

COMMISSIONER WATLING: I will take appearances please.

**MRS H.J.DOWD:** If the commission pleases, I appear on behalf of the Australian Municipal Administrative, Clerical and Services Union - DOWD, H.J.

5 **MR D.J. O'BYRNE:** If the commission pleases, O'BYRNE D.J., on behalf of the Australian Liquor Hospitality and Miscellaneous Workers' Union Tasmanian Branch.

COMMISSIONER WATLING: Good, thank you.

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

COMMISSIONER WATLING: Good, thank you. Right, Mrs Dowd.

10 **MRS DOWD:** Thank you, Mr Commissioner. Mr Commissioner, the application before you today is seeking to vary the Independent Schools (Non-Teaching) Staff Award to reflect the Third \$8 Arbitrated Safety Net Adjustment and adjustment to any work related allowances.

15 We would actually like to seek at this stage to amend our application to include work related allowances. If the commission pleases.

COMMISSIONER WATLING: Any objection? No objection?

MR GATES: No, I don't have objection to the amendment.

COMMISSIONER WATLING: Right. Thank you, Mrs Dowd.

20 **MRS DOWD:** Thank you, Mr Commissioner. We refer the commission to the wage fixing principles of the Tasmanian Industrial Commission under T.5214 of 1994, a decision of the full bench of December 1994 and amended under T.6284 of 1996 and T.6305 of 1996 on the 24th July, 1996.

25 The main principle related to the third arbitrated safety net adjustment is Principle 7.3 and in relation to the award level is 7.3.2. Mr Commissioner, this award was varied to reflect the first safety net adjustment on the 18th January 1994 under T.4798 of 1994. And the second safety net adjustment on the 26th July, 1995 under T.5551 and 5592 of 1995. It can be seen from that the Principle 7.3.2.1 is thus satisfied.

30 Also, Principle point 7.3.2.2 is also satisfied because a period of more than 12 months has elapsed between the granting of the second safety net adjustment and today's application for the third safety net adjustment.

The Australian Services Union gives a commitment to Principle 7.3.2 3 in that we agree to review the award. I believe that a letter from the Australian Nurses Federation has been forwarded to the commission in relation to giving that principle also.

35 **COMMISSIONER WATLING:** Yes, it has, and I'll read it in part. It says: 'The Australian Nursing Federation branch has no objection to varying the award to allow the third arbitrated safety net adjustment and further confirms its commitment to review that award as per section 7.3.2.3 of the Tasmanian Industrial Commission's Wage Fixing Principles'. Signed by Helen Gray, State Secretary.

40 **MRS DOWD:** Thank you, Mr Commissioner. I have draft orders to present to the commission in relation to our application.

COMMISSIONER WATLING: I'll just let you know that I've also got a commitment from the CFMEU who are prepared to commit to review this award as well.

MRS DOWD: Thank you. Are they party to this award? Didn't think so.

MR O'BYRNE: .... good of them though.

5 MR GATES: Perhaps they're trying to.

COMMISSIONER WATLING: I think there may be a hint.

MRS DOWD: Could be.

MR O'BYRNE: All bets are off.

10 COMMISSIONER WATLING: They've probably looked at that section where we are supposed to review the parties and persons bound.

MRS DOWD: We'll wait and see what the outcome of that is.

COMMISSIONER WATLING: Right, we'll mark this exhibit D.1.

15 MRS DOWD: The draft order, Mr Commissioner, is for the deletion of clause 8 - Wage Rates - from the award and the insertion of a new clause 8 - Wage Rates. The draft order has been forwarded to the TCCI. There was one amendment to the draft order which I gave to Mr Gates only a few minutes before the hearing started. That is in relation to clause 17 - First Aid Allowance. That was not included in the original draft order but I don't believe that Mr Gates has any problems with that particular amendment.

20 The rest of the draft order has been confirmed as correct. The draft orders reflect the increase in the third safety net adjustments and the adjustment to the first aid allowance in clause 17. It's been adjusted by a 5.75 per cent from \$5.60 to \$5.90 per week.

25 Mr Commissioner, we seek ratification of our application for the third safety net adjustment and we seek an operative date to be the first full pay period on or after Tuesday, 27th August, 1996.

30 Now the TCCI have indicated via a fax dated the 12th September to the ASU that they will be opposing that operative date. Mr Commissioner, we actually seek the first full pay period on or after the 27th August because that is the date that the hearing for this application would have been heard if the appropriate parties to the award had been notified.

35 The application for the variation to this award was actually forwarded to the commission on the 24th July 1996 which is about four and a half weeks prior to the 27th August, '96. The ASU did not receive any notification of the date of hearing for the application and did not even know that it was listed for the 27th August until arriving at the commission for other hearings that were listed for that day.

