TASMANIA

Tasmanian Industrial Commission

Industrial Relations Act 1984

T No. **8857 of 2000**

IN THE MATTER OF an application by the Secretary, Department of Justice and Industrial Relations for an interpretation of the Restaurant Keepers Award

Re: the classification of Samantha Clark who was employed from 11/5/97 to 31/3/98 by ACN 009 581 364 Pty Ltd formerly Fee & Me Proprietary Limited, ACN 009 581 364

PRESIDENT WESTWOOD

HOBART, 15 March 2000

TRANSCRIPT OF PROCEEDINGS

Unedited

(WOULD PARTIES PLEASE READ THIS TRANSCRIPT CAREFULLY)
(ANY QUERIES SHOULD BE DIRECTED TO THE COMMISSION WITHIN 14 DAYS)

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HEARING COMMENCED 10.34am

PRESIDENT: Could I have appearances, please.

MR G. WILLIAMS: If it pleases, Mr President, GRAEME WILLIAMS together with GARY THOMAS representing the Secretary of Justice and Industrial Relations.

PRESIDENT: Thank you.

MR P. TULLGREN: Mr President, if the commission please, my name is TULLGREN and I seek to appear on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers Union.

PRESIDENT: Yes, thanks, Mr Tullgren.

MR A. CAMERON: If the commission pleases, ANDREW CAMERON from the Tasmanian Chamber of Commerce and Industry, appearing on behalf of that organisation and also on behalf of the company, ACN 009 581 364 Pty Ltd.

PRESIDENT: Very good. Thanks, Mr Cameron.

MS L. FITZGERALD: If the commission pleases, LYN FITZGERALD, from the Tasmanian Trades and Labour Council.

PRESIDENT: Thanks, Ms Fitzgerald.

MR I. PATERSON: If the commission pleases, IAN PATERSON, appearing for the Australian Municipal Administrative, Clerical and Services Union.

PRESIDENT: Thanks, Mr Paterson.

MR P. NOONAN: If the commission pleases, I appear on behalf of the Shop Distributive and Allied Employees Association, Tasmanian Branch, NOONAN P.

PRESIDENT: Thanks, Mr Noonan. Well, Mr Williams, that's quite a roll call. You've obviously set a lot of things in motion with this application. Would you care to tell me about it so we know where we're going?

MR WILLIAMS: Mr President, this application has come about as a result of an interim decision of Commissioner Watling,

made on 30 October 1999 in T8374, and I'll go to that shortly, but if I might just summarise where we are.

PRESIDENT: Yes, please.

MR WILLIAMS: It's our intention to provide you with the details of the employer to confirm the employment status of the employee, to in turn provide you with some details of the employer/employee relationship, which I have provided prior to today's hearing to a couple of the parties but not to all the parties, and then to go through by virtue of application of section 42 of the *Industrial Relations Act* to give you a - not by virtue of that, to go through the history of the Restaurant Keepers Award from when apprentice, in particular, first came into the award and go through the changes that have taken place in the award there, up until the award's current status.

We will then go on to deal with the legislation which we believe relates to apprentices in Tasmania and in particular commencing with the *Apprenticeship Act* of some years ago and its application which we believe, through section 42 of the *Industrial Relations Act*, and then to conclude with some case history which we believe will assist you in determining this matter. That's the basis of our presentation this morning, Mr President.

PRESIDENT: Yes. I'd like to hear from the other parties and particularly, Mr Cameron, in respect of that approach. Mr Cameron?

MR CAMERON: Mr President, Mr Williams has referred to a number of historical factors. I suppose our first concern is in relation to the application itself, which deals with the classification of Samantha Clark. It will be our submission that such a classification for her would be something that would be heard by the commissioner of first instance, in this case now Commissioner Watling.

We understand the purposes and the reasons behind this application being made. We feel that the application for interpretation should be in relation to the award and the meaning of the terms in the award rather than the classification for a particular employee. We understand that those circumstances may be of relevance in helping the commission as it sits to look at the award and work out why the problem arose

and why an interpretation is needed. But to actually look at the interpretation in relation to that classification itself would indicate that that particular employee or ex-employee needs to be classified in one of the existing classifications. We've got no problem with that. The only thing is of course, the concerns and the problems that arose relate to a classification of an apprentice under that award and therefore what the interpretation is to look at is, what is an apprentice under that award rather than looking to classify this particular employee in one of the other classifications.

In relation to the historical matters under the principles of interpretation, those of course can be put to the commission to assist you in looking at the matter. At the end of the day though, we would ask that the principles themselves be clearly utilised, that the words that are clearly set out in the award be looked at and that therefore an interpretation that will help not only this particular claim by Ms Clark but future employees can be made and therefore set the matter to rest.

In relation to the reference to *Vocational Education and Training Act* which is I think the legislation referred to by Mr Williams, it will be our submission in this matter that that Act is unclear, that the relevance of section 42 of the *Industrial Relations Act* is probably tenuous in terms of tying it to that particular Act as the definitions or the same subject-matter requirement that exists under section 42 are not covered by that legislation.

Therefore to use the *Vocational Education and Training Act 1994* to assist in any way in interpreting the award is probably not the correct way to go. In that regard we would be referring to recent decisions of the full bench of this commission where similar issues were raised and the decision of the full bench in that regard when doing an interpretation for section 42 and the relevance of other legislation.

Mr President, it would be our hope today that the interpretation would clearly focus on the interpretation of the provisions for apprentices under the Restaurant Keepers Award.

PRESIDENT: Yes. Does anybody else wish to address that point. Mr Tullgren?

MR TULLGREN: If I could, Mr President. Our position is this, that we say that this issue is a fairly narrow focus and that is

that there is a classification and a rate of pay that attaches to an apprentice under the Restaurant Keepers Award. There is an issue about whether Ms Clark was an apprentice and was entitled to receive a rate of pay or whether she held some other classification.

I agree with my friend, Mr Cameron, to the extent, it's not appropriate for the commission to determine if she was not an apprentice, what she should have been paid. That is a subsidiary matter which clearly would have to be pursued somewhere else, before someone else, I think.

We say that if there is a dispute or a question about whether in fact there is such a thing as an apprentice - and here I rely on reading the previous decisions that relate to the history of this matter - then we say that that's a matter that is appropriate for you to consider because there is clearly - and I apprehend that unless my friend, Mr Cameron, changes his position, that it's going to be the challenge again today, that the award doesn't provide a definition of apprentice and because it's unclear, certain things would flow from that or that is as I apprehend the argument. If I misstate it, I apologise in advance.

We say that that's a fairly narrow focus. We would differ slightly from Mr Williams in the sense that, we would say that the matter can be determined simply by reviewing the current award, the *Industrial Relations Act* and if necessary, the *Vocational Education and Training Act* and we say that for this reason, that in a matter of interpretation about whether Ms Clark was an apprentice, reference has to be made first to the award and the *Industrial Relations Act*.

The canons of interpretation provide that assistance can be gained in relation to the interpretation of words or phrases based on their common meaning and that does provide and allow the commission to review not only the provisions of the *Vocational Education and Training Act* but also wider issues about the understanding of apprentice because, at the end of the day, we say the matter is very simple.

If Ms Clark is an apprentice, an apprentice has an accepted industrial and common meaning and the commission can determine that meaning very simply, stripped of all of the varnish that may have been overlaid and that that is what it comes down to, the commission should, with respect, narrow the

focus and seek to be addressed on what the parties say the award provides for in the Act and anything that can be drawn in assistance. We do not support and do not agree with the position Mr Cameron puts, that using the *Vocational Education and Training Act* is of little relevance or of questionable relevance because, clearly, I think it doesn't put it too strongly.

