Okay.

PN83

MR M. WATSON: I appear on behalf of Tasmanian Chamber of Commerce and Industry in all matters.

PN84

THE PRESIDENT: Thank you. I take it there is no objection to Mr White representing his members in the awards that - - -

PN85

MR FLANAGAN: In fact, President, he has got a right to appear in the Building Construction Award.

PN86

THE PRESIDENT: That is right, yes. Okay, for the benefit of the transcript I am sitting alone and will report to the other two members of the bench about the matters that we discuss today. Thank you.

PN87

MR FLANAGAN: Thank you, President. President, these applications seek to vary five awards of the Tasmanian Industrial Commission to move the casual loading from 20 per cent to 25 per cent. Following the application there have been comprehensive discussions with the Tasmanian Chamber of Commerce and Industry in relation to the application and arising from that the parties have reached agreement in relation to the position.

PN88

What is proposed by the union and I understand not objected to by the TCCI, is that in respect of the Dairy Processing Award, The Shellfish Industry Award, the Fish Aquaculture and Marine Products Award and the Meat Processing Industry Award in respect of white meat only is that the casual loading will increase by 1 per cent on 1 October 2004 to become 21 per cent; on 1 October 2005 by a further 1 per cent to become 22 per cent; by a further 1 per cent on 1 October 2006, becoming 23 per cent and then a final adjustment of 2 per cent on 1 October 2007 taking the loading to a 25 per cent figure.

PN89

In addition, in relation to those awards the parties have agreed on a conversion process which will take effect for people that have 12 months service, and the operative date for that will be 1 October 2004 so that from 1 October 2004 if you have completed 12 months service you will then have the capacity to elect to convert to either a full-time or part-time position under those awards.

PN90

THE PRESIDENT: So is that prospective or retrospective? Does - - -

PN91

MR FLANAGAN: Prospective.

PN92

THE PRESIDENT: So you start counting from October 2004?

PN93

MR FLANAGAN: That's correct, yes. So the first date where the capacity to convert will be available will be 1 October 2005.

PN94

THE PRESIDENT: Yes, that is fine, thank you.

PN95

MR FLANAGAN: In relation to the Building and Construction Industry Award the agreement is that the 20 per cent loading which currently appears in respect to the civil side of that award will move from 20 per cent to 25 per cent from 1 July 2005 and that there would be no conversion process in respect to that award and underpinning that understanding is the recognition on the part of the AWU that there are a number of employers currently bound by the State Award involved in civil operations that currently have in place contractual arrangements, that being the nature of civil construction and therefore there is - by having the operative date of 1 July, it doesn't sort of impact on labour costs adversely but it also identifies to those employers where they are in part using casual employment, from 1 July next year their contractual arrangements will need to reflect the higher rate of pay for casual employees, so that is the position that the parties have reached agreement on. I would seek to tender an exhibit book with material in support of the applications before you.

PN96

THE PRESIDENT: Thank you. I will mark the whole of the book and we can deal with if we go through them, AWU1.

EXHIBIT #AWU1 EXHIBIT BOOK WITH MATERIAL IN SUPPORT OF THE APPLICATIONS

PN97

MR FLANAGAN: If I can take you to AWU1, President? You will see that on the inside cover there is a loose attachment and that is headed up Application By the AWU To Increase the Casual Loading. It there says Australian Workers Union list of authorities and identifies from 1 through to 16

on the following page. The union will provide you with a separate exhibit book containing those decisions. On the third page of that document is the list of 71 awards of the AWU which have a loading in excess of 25 per cent and that was as at December 2003 and that simply reflects in terms of that list the general movement away or up, if you like, in the casual loading in the Federal jurisdiction and the award code is there for any reference.

PN98

It is not proposed that the second exhibit book will contain the decisions in relation to each of those 71 awards, it is merely the first 1 to 16 identified on that. If I could take you then to the index in terms of the documents which are contained within AWU1. The first document in tab 1 is an outline of the union's submissions and I don't propose to take the Commission through that outline today, I would simply ask the Commission to examine its content and rely upon it in issuing its considered decision.

PN99

Secondly, behind tab 2 is a statement of Professor Bruce Felmingham and if I can take you to that statement. The AWU commissioned a report from Dr Felmingham and if I can take you to the third page at tab 2 you will see that the study is designed to provide - under the heading one, Introduction - designed to provide evidence germane to the AWL. That should say AWU, I am not sure what inference should be drawn from that error but it should say AWU.