40 When we realised that this matter was also listed it was impossible to proceed as the union did not have anything to present to the commission by way of a draft order. And the commission, during conversations after the hearings on the 27th May admitted that a mistake had been made in the fact that the wrong parties had been notified in relation to this matter.

The TCCI might argue that at the time that they had not seen any or nor consented to a draft order, and this is correct, as the procedure adopted by the ASU was that the draft orders were forwarded to the TCCI only a few days prior to hearings, as requested by the TCCI.

5 Mr Commissioner, the union has done everything required under the principles to gain access to the third safety net adjustment and we believe that the operative date should be the first full pay period on or after the 27th August because it was not the union's fault that they were not notified about the hearing.

10 In the Industrial Relations Act under Division 3, section 23(2), it relates to notice to be given to the parties. In relation to section 23(2)(c) it says that the commission shall cause to be given written notice at the time and place to an organisation that has an interest in the application. This was not the case in relation to this award. The wrong parties, with no interest in the award were actually notified about the date, the time and the place of the hearing.

15 So, Mr Commissioner, we actually -

COMMISSIONER WATLING: I don't think it's true to say that all the parties were missed out -

MRS DOWD: No, not all the parties, Mr Commissioner, but some of the parties were not -

20 COMMISSIONER WATLING: - in fact the employer was notified.

MRS DOWD: - some of the parties were not notified -

COMMISSIONER WATLING: The TCCI was notified.

MRS DOWD: Well the union that actually put the application in that led to this was not notified about it.

25 COMMISSIONER WATLING: No, I know - no - but I'm just correcting the point you made where all parties weren't notified.

MRS DOWD: No, I wasn't - I wasn't trying to infer that all parties were not notified, Mr Commissioner.

30 COMMISSIONER WATLING: Yes. In fact the Tasmanian Chamber of Commerce and Industry Limited were -

MRS DOWD: Well I believe the -

COMMISSIONER WATLING: - notified.

MRS DOWD: - and also the TTLC.

COMMISSIONER WATLING: And the TTLC.

35 MRS DOWD: But, Mr Commissioner, I respectfully request that the operative date be the first full pay period on or after the 27th August, 1996 and that this be granted by the commission as currently constituted according to equity and good conscience. If the commission pleases.

COMMISSIONER WATLING: Good, thanks.

MR O'BYRNE: Mr Commissioner, we support the submissions put forward today by Mrs Dowd on behalf of the Australian Municipal Administrative Clerical & Services Union, and further to that, we also commit to a review of the award in the context of 7.3.2.3 of the full bench's decision that Mrs Dowd referred to. If the commission  
5 pleases.

COMMISSIONER WATLING: Good, thank you. Mr Gates.

MR GATES: Yes, thank you, commissioner. We are in a position this afternoon, commissioner, where we can consent to the draft order which is before you insofar as all matters other than the operative date for which my colleagues are seeking to attach  
10 to the draft order. We're satisfied, commissioner, that the requisite commitments by the parties to the award have been given in accordance section 7.3.2.3 of the wage fixation principles although we'd state at this point that we don't believe that the one of the CFMEU is required in accordance with that award. We further say that the draft order is in accordance with the wage fixation principles in that the - there has been  
15 more than a 12 month delay since receiving the second safety net adjustment. And furthermore, that the allowances have increased - well the first aid allowance has increased by 5.75 per cent which is in accordance with those principles.

To specifically address you as to the operative date, commissioner, we'd say very clearly that on the date that this matter was originally before the commission we had  
20 not viewed the draft order as was alluded to by my colleague Mrs Dowd who said that it's their policy to have it out a couple of days before the hearing and consequentially we never received a draft order. It is the policy of my organisation that in absence of receiving a draft order with sufficient time to peruse it before any hearing, that the application would be objected to until such time as we have had a perusal of the draft  
25 order and can then put submissions before the commission as to that draft order.

It would be wrong for this commission, both in equity, good conscience and in the public interest to give a retrospective operative date back until - it's the 25th August - 27th August and indeed we'd seek an operative date of the first full pay period to commence on or after today's date, being the 18th September of 1996.

We further say in support of our application - or in support of our submission - of an operative date being today's date, that the original matter when it was called before the commission was not validly brought before the commission in so far as all of the parties to it were not aware and today is the first opportunity for all of those parties to come before the commission and put submissions as to the facts in this particular  
30 matter with the draft order before them.  
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COMMISSIONER WATLING: But your organisation knew that the applicant was seeking to vary the award by the decision of the full bench. Your organisation was notified on the day and - of the day I should say - and indeed the commission pointed out that there was an error on the part of the commission in not notifying the  
40 applicant. But you were aware that the application was around -

MR GATES: Yes, commissioner, as -

COMMISSIONER WATLING: - and you were aware that it was listed for hearing on the 27th August.