The position that's been put when this matter has previously been on is that if there is inadequate or insufficient definition of an apprentice under the Restaurant Keepers Award, then there's recourse to some common law proposition about master and apprentice. That, with greatest respect my friend, is an entertaining and interesting proposition but one, with the greatest respect, which I think is nothing more than a frolic because we are not about to be in a position, or the commission should not be in a position where it is being asked to actually overturn at least 55 years of statute regulation in Tasmania and return to the previous century, so it does narrow the focus about whether Ms Clark is an apprentice. If there is an apprentice classification what does it mean, and by that I do not mean, some detailed examination of the ins and outs of being an apprentice. That can be dealt with fairly quickly by reference to the law.

I might also say, that this matter has been the subject of definitively being decided by a full bench of the Industrial Appeals Court of Western Australia in a decision which referred to, I think, by my friend, Mr Williams, before Commissioner Imlach, when this matter first went on and that decision, as I recall reading Commissioner Imlach's decision, has been adopted effectively by this commission in other proceedings. That's what it comes down to. We think the commission should narrow the focus and that that could be disposed of reasonably expeditiously this morning, with respect.

PRESIDENT: Do you take the view that the application, as worded, does not give the commission the power to deal precisely with the issues that should be dealt with in an interpretation? I think that is what Mr Cameron was saying to me?

MR TULLGREN: I find the wording of the application unusual in its presentation, however, I think that there is sufficient based on the meaning, or the powers that reside in the commission, to actually in dealing with this dispute, to actually make an interpretation because the commission would be aware,

interpretations must actually be based on a series of real facts, real situations. It's not a hypothetical interpretation.

In this case we have - I presume she still lives and breathes, Ms Clark. She has a claim that is disputed. The nub of that dispute is that she is not an apprentice effectively. I don't think that misstates the position. Therefore, the commission - it can interpret if she is an apprentice in the broadest legal sense, not in a detailed work sense. So, I think that there is sufficient in the wording of the application that's before you to allow the commission to dispose of this matter this morning.

I think also to be borne in mind, that I recall in reading the decision of Commissioner Watling, that he developed a preliminary view that this is a matter that was one that was subject to interpretation. Now, I think there has to be some force in the fact that another member of this commission when faced with the history of this matter, felt that it should be addressed as a matter of interpretation and that the commission should proceed on that basis but very narrowly focused.

PRESIDENT: Yes. Does anybody else want to address that preliminary point? Mr Paterson?

MR PATERSON: If the commission pleases, I think my view would echo that just put to you, that the interpretation is a little at odds with what we would usually find ourselves asking for in an interpretation. My reading of the application is it's asking for interpretation implicitly of the relevant words in the award and the relevant words and sections in the award would be those that go to definitions of classifications. I'd echo the view that the question before you, has the term, apprentice, got application. If not, then provided the person is an employee, they're entitled to be classified in accordance with the other classifications in the award and that's a matter that then should be referred back to be dealt with, with the primary application before the commission.

PRESIDENT: Yes.

MR PATERSON: I reserve any further comments to later in the proceedings.

PRESIDENT: Yes. There are a number of other questions that leap out at me but I think it might be worthwhile leaving them

aside for the moment and hear from you, Mr Williams - do you feel comfortable in the way in which your application is worded or do you wish to amend it?

MR WILLIAMS: I feel comfortable with it but by the same token, we're looking to achieve a result and if we're merely playing with words today, I'd be happy to -

PRESIDENT: That's what interpretations are.

MR WILLIAMS: I don't mean that in the sense - but if the words, in a sense, of the application - the parties believe they can be improved to get a definitive result from the proceedings as we've had before us, then I'm happy to move in that direction. If in that sense and having - if I could maybe pre-empt some words which I might put before the president and that would be these, that the interpretation could be altered to read as such:

The interpretation of subclause (iv) apprentices clause 8 of the Restaurant Keepers Award PO58.

And then I would go on to add, to bring into the example that we have before us - this is in regard to the classification of Samantha Clark who was employed and the same details, to get the live example. I put that for the president's consideration.

PRESIDENT: Yes. Well, that's got some attraction. Has anybody got a view about that? I know it's pretty difficult to ask you, Mr Cameron, how you want the application you're going to oppose to be worded?

MR CAMERON: I suppose, Mr President, it does narrow it down to the point in question and in particular to the case that's before the commission, before Commissioner Watling, and I think it would address the issues that Commissioner Watling was foreseeing be interpreted by you.

I would just wish to comment on Mr Paterson's submission, that this hearing today should determine whether Ms Clark is an apprentice or not. That's not what we're here for. That's a matter of merit for Commissioner Watling to look at. I think we're here to say, this is what an apprentice is, under the award, so Commissioner Watling can then look at the facts and determine whether that particular employee fits that bill.

In relation to the proposed amendment, I suppose it certainly does focus on the relevant part of the award that we need to look at and in that regard, I would again not wish to have reference in the application to the classification of Ms Clark. That is something that can be brought forward in submissions by the applicant to give you that historical background and the reasons we're here. I don't think the application at all needs to refer to a particular employee and therefore I think such an interpretation then would be of more use in the future.

PRESIDENT: Yes, Mr Tullgren?

MR TULLGREN: Mr President, can I just make a brief submission in relation to what my friend, Mr Cameron, has put. I don't think the way that he proposes to deal with this is the correct way and I do so for this reason. As I said, in making an interpretation you have to deal with a factual situation and that is the factual situation of Ms Clark. It follows that if you determine that she was an apprentice within the meaning of the award, then that determines the matter. If you equally determine that she is not an apprentice under the award, that determines the matter and the only thing that would then have to be resolved, either by the commission as currently constituted or by Commissioner Watling or another member of the commission, is, if she's not an apprentice, what was she.

As I apprehend Mr Cameron is putting to you, that you'd make some interpretation about the question of an apprentice and then armed with that, the parties would return to Commissioner Watling and then have a similar argument about Ms Clark and that's a waste of resources and I would submit, is not logical. You, Mr President, determine that Ms Clark is an apprentice under the award or she's not and that ends that issue and then there's a subsidiary issue.

PRESIDENT: Yes. I really don't think there's too much of variance in the way both of you are viewing this.

MR TULLGREN: I apologise if I've misunderstood my friend.

PRESIDENT: I think it is pretty obvious, on the basis of the material that's put, I determine that those circumstances indicate that the individual was or was not an apprentice, then that's pretty much going to give Commissioner Watling everything he needs to resolve the matter that's currently before

him as a dispute and I don't think Mr Cameron would oppose that.

It's really a question of just how far we take what is intended to be simply an interpretation of the award. My interpretation will clarify that particular point and that's the purpose of it.

MR TULLGREN: In the broad sense but also in relation specifically to Ms Clark.

PRESIDENT: Can I interrupt you? If I make an interpretation that Ms Clark is an apprentice that isn't the wherewithal for the parties to go away and decide what to pay Ms Clark. If the dispute is still on, it's still on and that'll be resolved before Commissioner Watling.

MR TULLGREN: I won't press that at this stage, Mr President.

PRESIDENT: No, thanks, Mr Tullgren. I appreciate that.

MR CAMERON: Maybe just for clarification purposes, I've just referred to the decision of Commissioner Watling in that regard and I think it correlates with what I'm putting here, that the commissioner said that he's *arrived at a preliminary conclusion that this dispute is not capable of being resolved until such time as the meaning of the provision for "Apprentices", in the award, has been determined. That being the case, it is my recommendation that the applicant in this matter make an application pursuant to s.43 of the Act, for the purpose of having the President declare how the provision "Apprentices" is to be interpreted, in the context of the award and this dispute.*

I can't see - because the dispute before Commissioner Watling is whether she is an apprentice or not - what Commissioner Watling is looking for is an interpretation as to what an apprentice is and then he can classify her accordingly based on the evidence that has already been provided.

PRESIDENT: Yes, that's the way I see it going. All right. Thank you for that. The wording that you've proposed to amend your application, Mr Williams, would you mind repeating it for the parties and myself.