PN100

THE PRESIDENT: Typographical, let us hope.

PN101

MR FLANAGAN: Yes, I think so. I hope so.

PN102

THE PRESIDENT: Otherwise maybe he thought he had a different client.

PN103

MR FLANAGAN: Yes. Application to vary five awards in relation to two matters, increase the casual loading in the award from 20 per cent to 25 per cent and give employees the right to convert their job status from casual to permanent, full time to part time beyond six months service as casual, and indeed, at the time the application was filed the application referred to six months but the parties have seen that in the context and circumstances of the four awards that deal with conversion in these proceedings, the 12 months is an appropriate period rather than six.

PN104

Obviously we will reserve the right in future applications to pursue a six month period if that is considered to be appropriate in the circumstances and context of other awards. Dr Felmingham continued. The following terms of reference were agreed. First dot point, to analyse the general demographic characteristics surrounding casual employees and the second dot point, to determine the effect on productivity at company or employer level if the loading is increased or if casuals are given the right to alter their job status

from casual to part time or full time, and the third dot point, to assess the effect on the Tasmanian economy of either change.

PN105

Now, the paper then deals with that and has attached to it a number of appendixes but if I can take you to the second last page of Dr Felmingham's report. It is headed up Six Recommendations. It says:

PN106

This overview of the Tasmanian economy has established the presence of significant improvement ...(reads)... and casual to permanent status should result in productivity improvements.

PN107

And that is an important point I would suggest, President. Second:

PN108

The final labour costs and income does not have a significant effect on employment suggests that an increase from 20 to 25 per cent in the loading for casual workers should be absorbed by the Tasmanian economy without any significant impact on Tasmanian employment.

PN109

Now, we would ask the Commission to take those comments into account when considering its obligations under section 36 of the Act.

PN110

THE PRESIDENT: Is there something within his document that talks about - that part-time and casual employment reduces labour productivity?

PN111

MR FLANAGAN: Yes.

PN112

THE PRESIDENT: Is that one of the attachments, is it?

PN113

MR FLANAGAN: That is dealt with in his - first in his submissions at the front there it is dealt with, but it is also dealt with on some of the material that he has relied upon in coming to that conclusion.

PN114

THE PRESIDENT: At point 3 it looks like he has addressed it.

PN115

MR FLANAGAN: That is right. Appendix A is a journal article by John Mangan of the University of Queensland dealing with casual employment. Appendix B to his report is an extract of papers prepared by the Department of Treasury and Finance. Appendix C is a report by Anglicare which was released in I think May 2003 - yes, it was, in May 2003 and titled Blue Collar, the Shrinking World of Work in Tasmania and this document deals in length and in detail with the circumstances of casual employment in Tasmania and of particular importance, we would say, is the conclusion that the report reaches which can be found - if I can take you to page 79 of the report which is the

third or fourth last page in appendix C. have you got page 79; is it the bottom right-hand corner there - - -

PN116

THE PRESIDENT: Yes.

PN117

MR FLANAGAN: Yes. If you go to the next page under point 4 Conclusion, the Anglicare report states:

PN118

The loss of employment security for people at the bottom of the labour market has arguably been a most fundamental change in Tasmanian labour market in the past three decades.

PN119

And I would ask the Commission to note that the awards which are before you prescribe safety net earnings and are modest levels of earnings. They are a long way short in the level of earnings that you would expect to see, for example, in enterprise agreements. The conclusion continues on:

PN120

In the early 1970s those people in the labour market were very unlikely to be unemployed ...(reads)... due to the uncertainty about their work situation and income levels.

PN121

And the accuracy of that is in fact confirmed by some of the witness statements which we will deal with later:

PN122

They are often excluded from access to resources such as bank finance which allows individuals the ordinary milestones of life in Australia.

PN123

And indeed the evidence of Mr Wakefield touches upon that:

PN124

These changes in the labour market have been driven by Federal Government policy responses to changes in the national and global economy ...(reads)... little hope of a more secure future for themselves and their families

PN125

And again we would ask the Commission to consider that when looking at the public interest. Public interest is not focused exclusively on economic impact but also on other factors and the security and future security and the capacity to plan we say are matters of public interest. The report continues:

PN126

There have been some winners to emerge from the upheaval of labour market restructuring but for the most part they do not live in Tasmania ...(reads)... it is a challenge which can and must be met.