MR GATES: That's my understanding.

45 COMMISSIONER WATLING: And you got the notice for that.

MR GATES: And as I've already pointed out, commissioner, with respect, it is the policy of my organisation to oppose any application where it is seeking to be heard in relation the \$8 where we haven't received a draft order prior to that hearing.

5 COMMISSIONER WATLING: Your organisation has a lot of policies, I know, and this is obviously one of them, but the commission isn't bound by the policy and I'm glad you said that it was your submission. I'm interested in the question - and you've answered as far as I'm concerned - that you didn't know that the application was in. You did receive a notice that the hearing was on that day and you did know that the applicant was seeking to have the national - the State Wage Case decision reflected in  
10 this award in respect of the third safety net adjustment.

MR GATES: That is my understanding, yes, commissioner.

COMMISSIONER WATLING: Yes. Now you did tell me that it would be against the public interest for me to do this; I'll be very interested in that argument, and I'll be very interested in your argument that in equity I shouldn't do it.

15 MR GATES: Mm. No, that's -

COMMISSIONER WATLING: So you just threw those in and I'm not too sure how much weight I should put on them if you're going to address them.

MR GATES: Well if one takes the public interest and equity and good conscience in the generic terms which is often applied in, then one of the things which is material to  
20 a consideration in the exercise of your discretion will be the fact that the application before you today is not the original application which was lodged with the commission. And indeed the application before you today has been amended on today's hearing. Now the change which is being sought was not in the mind of the parties when the application was lodged. It was not in the mind of the parties when it was brought on  
25 by the commission.

COMMISSIONER WATLING: And what part wasn't in your mind?

MR GATES: In fact -

COMMISSIONER WATLING: What part wasn't in your mind? Because if you look at the original application it says 'seek to vary the award the extent required with respect  
30 to the third safety net adjustment as per the Wage Fixing Principles'.

MR GATES: Yes, I accept that that is there and what we are saying is, a new application before the commission relates to -

COMMISSIONER WATLING: No - no, it's not. It's not a new application.

MR GATES: There is an amended application before the commission -

35 COMMISSIONER WATLING: Thank you - yes.

MR GATES: - which has been amended before you today which relates to clause 17 of the award which is handwritten on the back of the draft order and that relates to the first aid allowance.

COMMISSIONER WATLING: So is that a submission to have a different operative  
40 date for the first aid allowance as opposed to the wage rates?

MR GATES: In a fall back position, yes, it would. Our primary position would be that it all had the same operative date and that operative date be the first full pay period to commence on or after today's date, commissioner.

5 Now if the commission is so moved to reject our submissions, then that would obviously be an alternative or fall back submissions, but it should in no way prejudice the veracity in which we put our primary submission in this matter.

10 Now as to the public interest and equity, it is not, I suggest, in our submission, something that the commission should do to give retrospective operative date to an application to a date before such that the application is heard. Now the application is only before you today. It is only today that the parties have had the opportunity to put submissions before you. It is only today that the application has been amended and it would be wrong to give an operative date some three to four weeks prior to today's date.

15 COMMISSIONER WATLING: But the hearing was actually listed, wasn't it? In fact, you came along to it.

MR GATES: Yes, sir, and I recall that there are a number of other matters which I was representing various awards in on that particular day.

COMMISSIONER WATLING: Mm.

20 MR GATES: Now this particular award from memory was not allocated to me on that particular day. There were some four or five other applications, which I was concerned with -

COMMISSIONER WATLING: Yes. Oh, well that's an -

MR GATES: - and I was ....

25 COMMISSIONER WATLING: - surely that's an internal thing. I'm saying - I'm trying to make the point - I think I've made it - that it was listed for hearing on the 27th. Your organisation had been advised.

MR GATES: And it was not called on on the 27th, commissioner.

COMMISSIONER WATLING: And people turned up on the 27th -

MR GATES: Commissioner -

30 COMMISSIONER WATLING: - however - however, the commission declined to call it because the applicant hadn't been notified and we were informed - I'm not too sure whether it was that day or the day before - that the applicant hadn't been notified. Now it was an error on the part of the commission. It wasn't an error on the part of the applicant, nor was it an error on the part of the respondent. Now should we then say  
35 because of the commission's error, that the applicant should be penalised because of the commission's error?

40 MR GATES: Well it raises a very important question, commissioner, and that is, was the commission correct in calling that matter on on that particular day? Now there would be evidence which would corroborate the suggestion that, no, that matter should not have been called on that particular day; in fact it was an error on the commission's behalf that the matter was called on.