MR WILLIAMS: I do have copies.

PRESIDENT: I'm happy to accept that as an amendment, if there's no objection from the parties.

MR CAMERON: I think the substance of the application is the interpretation of the award. The reference to Ms Clark, as I previously indicated, we should not have reference there. It is the dispute that has actually brought the matter before the commission, so it is not improper for it to be highlighted in the application but the substantive part of the application is the interpretation of the relevant clause.

PRESIDENT: That's right and the remainder is simply supporting and clarifying. I'm happy with that and if there's no objection to it from the other parties, I'll amend the application accordingly. Thank you very much. Mr Williams?

MR WILLIAMS: Mr President, as I outlined earlier, we're here today as a result of Commissioner Watling's decision in relation to T8374 and I put that up as an exhibit.

PRESIDENT: **EXHIBIT 1**.

MR WILLIAMS: In relation to this, Mr President, I feel it's important to go through the background of where we are today to get an understanding of where we're at and I'd like to read from that decision. This is in relation to an industrial dispute over an alleged breach of the Restaurant Keepers Award and it goes -

PRESIDENT: Are you going to read it all, Mr Williams?

MR WILLIAMS: Well, I was going to draw your attention to it.

PRESIDENT: If you just highlight the specific points that you want me to take note of.

MR WILLIAMS: In particular, I'll turn to page 2, that's where it comes before us today:

> *The Commission also advised the parties that it wished to be addressed, at the same time, on all issues giving rise to the inclusion of the classification "Apprentices" in the Restaurant Keepers Award.*
>
> *Since adjourning the hearing on 8 October 1999, I have had the opportunity of reading the transcript, which the parties requested the Commission adopt, and I have arrived at a preliminary conclusion that*

this dispute is not capable of being resolved until such time as the meaning of the provision for "Apprentices"', in the award, has been determined.

I suspect that such a determination will require the award to be interpreted.

It goes on to read section 43 there and the recommendation, and that's the basis of why we're here today, Mr President.

PRESIDENT: You might read that into the transcript, if you would.

MR WILLIAMS:

That being the case, it is my recommendation that the applicant in this matter make an application pursuant to s.43 of the Act, for the purpose of having the President declare how the provision "Apprentices" is to be interpreted, in the context of the award and this dispute.

PRESIDENT: Yes. Thank you.

MR WILLIAMS: Before going on to the next lot of exhibits, Mr President, I might just ask Mr Cameron whether or not I need to produce records in relation to the corporation or the employment of Ms Clark.

MR CAMERON: I don't think that's a matter necessarily for the commission at the end of the day.

MR WILLIAMS: Right. I can preclude those particular points. The next document which I put forward in detail is what I allude to as the employment relationship between the parties which led towards - this particular document was only circulated to two of the parties, president, prior to today to give some relevance to the detail of the case before us.

PRESIDENT: Sorry, you were saying - this document was submitted to the -

MR WILLIAMS: To the TCCI and the TTLC, but not to the other parties prior to today's hearing.

PRESIDENT: Just some background facts?

MR WILLIAMS: Yes. These were the facts which we believe represent the employment relationship between Samantha Clark

and Fee and Me Pty Ltd as it was then and now, ACN 009 581 364 Pty Ltd.

PRESIDENT: All right. **EXHIBIT 2**.

MR WILLIAMS: The particular points which I'd draw the president's attention to in this particular matter is on page 2, particularly point 6, which sets out:

> *Samantha Clark's previous experience was five month's with Richard and Robert Matson as a catering assistant, Rochcombe Restaurant 11 months full time in the kitchen and 1st year apprentice cook at the Star Bar -*

So the person was employed as a 1st year apprentice at a previous establishment.

> *7. The employer did not supply any details to the Training Authority within two weeks of employing Samantha Clark as an apprentice.*
>
> *8. No apprenticeship papers were signed under the Vocational Education and Training Act 1994 in regard to Samantha Clark for her employment with Fee & Me Proprietary Limited.*

I just hand those up for the President's attention.

The next matter, the history of when apprentice appeared first in the Restaurant Keepers Wages Board. I've got extracts which go to the Record of Decisions of the Restaurant Keepers Wages Board on 21 August 1975. That's the first four pages.

We then go to the log of claims that was put forward - three pages there.

A letter from the Australian Hotels Association in relation to apprentices.

A record of a couple of meetings in relation to the Wages Board.

Before I go to deal with that one, I'll also hand up the -

PRESIDENT: The one you have just handed up will be **EXHIBIT 3**.

MR WILLIAMS: What we have here is the actual determination of the Restaurant Keepers Award following that particular meeting. I've got the minutes and the award.

PRESIDENT: **EXHIBIT 4**.

MR WILLIAMS: Going back to exhibit 3, Mr President, the insertion of the casual - if we look at the Australian Hotels letter, towards the back of the document, it's on that basis that the employers were putting forward that what was appearing in the Hotels Award should also apply to the Restaurant Keepers Award and that exact provision was then inserted in the award, those percentages of a qualified cook, within the award and the record of the minutes show that. If we look down the bottom of page 3, Clause 4 - Apprentices, and it goes over the following page there.

That's the first time that we had apprentices within what is now the Restaurant Keepers Award. It was in the Wages Board.

PRESIDENT: Yes. Is this where your 1991 -

MR WILLIAMS: Comes in next, yes, Mr President.

PRESIDENT: Consolidation comes in, yes. **EXHIBIT 5**.

MR WILLIAMS: I bring this one to your attention. In the back part we have the actual decision and the front part the award. In this particular one we change from the one classification to the three different rates within Clause 4 - Apprentices. On page 17 of a shortened version of the award there, it sets out that we then had food and beverage, greenkeeping and kitchen/all other trades. In this particular case we've then gone to splitting it into three different rates of payment for apprentices in those different trades.

PRESIDENT: Yes.

MR WILLIAMS: The last one in the award section is the current award as it is today and if we go to the first tag at the back there which is the consolidated version and there's two amendments which take place from then.

PRESIDENT: Just for the record. There is a later consolidation.

MR WILLIAMS: I was going to the point in time when this person was employed.

PRESIDENT: All right. Very good.

MR WILLIAMS: In particular, if we take the consolidated version on pages 16 and 17, clause 4.

PRESIDENT: Yes.

MR WILLIAMS: I'll now call on Gary Thomas to detail the legislation in Tasmania in relation to apprentices.

PRESIDENT: Okay.

MR CAMERON: Is that to be exhibit 6, Mr President?

PRESIDENT: **EXHIBIT 6**. Thank you, for that.

MR THOMAS: Mr President, what I'm going to deal with now is just the history of an apprentice. I'll refer to certain Acts and I'll go back to the *Wages Boards Act 1920* when - it's a divisional Act that was brought about - and it did have a definition and I'll table exhibits from that and I'll keep going and bring us right up to current day, if I may.

PRESIDENT: All right. Thanks, Mr Thomas. **EXHIBIT 7**.

MR THOMAS: It's not a very long definition, so I can just read it into transcript. It says:

> *"apprentice" means any person bound by indentures of apprenticeship in accordance with the Apprentices Act 1942.*

That's what it said back in those days. What I'll do now is refer to what it says, which is the *Apprentices Act 1942*.

MR TULLGREN: Mr President, are these to be marked as individual exhibits or are they all effectively going to be one exhibit?

PRESIDENT: Well, I'd mark them individually, Mr Tullgren. Do you think they ought to be marked any differently?

MR TULLGREN: No, that was the course I was following but I noticed - I wasn't sure whether my friend intended it - he tendered them separately but referred to them corporately as one exhibit - or not.

PRESIDENT: No. I assumed they were separate and I marked the first one exhibit 7 of Mr Thomas' and this one, which is the

amendment to the *Apprentices Act 1942* - this is the 1942 Act, is it?