PN127

So not an unimportant conclusion contained in the Anglicare report in the context of the proceedings before you and the unions outline as contained behind exhibit 1. Appendix D is the curriculum vitae for Mr Felmingham which indicates that he is currently the Dean of the Faculty of Commerce and Law at the University of Tasmania. He is also the Head of School of Economics and Reader in Economics at the university and that the rest is contained simply for your information about his capacity to give evidence in the context of being expert evidence.

PN128

The next, behind tab 3 is a witness statement of Mr Paul Barrett. I understand that the TCCI disputes some of the accuracy of the details contained within Mr Barrett's statement but in the context of the agreed arrangements it is not necessary to explore those issues.

PN129

THE PRESIDENT: No, I take it they will be noting that on the transcript.

PN130

MR FLANAGAN: That is right.

PN131

THE PRESIDENT: That is possibly all that is necessary.

PN132

MR FLANAGAN: Yes. Behind tab 4 is the statement of Jill Reid who is an employee of the Inghams meat processing facility, white meat processing facility I should stress, at Inghams and you will see the critical part of her evidence on page 2 is that they already have in place an understanding as to a conversion process despite the fact that that conversion process is neither reflected in the award nor in their industrial agreement but it is a practice that Inghams apply and they are to be applauded for taking that approach.

PN133

THE PRESIDENT: Yes.

PN134

MR FLANAGAN: The next statement behind tab 5 is a statement by Mr David Goodrick, an employee at National Foods at Lenah Valley, who discusses the circumstances of casual employment at their site and whilst the numbers at that particular site are quite low compared to the other sites - of casual engagement, that is - there is a clear desire by those persons to obtain permanent employment if possible, and in tab number 6 is a statement of Mr Wakefield who deals with the circumstances on the civil construction industry and the other awards affected by the application together with some of the difficulties that employees engaged as casuals experience so we see those as relevant points that Mr Wakefield makes.

PN135

Behind tab 7 is the decision of the Full Bench of the Federal Commission in relation to the Pastoral Industry Award which we referred to as the pastoral industry casuals case. Of particular relevance, and you will note that it is

contained within the union's outline of submissions, is paragraph 67 which appears at page 17 of that decision and states:

PN136

In our opinion the relevance of the metal industry casuals case to the present matter is as authority for the proposition that if...(reads)... ought to be applied unless there is some clear distinguishing circumstances.

PN137

So in fact consistent with that observation by the Full Bench of the Australian Commission attached behind point - or tab 9, and I will take you to it, is the break down of calculations consistent with the metal industry approach. Behind tab 8 is in fact the metal industry decision which was referred to just then in paragraph 67 and of particular importance in the context of these proceedings is the findings of the Commission which start at page 71 and go through to their conclusions on page 84 and that talks about the methodology to be applied in the context of the Federal Commission in determining any adjustment for a casual loading.

PN138

Turning then to page 9 is the break down in respect of each award. There are four break downs in the calculation, and if I can simply refer to the first one, the Dairy processing award, the first calculation is assuming one year of work with five days a week but with no work on public holidays, and it includes an allowance for notice of termination and then it is broken down. the second page, and there are four methodologies which we provide you with here.

PN139

THE PRESIDENT: Yes.

PN140

MR FLANAGAN: The second one is assuming one year of work with five days a week but with no work on public holidays, and this one excludes an allowance for notice of termination. The third one is assuming one year of work with five days a week but with no work on public holidays. This again includes an allowance for notice of termination in short time worked and then the final one is assuming one year of work with five days a week but with no work on public holidays and this excludes allowance for notification of termination but includes short time work, so depending on whether it is short term or long term, whether you include or don't include the notice provisions. You will see that the calculation fluctuates from 122.1 right up to a range of 129.05.