COMMISSIONER WATLING: I just told you, Mr Gates, that the matter wasn't called that day. I made that point. So don't attribute any more errors to us than we can suffer. I'm prepared to suffer one error, and that is, that we notified the wrong parties.

MR GATES: Well -

5 COMMISSIONER WATLING: But - and the reason we didn't call it on was because on the morning the applicant advised us that they hadn't been notified and therefore it wasn't called for that reason.

MR GATES: But what I am saying - and I don't know whether I'm clear enough -

10 COMMISSIONER WATLING: Oh well, your last statement I'm just pulling you up on because it was incorrect. We didn't call it.

MR GATES: But what I am saying is whether the commissioner was not in error in advising my organisation and the TTLC that that matter was going to be heard on that particular day. Now whether that was not in error.

15 COMMISSIONER WATLING: Well it was; in fact you're a party to that award; you were notified; it's just that not all parties were notified.

MR GATES: But that would lend support to the submission that the commissioner had erred in bringing the matter on in that it hadn't notified all the parties.

COMMISSIONER WATLING: Well it didn't know until the morning.

20 MR GATES: No, but that it was even put out to be a matter to be brought on on a particular day -

COMMISSIONER WATLING: Mm.

MR GATES: - that the intention of the commission was never to bring it on on that day.

25 COMMISSIONER WATLING: But it was the intention of the commission to bring it on that day except we made an error and we didn't notify all the parties to the award, we notified some. And in fact we even notified some organisations that weren't party to the award.

30 MR GATES: Yes. But if there is an error which flows from the commission's own doing, then it is not in the interests of the public at large; it is not in the interests of employers in the industry to be penalised by something which is outside of their control.

COMMISSIONER WATLING: It is up to then the commission to penalise the employees?

35 MR GATES: Well the commission - there has, in my submission, been no penalisation of the employees, or if there is, nothing of such weight is to warrant the commission to exercise a power - a discretionary power - to award retrospectivity in the operative date for a wage increase.

COMMISSIONER WATLING: What does the act say about retrospectivity?

40 MR GATES: Well I was looking for it, commissioner, I haven't as yet found it. My understanding was that it was in special circumstances.

COMMISSIONER WATLING: So you think this might be a special circumstance?

MR GATES: No, I don't believe it is.

5 COMMISSIONER WATLING: Yet there was an application made, some parties were notified, some parties weren't, the commission made an error. So for that error employees should be deprived of receiving the money?

10 MR GATES: Well on the same token, commissioner, and more validly, why should employers be penalised by having to do retrospective adjustment to the wages of employees. Now it's not just to \$8 a week, it is to casuals, it is to penalty loadings, it is to overtime, it is to allowances - three weeks into retrospectivity. Now that is not in the interest -

COMMISSIONER WATLING: But you would have advised them as a good employer organisation that the matter was coming on for hearing on the 27th so they would have been familiar, I would have thought, with the fact -

15 MR GATES: They had not been notified by my organisation, commissioner, that the matter was to be brought on on that particular day.

COMMISSIONER WATLING: You're representing employers.

MR GATES: Yes.

COMMISSIONER WATLING: So you got a notice - so you would have had instructions prior to coming to the hearing.

20 MR GATES: Commissioner, it is not a practice - I hear what you say - but it is not a practice of our organisation to notify every single employer who is a member of our organisation when an award comes - when an application is before an award to increase it to notify them that a hearing is coming up. As you may be aware, we've some 1,800 members statewide.

25 COMMISSIONER WATLING: Mm.

MR GATES: Now we suggest it is not in the interests of any party that retrospectivity be granted. It would not, I suggest, be a valid exercise of discretion, and further, that in all of the circumstances of this case that the operative date be the first full pay period on or after today's date. If the commission pleases.

30 COMMISSIONER WATLING: Thank you. Mrs Dowd, have you anything further to add?

35 MRS DOWD: Well the only thing I'd like to actually add, Mr Commissioner, is the fact that under section 20 of the act, the commission - it says, the commission to act according to equity and good conscience. And it says that the commission shall act according to equity, good conscience, and the merits of the case without regard to technicalities or legal forms; and, shall do such things as appear to it to be right and proper for effecting conciliation between parties.

40 At this stage I believe that we do have a difference of opinion between the TCCI and the ASU in relation to the operative date and I believe that I should actually leave it in your hands to act according to equity and good conscience in granting the retrospective date to the 27th August. If the commission pleases.

COMMISSIONER WATLING: Mr O'Byrne, have you anything further? Right. I will reserve my decision on this matter and hand down a written decision in due course. Thank you.

**HEARING CONCLUDED**