MR THOMAS: This is straight from the actual 1942 Act.

MR CAMERON: Mr President, I don't want to interrupt Mr Thomas' flow but perhaps it may be easier at this stage whilst we have that document fresh before us, exhibit 7, which is the *Wages Boards Act 1920*, the inference there is that it's a copy of the 1920 Act but it refers to the *Apprentices Act 1942* which would indicate it's been amended at some stage. For clarification, this is a copy of the Act as it existed at what date?

MR THOMAS: I'll just have to get the Act out.

PRESIDENT: This definition of apprentice was inserted in 1960.

MR PATERSON: If you refer to the *Wages Boards Act*, first page, and I would presume that the last amendment is the amendment that this gives effect to ..[inaudible]..

PRESIDENT: For our purposes, the page with the definition of apprentice on it also indicates when that particular definition was inserted in the *Wages Boards Act* and that was in 1960 and I think that's all we need.

MR THOMAS: You're referring to 67 of 1960, which is on the side there?

PRESIDENT: Yes. I think we can accept that. We're now going to the *Apprentices Act 1942*?

MR THOMAS: 1942.

PRESIDENT: **EXHIBIT 8**.

MR THOMAS: I'll just read the definition of apprentice which is in that - it says:

> *"Apprentice" means a person bound pursuant to this Act by indentures of apprenticeship to an employer in any trade to which this Act applies; and where applicable includes an applicant for apprenticeship employed on probation:*

That's what it says in that section. That came out as an original document on 28 October 1942. That was an original document.

PRESIDENT: Yes.

MR THOMAS: In reference to that Act, I'd also refer to page 104, which is the second last page, which has sections 13, 14 and 15 and it deals with the conditions of an apprenticeship, how they are bound. It talks about trade and in 15, it gives you an actual form. It tells you what the form for indentures of an apprenticeship in fact is and it stipulates, they must be in triplicate for the term prescribed of the trade, it deals with the actual issue of what is an indentureship.

We're working our way through to the current day. The *Industrial Relations Act 1975* when it came into being on 22 December 1975 had no definition of an apprenticeship at all. So, in changing from the *Wages Boards Act* to the *Industrial Relations Act* in 1975, that definition of apprentice was actually deleted.

We come to the Act after the *Apprenticeship Act 1942* which was the *Industrial and Commercial Training Act 1985* and I'll tender some exhibits on that.

Before I do that, I've just missed something. There was an amendment to the *Apprentices Act 1942* that came into being in 1960 and I'll just tender a document that actually - they did make an amendment to the *Apprenticeship Act 1942* that actually legalised, if you may, a section in that Act that employers could be prosecuted if they did not comply with the provisions of an indentureship of apprentice. I will just tender that in reference to the *Apprenticeship Act 1942*.

PRESIDENT: We'll attach this to exhibit 8, as part of the 1942 Act.

MR THOMAS: If we go to the *Industrial and Commercial Training Act 1985* and this actually replaced the *Apprenticeship Act 1942*.

PRESIDENT: **EXHIBIT 9**.

MR THOMAS: In relation to that document you have before you, I'll make some comments. It received Royal Assent on 21

November 1985 and in reference to page 2 of what you have before you I'll read some of the sections. It says:

> *"apprentice" means a person whom another person has agreed to train in a trade in pursuance of a contract of training;*
>
> *"Authority" means the Training Authority of Tasmania constituted under this Act;*
>
> *"contract of training" means a contract (including an indenture of apprenticeship) under Division 3 of Part III in respect of training in a trade or other declared vocation;*

It gives a definition of what a declared vocation is and it says:

> *(a) a trade; or*
>
> *(b) an occupation declared by proclamation to be a declared vocation for the purposes of this Act;*

Down the bottom:

> *"trainee" means a person whom another person has agreed to train in a declared vocation other than a trade, in pursuance of a contract of training.*

It is a definition of actual training.

I'll go to page 12, which is the third page of that document, and down the bottom, which is section 15, it says:

> *The Governor may, on recommendation of Authority, by proclamation, declare -*
>
> *(a) an occupation to be a trade for the purposes of this Act; and*
>
> *(b) an occupation to be a declared vocation for the purposes of this Act.*

Section 16(1) says:

> *Subject to this Act, an employer in any declared vocation shall not undertake to train a person (as an apprentice or otherwise) except in pursuance of a contract of training.*

Now if you go to section 19, the second last page, it references what a contract of training is and it says:

A contract of training shall -

(a) be in a form approved by the Authority that is relevant to the declared vocation to which the contract relates;

(b) contain the conditions determined by the Authority that are relevant to the declared vocation to which the contract relates;

And then at (c) over the page:

(c) be executed in triplicate; and

(d) be for the term determined by the Authority that is relevant to the declared vocation to which the contract relates.

Now the next thing, the *Industrial Relations Act 1975* was replaced by the current Act, the *Industrial Relations Act 1984*. There is no definition in the *Industrial Relations Act 1984* of the word 'apprentice' or 'apprenticeship'.

Now we go to the current Act which applied at the time of Samanatha Clark's employment and it is the current Act today.

MR CAMERON: Mr President, I'd have to object to the use of the word 'applied' at the time of the employment, that is said to be found. It was in existence at the time of employment.

PRESIDENT: All right, I take the point. Thanks, Mr Cameron. You follow that, Mr Thomas?

MR THOMAS: Yes, I follow the reason behind it.

PRESIDENT: It would make Mr Cameron happy if you talk about the Act in force at the time.

MR THOMAS: We'll go to the *Vocational Education and Training Act 1994* and I'll exhibit a copy of that.

PRESIDENT: **EXHIBIT 10**.

MR THOMAS: That received Royal Assent on 16 December 1994 and I'll go through some of the sections of that Act I believe are relevant. Some of these definitions and so forth have been used in prior hearings and I'll just go through them.

PRESIDENT: Well, if you want me to know about them you'd better tell me because I'm not taking notice of any prior hearings.

MR THOMAS: We go to page 9, which is the fourth page of that document and it does have a definition of a trainee. The page before that it does not have a definition of apprentice at all. The definition of a trainee means:

> *"trainee" means a person undergoing -*
>
> *(a) a training course under a training agreement or vocational placement agreement; or*
>
> *(b) an apprenticeship;*

Underneath that it says:

> *"training agreement" means an agreement or a contract between an employer and a trainee in force under Division 1 of Part 6;*

Over the page it has vocation:

> *"vocation" includes an occupation or trade;*

And if we go to page 18 which is I believe the fifth page - you have section 33:

> *The Minister, by order and on the recommendation of the Training Authority, may declare that a vocation is a vocation in respect of which a training agreement must be made before an employer may provide a training course for a person.*

Section 34, I won't go into detail, it just mentions training courses in vocations and there are certainly penalty provisions provided in that section.

Section 35 mentions training agreements and gives you a factual account of what applies and I will read from that:

> *A training agreement must be in writing and contain provisions relating to the following matters:-*
>
> *(a) the accredited course covered by the agreement;*
>
> *(b) the award to be attained;*

(c) the duration of the agreement;

(d) the rights and duties of the parties to the agreement;

(e) any other matter the Training Agreements Committee determines.

Subsection (2) of that, which is over the page, says:

(2) The employer must forward the training agreement to the Training Agreements Committee for its approval within 14 days of making the agreement.

(3) The duration of a training agreement may be expressed -

(a) in terms of years and months; and

(b) in terms of achievement of competencies.

(4) A training agreement must not contain any provision which is inconsistent with any applicable industrial award.

Section 36 deals with the actual approval process of the training agreement and section 37 deals with the actual transfer of the agreement to some other party.

In section 38 there's a penalty provision in regard to the compliance with the actual training agreement and section 39 is an actual release from the training agreement.