PN141

Now, that methodology is in fact applied in respect of each of the awards which are currently before the Commission for its consideration. It follows on for Shellfish, after the Shellfish the Building and Construction Industry Award. After the Building and Construction Award the Fish Aquaculture and Marine Products Award and after that the Meat Processing Industry Award and that is all contained behind tab 9. Tab 10 is a decision of the Queensland Industrial Commission and the real pointy end of that decision appears at page 14 where the Full Bench of the Queensland Industrial Commission, in what is termed in

Queensland as a general ruling, determined to take their casual loading from 19 per cent as the general standard to an amount of 23 per cent and at the bottom of page 14 the Queensland Commission said:

PN142

To this end we determine to implement the decision in the following manner: where current award entitlements for casual loadings are 19 per cent, first dot point, from the date of operation of this decision 2 per cent -

PN143

so it was increased by 2 per cent -

PN144

after six months from the date of this decision 1 per cent and after 12 months from the date of this decision 1 per cent.

PN145

So in a period of 18 months the casual loading went from 19 per cent as the standard to 23 per cent as the standard and we would ask the Commission to take that into account when considering the phasing arrangements which have been agreed between the parties to these proceedings, and in fact what we would say is that the nature of that phasing in and the length of time over which it is phased in, given the buoyant economic circumstances that Tasmania is currently enjoying, minimises any negative impact not only on the economy and on employment levels but any negative impact whatsoever.

PN146

So what the union would do, President and Members of the Bench, is we would ask the Commission to take into account the submissions which are contained behind tab 1, together with the supporting material found in exhibit book 1, AWU1, and a further exhibit book which will deal with the list of authorities I referred to at the beginning of the process, and in those circumstances we would ask that the Commission vary the awards to give effect to the position reached between the union and the TCCI and that we will provide the Commission with orders to reflect those arrangements.

PN147

We would submit that whilst the application is of a special case nature in that it seeks to vary an award outside the wage fixing principles, the submissions and attached supporting material demonstrate that the proposed variations do not offend the public interest as required by section 36 and in the context of the arrangements between the parties, together with the fact that it is not opposed by the employer respondents, that the union approve the applications for variation as sought. If it pleases the Commission.

PN148

THE PRESIDENT: Thank you. Just before I hear from anybody else, we have had a fax from the Australian meat Industry Council. The only part that is relevant, I guess, is that Mr Johnston has spoken with Mr Watson about the possible agreement with the applicant, AWU, whose interests extends to the poultry section of the award, this is the Meat Processing award. They raise no

objection to the proposal as it appears to be confined to this poultry section and I confirm that is what you are putting anyway.

PN149

MR FLANAGAN: That is correct, yes.

PN150

THE PRESIDENT: Yes. Okay, that is fine. Mr White?

PN151

MR WHITE: Thank you, President. The CFMEU supports that part of the AWUs submission to increase the casual loading as prescribed in clause 8(b(3) of the Building and Construction Industry Award. Thank you.

PN152

THE PRESIDENT: Effective from 1 July 2005?

PN153

MR WHITE: Yes, yes, President.

PN154

THE PRESIDENT: Thank you. Mr Watson?

PN155

MR WATSON: Thank you, President. First of all if I can just address the submissions of Mr Flanagan. The exhibit book that he has provided most of that material was actually provided to us back in April I think it was, so they are - - -

PN156

THE PRESIDENT: You are familiar with it?

PN157

MR WATSON: We certainly are familiar with it, but as you will probably note in the outline of submissions that we put to the Commission when we thought this matter was going to arbitration, we did raise some particular matters about the witness statements so I don't wish to go to detail but perhaps just for the purpose of the record if it can be noted that we did raise some issues in relation to some witness statements and given the circumstances I don't wish to pursue those matters but as long as it is noted that they are still potentially issues.

PN158

THE PRESIDENT: Yes. That you are not accepting all of the copious

PN159

statements made in the witness statements - - -

PN160

MR WATSON: That is correct, that is correct, yes.

PN161

THE PRESIDENT: And I think you have detailed those previously in your written - - -

PN162

MR WATSON: We did highlight which particular statements we didn't object to and which we did so, yes.

PN163

THE PRESIDENT: Yes, that is fine.

PN164

MR WATSON: President, I was also going to say that I had spoken to Mr Johnston but obviously you have got a fax from him - - -

PN165

THE PRESIDENT: Oh right, yes we have.

PN166

MR WATSON: - - - so I can confirm that we have discussed it and given that it doesn't apply to employers that Mr Johnston represents, he has put his position fairly clearly in that fax.

PN167

THE PRESIDENT: Yes.