But the parts I want to make particular reference to are, obviously, section 35(2):

> *The employer must forward the training agreement to the Training Agreements Committee for its approval within 14 days of making the agreement.'*

And section 36 is the training agreement - the Training Agreements Committee has to approve the training agreement.

What I would like to table now is an actual training agreement and this may help the commission. This is an actual training agreement so you can actually see what it details. If you go up to the top page it mentions the words 'Apprentice/Trainee Details'. Underneath that, in bold:

The employer must ensure that this agreement is returned to the Tasmanian State Training Authority within 14 days of starting the apprenticeship or traineeship.

That is on that page. The next thing outlines details that have to be completed by the employer and it has a Part 2 where the employer completes details and at the back of Part 2, which is on page 4, it sets up again and it says:

The agreement must be returned to the Tasmanian State Training Authority within 14 days of starting the apprenticeship or traineeship.

The next page is Part 3 and I will draw your attention to 'Declaration by Apprentice/Trainee' and it says:

In signing this agreement the apprentice/trainee agrees to meet all the requirements of the Vocational Education and Training Act 1994 including:

(a) working towards the achievement of the required competencies;

(b) undertaking all workplace activities required by the agreed training program; and

(c) participating in any off-the-job training required by the agreed training program.

Underneath that it does have actual signatures of parties - the signature of the employer and the employee being an apprentice/trainee must sign as well. It has witness signatures.

Now I draw your attention to the back five or six pages and it says: 'Employer's Copy of Training Agreement Explanatory Notes' and it's page 1 and I'll read from that. It says:

What is a new apprenticeship?

A new apprenticeship is defined by:

- *a registered training agreement, signed by the employee and employer;*
- *negotiated, structured training leading to a nationally recognised qualification; and*
- *paid employment under an award or registered agreement.*

New apprenticeships include existing apprenticeships and traineeships, which are based on vocational pathways.

Underneath that it says:

What is a training agreement?

The training agreement is a legally binding agreement that allows an employer and employee to undertake training which leads to an industry recognised formal qualification.

A training agreement must be registered with the Tasmanian State Training Authority. Once registered, it can only be varied with the approval of the authority.

Up the top of the same page it says:

What happens to the training agreement?

The Vocational Education and Training Act 1994 requires the training agreement to be returned to the Office of Vocational Education and Training within 14 days of starting the apprenticeship/traineeship.

I will go along to the section, which is page 1, which is the third last page, 'To the Apprentice/Trainee' and it has the same wording as for the employer in regard to what is a new apprenticeship, what is a training agreement, what happens to the training agreement - there's certainly the same words used there. So in other words I put to you that this is a formal document, it is a document which is covered by a *Vocational Education and Training Act* and I table that as an exhibit to show actually what has to happen and what it says to both parties on the actual training agreement.

PRESIDENT: **EXHIBIT 11**.

MR CAMERON: Mr President, we seek to object to the tendering of that document.

PRESIDENT: Why is that?

MR CAMERON: Mr President, this document is obviously dated 1 June 1999, it possibly is the current agreement, but it has no relevance perhaps to the application of Ms Samantha Clark who was employed some time prior to that. Other interesting points of note are that it refers to new apprenticeships which is a current terminology used by the

Federal Government and we would object, too, on the basis that a new apprenticeship is not even defined under a *Vocational Education and Training Act* as previously submitted by Mr Thomas. In that regard, any of the relevant parts of this document would not be relevant to any agreement that existed between the employee and the employer at the time of employment.

PRESIDENT: Any other response before Mr Thomas replies?

MR TULLGREN: I'd just ask whether Mr Thomas is in fact saying that this document is the same document that existed at the time of Ms Clark's employment or whether there is some other document or form that existed at the time which might be of assistance?

PRESIDENT: Mr Thomas?

MR THOMAS: In response, going back to the first hearing that occurred in October 1998, at that time I requested from TASTA, which is the Tasmanian State Training Authority, a document which applied at the time to an apprentice/trainee and I received this document here that you have before you. It is not a new document -

PRESIDENT: The document is dated 1 June 1999. What did you have in the 1998 hearing?

MR CAMERON: No document was tendered at the time.

MR THOMAS: No document was tendered at that time.

PRESIDENT: I think I accept the objection raised by Mr Cameron in this sense that it can hardly be construed as the document which applied at the time that Ms Clark was employed by that employer. It's interesting to note -

MR THOMAS: Well, I put it to you that there was a training agreement but this may not be the -

PRESIDENT: We may need to know, if we are going to be at all prescriptive about it, what the agreement was that was in force at the time of her employment.

MR THOMAS: Would it help the commission, after these proceedings are finished, that approaches are made by myself to

TASTA at the time that the person was employed and to produce to the parties, including the commission, a copy of that document. Would that assist?

PRESIDENT: I think it's fairly critical and probably needs to be available before we can conclude the matter. I'm not saying that it's going to prevent us from going much further today but -

MR THOMAS: Does Mr Cameron have any objection on that?

PRESIDENT: Just a moment. Mr Paterson?

MR PATERSON: Really the document, I presume the relevant document from that point in time, could be obtained but I think you'll find that all that document does is give voice as an information document to the provisions that are in the Act. But nonetheless -

PRESIDENT: Well, we need to know.

MR PATERSON: Yes. I believe that if that document is critical it may be that the proceedings can go ahead in the way that it's criticality is not important, but I would understand that the document that applied at the time would be available.

PRESIDENT: Yes. How soon can you get a copy of the training agreement which was used at the time of the relevant employment?

MR THOMAS: I can make approaches and obviously probably I won't be able to get it this week but obviously next week.

PRESIDENT: You should be able to get it in half an hour.

MR THOMAS: I can make approaches.

PRESIDENT: Is anybody else able to -

MR PATERSON: What's the date we're looking at, the date that she commenced employment, I presume?

MR THOMAS: 1997 to 1998.

PRESIDENT: 11 May 1997, according to the application. Has anybody got any useful ideas as to how we might get it more quickly?

MR PATERSON: No, but I do have a copy of the document that preceded this one in my office. I don't know whether it's dated.

PRESIDENT: I don't think we can use that. We will go off the record for a moment.

OFF RECORD 11.44am

ON RECORD 11.46am

PRESIDENT: Yes, Mr Thomas. Every effort at the highest level is being made to get a copy of the relevant document, Mr Thomas, so we will press on without it for the time being.

MR THOMAS: Okay. What I seek to tender now is actual correspondence between myself and TASTA and I will briefly read what I wrote and the response that I received. It is dated 11 June 1998. I will just read it into transcript:

> *In relation to Samanatha Clark (DOB 10/1/1974) Address 2 Trevallyn Rd, Launceston who was employed by Fee and Me Pty Ltd 190 Charles St, Launceston from 11/5/97 to 31/3/98.*
>
> *Could you please confirm in writing under the Vocational Education and Training Act 1994 with regard to Section 33 (Declared Vocation), Section 34 (Training Courses in Vocations), Section 35 (Training Agreement) and Section 36 (Approval of Training Agreement) if a training agreement was approved for the above employer and employee.*
>
> *Also, I understand the employer must forward the training agreement when completed to the Training Agreement Committee for its approval within 14 days of making the agreement. Could you please confirm this in writing.*
>
> *Samantha Clark has referred her dispute to us as she was paid an apprenticeship rate of pay as an adult employee and there was no signed formal apprenticeship.*

And in a response dated 15 June 1998:

> *In response to your query dated 11 June 1998, regarding a training agreement between Samantha Clark and Fee and Me Pty Ltd, the Tasmanian State Training Authority (TASTA) has no record of an agreement for these parties having been received to date.*
>
> *If you have any further queries, please contact me on 6233 7713.*

PRESIDENT: **EXHIBIT 12.**

MR CAMERON: Mr President, I think that should be exhibit 11.

PRESIDENT: I marked the other one as an exhibit even though -

MR CAMERON: Oh.

PRESIDENT: I virtually over-ruled your objection.

MR CAMERON: I thought you had upheld my objection to the tendering of that document.

PRESIDENT: Well, I may not have indicated it very clearly but my ruling on it was that it could be tendered as an exhibit but that did not mean that it had to be regarded as the document which was in place at the relevant time.

MR CAMERON: Thank you, Mr President.

MR THOMAS: The next document is a further letter dated 30 April 1999 and their reply. The cover sheet is a fax document and it was:

> *My question is can TASTA speak on behalf of the Training Agreement Committee who under S34 must give its approval of a training agreement.*
>
> *Carolyn Nichols by phone answered Yes as TASTA controls the database of all training agreements ie if it is not on the database then it has not been approved. Please reply in writing to my request.*

And the reply is dated 30 April and it says:

> *I refer to your query regarding approval of training agreements by the Tasmanian Training Agreements Committee.*
>
> *The Tasmanian Training Agreements Committee (TTAC) has the power under section 36 of the Vocational Education and Training Act 1994 to approve training agreements.*
>
> *Under section 16, TTAC has delegated this function to the Director, Client Services. The Client Services Branch administers this function and each training agreement is reviewed and subsequently entered on the apprenticeship/traineeship database, DELTA. Once entered, letters*

are produced which are sent to both the employer and apprentice/trainee approving the training agreement.

As, you mentioned in your letter, if the agreement has not been entered on DELTA, the agreement has not yet been approved.

If you have any further queries regarding this matter, please contact me on (03) 6233 7713.

PRESIDENT: **EXHIBIT 13.**

MR THOMAS: The next document is a further letter dated 17 June. It's a fax document together with a letter of reply and I will just read from the cover sheet:

I have a case where the employer argues that Part 6 Division 1 - Training Agreements only applies to a trainee not an apprentice. In other words because the employer paid an apprenticeship rate and considered the employee as an apprentice they did not need to comply with the above section of the Vocational Education and Training Act 1994.

Your verbal response was that the employer is wrong and they must comply with Part 6 Division 1 - Training Agreements for both which included an apprentice.

Please confirm in writing.

The reply, dated 25 June 1999:

I refer to your query dated 17 June 1999 regarding the definition of a 'trainee' under the Vocational Education and Training Act 1994 and whether an 'apprentice' is covered under this definition.

Under Part 1, of the above Act, a 'trainee' means a person undergoing -

(a) a training course under a training agreement or vocational placement agreement; or

(b) an apprenticeship.

Therefore, it is very clearly defined, as noted above that an apprentice is covered under this definition.

If you have any further queries, please contact me on 6233 7713.

MR CAMERON: Mr President, we'd have to object to that document being tendered. It's trying to put forward an

interpretation of the *Vocational Education and Training Act* by the Executive Officer at TASTA. The fact that that person says it, I could very well write a letter that says I don't think I agree with that. That person's opinion in relation to that definition is of no relevance.

PRESIDENT: Any views? Mr Thomas?

MR THOMAS: My view is that it is relevant because Carolyn Nichols, who actually wrote that letter, is a Client Support Officer for TASTA. TASTA, Tasmanian State Training Authority under their umbrella, govern the Act and she has given a response to a query raised by myself. The relevance is it's purely up to the commission to decide the relevance of the document but I believe it should be tendered because it is a response to a query raised by myself in regard to this matter. The relevance is up to you as the president in this matter, but to have it not tabled at all or that response not tabled - it does need to be tabled because it is a response from the people that govern that Act and my answer to that.

MR CAMERON: Mr President, I take on board what Mr Thomas is saying but, as with any legislation, it's not for an employee to interpret that legislation the same, as president, you cannot interpret the *Industrial Relations Act*, it's a matter for the Supreme Court to interpret and, in particular, this particular clause - the definition of a trainee under the *Vocational Education and Training Act* is the very hub of the dispute between the parties. I don't think we should place any reliance - I know it goes to relevance - but I don't think it should be tendered because it could not place any reliance upon the opinion of an employee of the statutory body.

MR TULLGREN: Mr President, can I say, when you look at the correspondence all that Ms Nichols has done is to actually repeat the definition of a trainee or reproduce the definition and then to say *therefore, it is very clearly defined, as noted*. With great respect, Ms Nichols is not proffering an opinion or an interpretation, she's simply, if you like, parroting what the legislation says and saying it's clearly defined. Now there's a definition, whether it's clearly defined is perhaps a matter that this commission might bear with in its decision, but I don't think it's an opinion. It's a replication and a positive affirmation. I think on that basis alone it's appropriate to admit the material and the commission puts what weight it does on that statement.

PRESIDENT: Yes. Mr Cameron?

MR CAMERON: Yes. My friend has indicated that it's not an opinion but the question in the first paragraph says - the question put by Mr Thomas in his correspondence was whether an apprentice is covered under this definition. She is saying that it is, it is clearly defined, but the word 'apprentice' itself is not even there. The question that has been before the commission previously, and would hope to be resolved through this interpretation hearing, is whether an apprentice is defined under that Act and, again, we would submit that that's not something this commission can do anyway.

PRESIDENT: So what's the problem then, Mr Cameron?

MR CAMERON: Well, we're talking about state legislation and this document being put forward in relation to a particular request by Mr Thomas going to the hub of a dispute before Commissioner Watling, on the basis that we're now supposed to accept, that the definition put under the Act defines apprentices. The submission at the hearing in the first instance that it doesn't and it would be our submission here today that it doesn't define apprentices.

PRESIDENT: As Mr Tullgren pointed out, all that Ms Nichols is doing is repeating what's in the *Vocational Education and Training Act*.

MR CAMERON: Well, in that regard I would certainly agree that yes, the second paragraph could be paid heed to, but when the question in the first part is, whether an apprentice is covered under this definition, and then the statement, therefore, it is clearly defined, indicates an opinion. It doesn't have the words 'in my opinion' but it does indicate an opinion based on a question.

PRESIDENT: Yes, but whether it's an opinion or not it's a fact, isn't it? The words 'an apprenticeship' are contained in the definition of a trainee so all -

MR CAMERON: Yes, the words 'an apprenticeship' are there -

PRESIDENT: Yes.

MR CAMERON: - but to then say that the term 'apprentice' is clearly covered is probably questionable too, because when we referred to the previous legislation both terms were defined.

PRESIDENT: I'm sure you're going to put this argument to me very forcefully later, Mr Cameron, but I don't think either party is going to be affected dramatically by the tendering of this exhibit. I will allow it. **EXHIBIT 14.** Go ahead Mr Thomas.

MR THOMAS: The next is a letter dated 3 November 1999 and in that letter to TASTA, the Department of Education, Office of Vocational Education and Training, I have said:

> *I refer to your letter dated 12 October 1999 in which you sought clarification regarding -'*

Maybe I should go to my letter first, I think.

PRESIDENT: Yes, I think that might be better.

MR THOMAS: It makes commonsense. My letter to them on 12 October 1999 says:

> *In relation to Samantha Clark (DOB 10/1/74), Address -*

PRESIDENT: Don't worry about the peripherals.

MR THOMAS: All right. On the back of that I have attached a document which I received and what I'm querying is whether this document, which declares vocational pathways and vocations, whether there was a declared vocation entitled cooking for the period of time that Samantha Clark was employed and that is detailed 11 May 1997 to 31 March 1998 and the question I have raised is: *if the answer is yes, is the enclosed document the correct in that there was a 4 year apprenticeship in the vocation* entitled cooking, and that's what I've actually asked.

The response that I got back:

> *I refer to your letter dated 12 October 1999 in which you sought clarification regarding the declared vocation of Cooking.*
>
> *I wish to confirm that the declared vocation of Cooking was in existence during 11/5/97 to 31/3/98 and the appropriate qualification that related to this, was Certificate III in Cookery (Commercial).*

which has that written actually on that document.