PN168

MR WATSON: President, our position of consent to these applications I would have to point out fairly strongly is completely without prejudice to our position in relation to any other application that may come before the Commission.

PN169

THE PRESIDENT: Certainly.

PN170

MR WATSON: We formulated this position in consultation with all of the industries covered by these awards and believe that we have reached a settlement that the industries can live with, noting that it is phased in over a significant period of time. As far as tab 9 is concerned in the exhibit book, that is all the calculations in relation to the specific awards. That documentation we haven't seen before today. I don't necessarily object to it but just to make the point that I just don't have the time to do the calculations so - - -

PN171

THE PRESIDENT: Sure, and Commissioner Abey is out mathematical genius and he is not here to tell me what it means either.

PN172

MR WATSON: But I think also, given that we do have consent in relation to the applications - - -

PN173

THE PRESIDENT: Sure.

PN174

MR WATSON: - - - I don't propose to address that so I guess if we can just simply keep that powder dry in relation to that matter, I think that is probably where we can leave it.

PN175

THE PRESIDENT: Yes, I guess it doesn't change the end result - - -

PN176

MR WATSON: It doesn't.

PN177

THE PRESIDENT: - - - but I take note of what you say.

PN178

MR WATSON: Yes. President, I don't think there is really anything more that we wish to say at this stage other than to say that given the phasing in arrangement that has been agreed we don't believe that the outcome is against the public interest and I think there is material before you to address the matter being outside I suppose what we would term a normal application under the wage fixing principles - - -

PN179

THE PRESIDENT: Yes.

PN180

MR WATSON: - - - but I must say also that from our point of view we do appreciate the approach of the AWU, particularly given that there were I think two or three adjournments which were predominantly sought by us and we do appreciate the fact that they were prepared to - sorry, prepared to ask the Commission for those adjournments but also it was simply on the basis that we needed some time to formulate what is now an agreed position so I just want that recorded, if that is okay?

PN181

THE PRESIDENT: Yes.

PN182

MR WATSON: If it pleases.

PN183

THE PRESIDENT: All right, thank you. Did you want to add anything else, Mr - - -

PN184

MR FLANAGAN: Nothing further, thank you, President.

PN185

THE PRESIDENT: All right. As I indicated I will report to the other two members of the bench but I think it also needs to be said or it needs to be recorded, my compliments to the parties for reaching agreement on this matter. It had the potential to be bigger than Ben Hur but I think the approach of the parties is to be commended and I do so. Prima facie it is a - well, it is a matter by consent - prima facie I don't have any difficulty with it but subject to the

other two members of the bench, we will have a decision available well and truly before 1 October of this year and I don't see any problems with that.

PN186

The only thing that is crossing my mind at the moment is how we advise all of the parties covered by these awards and seeing Mr White reminds me of those sorts of things and I am wondering whether we do some public notices. Once the bench has issued a decision, if we issue a public notice that says that the awards have been varied or how they are going to be varied because they are - it is a significant change that employers need to be aware of and there is a limit, I think, to how much the parties directly can do but maybe we can exercise our minds to that over the next few weeks. All right.

PN187

MR WATSON: President, just one more thing before we finish. Just in relation to the orders I forgot to mention that Mr Flanagan and I need to have discussions about the final form of order and particularly one of the awards, I can't quite recall which one it is now, doesn't actually contain part-time provisions so we actually need to put those in as part of the final order.

PN188

MR FLANAGAN: That is the Fish Aquaculture and Marine Products Award. We have discussed an agreement in principle that we would put part time provisions in. It is a bit difficult to convert to part time if you don't have a part-time provision.

PN189

THE PRESIDENT: Indeed, that is so. Yes, that was very observant whoever picked that up. All right. As I say, prima facie I don't think there is any difficulty with the decision that will be issued but of course I must allow the other two members of the bench to have a look at what you have provided but there will be something issued well before the first variation is due to be effected and in the mean time the parties can apply their minds to the draft orders. All right, thank you, this matter is adjourned.

ADJOURNED INDEFINITELY

[2.55pm]

INDEX

LIST OF WITNESSES, EXHIBITS AND MFIs

**EXHIBIT #AWU1 EXHIBIT BOOK WITH MATERIAL IN SUPPORT
OF THE APPLICATIONSPN97**