> *The print out you enclosed with your letter is a true record from the Office of Vocational Education and Training (OVET) database.*

I tender that document.

PRESIDENT: **EXHIBIT15.**

MR THOMAS: The second last document I tender is the definition from the Oxford English Dictionary in regard to the words 'apprenticeship' and 'apprentice'. I would ask you to disregard the marking 12 at the top. I will read what it says - there are certainly a lot of other definitions you can obtain from quite a few dictionaries and I will just tender this as to what it says and it's from the Second Edition, Volume 1, 1989, Clarendon Press, Oxford. It says:

> *Apprentice: 1. A learner of a craft; one who is bound by legal agreement to serve an employer in the exercise of some handicraft, art, trade or profession, for a certain number of years, with a view to learn its details and duties, in which the employer is reciprocally bound to instruct him. 2. to bind as an apprentice; to indenture.*

And after that it's got:

> Apprenticeship*: 1. The position of an apprentice; service in the capacity of an apprentice; initiatory training, under legal agreement, in a trade etc. 3. The period for which an apprentice is bound.*

PRESIDENT: **EXHIBIT 16.**

MR THOMAS: All I ask is that the commission take note of that definition, but certainly a definition can be obtained from any dictionary.

PRESIDENT: Yes.

MR THOMAS: The last document in sequence, I only received it yesterday, and I will tender that. I haven't a letter with it because I received it late. All it is, is the fact that there was a Statutory Rule 1982, it, in pursuance of the *Apprenticeship Act 1942* - and that's an earlier exhibit - it lists for the Schedules - Trades - and Schedule 1 was Apprenticeship Trades and it listed various apprenticeship trades. I draw attention to page 2 of that document where it says:

9. *Food Trade Group*
Baking
Butchery
Cooking
Pastrycooking
Slaughtering
Smallgoodsman
Waiting

I only draw your attention to this document that I received late because it's a document that tied up to the 1942 Act and confirmed there was a trade in those things which I have earlier mentioned, and that's all I draw your attention to. It should have come in sequence with the 1942 Act but I did -

PRESIDENT: Was it applicable at the relevant time?

MR THOMAS: It was not applicable at the relevant time, I only use this as a history document as far as the trade.

PRESIDENT: Okay. **EXHIBIT 17.**

MR TULLGREN: Is my friend saying then, Mr President, that this statutory rule wasn't in force when Ms Clark was employed.

PRESIDENT: I think that's what he's saying. Whether it's relevant or not is -

MR TULLGREN: I just sought clarification of that because there doesn't seem to be any evidence that the Statutory Rule was repealed or amended.

PRESIDENT: Yes. Can you respond to that Mr Thomas? Mr Tullgren is asking whether there is any evidence that the Statutory Rule was repealed or amended?

MR THOMAS: I have no evidence, but I simply tender that document as showing there was a trade in cooking for the 1942 Act. It's a history document. It's not relevant to the period we're talking about.

PRESIDENT: So it had been repealed?

MR PATERSON: If the commission pleases, I can clarify this from the *Industrial and Commercial Training Act 1985*. Under that Act the trade or branch of a trade declared by proclamation to be a trade under the repealed Act was deemed to be a trade

under this Act, so certainly through until any changes that were effected by the 1994 Act those vocations, as declared, prior to the 1985 Act, which I presume would include those statutory - given effect by those regulations under section 46, as I said, the trade or branch of a trade declared to be a trade under the repealed Act -

PRESIDENT: It's a presumption, isn't it?

MR PATERSON: The reading of the 1985 Act is that under the savings and transitional provisions that any trade declared under the repealed Act -

PRESIDENT: Yes, but we don't for certain know whether anything else has happened since.

MR PATERSON: Between the two proclamations?

PRESIDENT: What's the later proclamation? Have I got that?

MR PATERSON**:** The earlier proclamation is the one that was just tabled with the Statutory Rules declaring being vocations.

PRESIDENT: Yes, but is there one in relation to the relevant period?

MR PATERSON: The answer to that question goes to the effect of the 1994 Act.

MR TULGREN: Exhibit 15, Mr President, would seem to indicate that there is a vocation of cooking at least in force according to the Office of Vocational Education and Training in the relevant period.

PRESIDENT: Yes, thanks for that. Yes. Mr Thomas.

MR THOMAS: I've finished my exhibits, Mr President.

MR WILLIAMS: The matters which I will go to now, Mr President, are decisions which I believe will lend support for our proposition in relation to this matter. In the first one which I tender is *Richardson v. Sedemuda*. The matters which I will particularly draw your attention to, Mr President - this was before the Industrial Appeal Court of Western Australia in relation to an employee engaged on construction work and paid wages applicable to an apprentice and the employee was

determined not to be an apprentice for the purposes of the Act and therefore not covered.

The particular ones I will draw to your attention are the ones that are underlined within the body of the pages and I wish to read those to you. On page 1 it reads:

> *During the period of his "employment" he was engaged on construction work within the meaning of the award and was paid wages applicable to an apprentice on a 5 year term of indenture in the trade award of wall and floor tiling. The industrial magistrate found as a fact that the respondent and Mustica mutually agreed that it was intended at the commencement of his employment that an apprenticeship agreement be entered into for a term of 5 years. It was also found as a fact that during the period of employment both parties were of the opinion that Mustica was an apprentice. However, no application was made for approval to employ him as a probationer or for approval to establish an apprenticeship as required by the Industrial Training Act 1975 as amended and the regulations thereunder.*

I turn to the following page - this is page 419.

> *It is common ground that he was not in any way registered as a probationer.*

To page 420 at the bottom.

> *Insofar as Mustica and the respondent entered into a contract of apprenticeship that contract was illegal as being contrary to s 26 of the Industrial Training Act and was void ab initio.*

I go to the following page, page 421, and at the top there it reads:

> *The phrase "junior worker" is not defined in the award nor for that matter can I find it defined in relevant legislation but the phrase is not a complex one as it merely contrasts a worker who is a junior to a worker who is an adult.*

Further down:

> *However, cl 46 has provided otherwise for by subcl (1) it makes express provision for the case where a junior worker (not being an apprentice) has done work which, if performed by an adult worker would be prohibited unless the consent of the union had been first obtained. If such junior worker is so employed then that worker shall be paid not less than the wage of an adult person performing similar work.*

Further down:

> *Mustica was a junior worker and an employee since he was employed by the respondent to do work for hire or reward and as a consequence, by reason of cl 46, he should have been paid not less than the wage an adult person would have been paid had he done ... It follows therefore, in my view, this appeal should be upheld and the decisions of the industrial magistrate restored.*

I turn to page 423 at the bottom:

> *Notwithstanding the mutual intention that Mustica should be embarking upon an apprenticeship, he was not an apprentice for the purposes of the Industrial Training Act, and therefore he was not an apprentice for the purposes of the Industrial Relations Act or the award, because he was not, pursuant to the Industrial Training Act, "bound" to an industrial training advisory board in an apprenticeship trade by an agreement or by assignment of an agreement, and, by virtue of s31 of that Act, he was deemed not to be employed as an apprentice, because no agreement was registered as required. Nor was he a probationer. It follows inescapably from this, in my view, in terms of cl 46(1), that he was initially employed as a junior worker and was required to be paid not less than the wage of an adult performing similar work, and that he was later employed as an adult worker.*
>
> *I am unable to accept that, because the intention was that Mustica should be apprenticed, although he was not, he is not to be regarded as being a junior worker.*

To the bottom of page 425:

> *Clearly, under this award, looking at the award together with the Act, the only way that a person can become an apprentice is by registering as a probationer pursuant to reg 6 of the Industrial Training Act Regulations, and during such term quite clearly he would not be an apprentice.*
>
> *The conclusion which follows from this passage is that at no time was Mustica either an apprentice or a probationer.*

I turn to page 430, in the middle of the page there:

> *The award at present under consideration came into force on a date subsequent to the proclamation of the IT Act and therefore in my opinion, in so far as it refers to apprentices it can only refer to apprentices who are regarded as such under the IT Act. In this respect s 31 of the IT Act is relevant to the extent that it provides that -*

> *"… a person shall be deemed not to be employed as an apprentice or industrial trainee in a trade to which this Act applies unless the apprenticeship or industrial training agreement entered into by that person is registered as required under this Act."*

And, finally, on page 431:

> *In my opinion the Full Bench in this matter has misconceived the law relating to apprenticeship and has purported to make a finding of fact which was not in issue in the proceedings at first instance and which in any event was entirely contrary to the evidence.*
>
> *In my opinion the appeal should be allowed and the decision of the industrial magistrate reinstated.*

MR CAMERON: Mr President, I understand that Mr Williams is seeking to tender that as an exhibit also. I was just querying the relevance of that particular case to the matter before the commission here today. It is a case from the Western Australian Industrial Appeal Court. We would submit that it's dealing with different legislation. I have a copy of the *Industrial Training Act 1975* here with me and the terms and definitions set out in that Act are vastly different to any statutory provisions here in Tasmania.

It may be very useful in a matter of merit before my learned commissioner to indicate that in other jurisdictions an apprentice needs to be signed up, but that is the question again that's before this commission. We're here to look at the interpretation of the award - to start looking at legislation from other jurisdictions which, I may point out, have particular definitions for apprentice, industrial trainees and sets out clearly the requirement for an apprenticeship indenture to be registered, has no relevance in relation to the application here before this commission. I can tender copies of that Training Act. I don't have copies of course for everyone. I wasn't aware that such cases would be brought before us here today. I just cannot see the relevance in an interpretation on a decision that is just looking at the application of an Act in another jurisdiction.

PRESIDENT: Mr Tullgren?

MR TULLGREN: Mr President, my position would be that the decision is relevant simply because what can be drawn from the case is the fact that in Western Australia there was legislation

that required that an agreement about trainees or apprentices had to be registered.

Now Mr Cameron is right that the legislation is far more detailed in some respects and it has some additional definitional material but the point that was before their Honours of the Industrial Appeal Court in Western Australia was: was Mustica an apprentice? And what is similar in relation to this matter and is relevant based on the employment history of Ms Clark, and this is where she is quite similar to Mustica, that there was some form of verbal understanding in relation to an apprenticeship but that that was never translated legally. And what is important - and I think this becomes an issue for your honour potentially - is the comment of his Honour, Justice Brinsden, at page 421 in the last paragraph of his learned decision where he says:

> *Before finishing with this case let me say that I am not unmindful of the extraordinary result which flows from the decisions of the industrial magistrate. The decisions, however, were in accordance with the law and therefore must be upheld however painful the result may be to the respondent.*

His Honour was saying that, regardless of what the arrangement might have been, legally there was no arrangement and the position here - and this has been taken to by Mr Thomas in some detail - that under the relevant training legislation in this state an agreement must be registered and there is a process which my friends have gone to. That's why this is relevant because an industrial appeals court has had to deal with a similar matter, different legislation with more detail, but the principle is the same, the agreement had to be registered. It wasn't in Western Australia, it was found not to be an apprenticeship.

The matter becomes relevant, we say, where if you find that - or you have to deal with whether there was an apprenticeship or an apprentice undertaking and what that means in Tasmania, and if that were to mean - if you were to find that that would mean that it required to be registered - then this decision becomes relevant and of guidance in how you would determine the issue in relation to Ms Clark. That is the benefit of it and we say that it is relevant to be admitted.

MR CAMERON: Well, I'd say that it would be relevant in relation if the matter is ever referred back to Commissioner Watling. If it's found here that an apprenticeship needs to be registered - and I'd question again the ability of this commission to interpret the *Vocational Education and Training Act* - then that is a matter perhaps of similar facts and similar circumstances that the commissioner could take into account.

But in terms of interpreting what is in a Tasmanian award referring to a case in another state with entirely different legislation and legislative provisions, and they are clearly set out in that Act, that is the question that was before Commissioner Imlach in the first instance: does the requirement for an apprenticeship need to be registered because of the lack of definitions and the lack of reference to apprentices under that Act.

Now it is all very well to bring this case forward here today but I don't see how it's relevant to an interpretation of particular words under an award. If we look at the guiding principles for interpretation, to look at those cases of similar -

PRESIDENT: You have gone far enough, Mr Cameron. I'm prepared to accept that objection. I won't treat this case as an exhibit in this matter, Mr Williams. I don't think, as Mr Cameron has put it, that this helps me determine what the words in the award mean. The words in the award relating to the apprentices provision are those which I have to interpret and I don't think the *Richardson v. Sedemuda Pty Ltd* matter helps me.

MR WILLIAMS: Mr President, if that's to be your decision the next exhibit -

PRESIDENT: Might be in a similar category.

MR WILLIAMS: It could have a similar effect because it's the one I was going to -

PRESIDENT: Yes. At some stage or another you have to get to me and put to me what the words in the award mean. We haven't really talked about that yet and that's critical. You've got to tell me what you believe the words in the apprentices provision mean and whether or not they can be construed in a way - whether or not the circumstances relating to Ms Clark can

help us in determining what an apprentice is for the purposes of the award.

MR WILLIAMS: Mr President, I put to you in relation to the legislation, and particularly the *Vocational Education and Training Act* in this legislation, and we believe by virtue of section 42 of the *Industrial Relations Act* that that requires you to be guided by that legislation in the effect it has on the award before us today. I believe that legislation sets out a format for application for an apprenticeship -

PRESIDENT: Let's go to the award, what does it say?

MR WILLIAMS: I think it's exhibit 6 we should be looking at which is the current one.

PRESIDENT: Yes.

MR WILLIAMS: I'll go to the consolidated provision first, page 16?

PRESIDENT: Yes.

MR WILLIAMS: The word there is 'apprentice' -

PRESIDENT: 'Apprentices' - a heading.

MR WILLIAMS**:** 'Apprentices' as it covers three types of apprentices - singular - in that essence there. The award doesn't give any more words of definition elsewhere in the award to add to that particular word.

PRESIDENT: So what does it talk about under 'apprentices'?

MR WILLIAMS: It talks about the engagement of employees on a program of apprenticeship -

PRESIDENT: Where's that?

MR WILLIAMS: I don't have any words to add to it there. You asked me what I thought they -

PRESIDENT: Yes, okay. Let me try and work out where I think it might be going if it's not being too presumptuous. The kitchen trades segment would be the segment that you believe ought to apply?

MR WILLIAMS: Yes.

PRESIDENT: And in order to be - you would be submitting, I presume - an apprentice under the kitchen trades section there would need to be a trade or vocation under kitchen trades, is that so?

MR WILLIAMS: Yes.

PRESIDENT: Can you show that?

MR WILLIAMS: The letter which we have, exhibit 15, is the one that sets out the category of cooking. It sets it out as being a trade under the *Vocational Education and Training Act 1994* and therefore that would be our cooking commercials.

PRESIDENT: You'd submit that kitchen trades includes vocations of cooking?

MR WILLIAMS: Yes, I would.

PRESIDENT: Declared vocation of cooking, is that the way I interpret -

MR WILLIAMS: Yes. By bringing those documents forward that's what we have purported, that those documents tie in with the question before the president today.

PRESIDENT: That I should interpret kitchen trades to include the declared vocation of cooking?

MR WILLIAMS: Yes.

PRESIDENT: All right. Okay, we've got that to that step, where do we go from there? You're asking me to interpret kitchen trades to include a declared vocation, now the next step, I presume, is whether or not, in order to be an employee in a declared vocation, you need to be an indentured apprentice.

MR WILLIAMS: That's what we believe the legislation purports to suggest.

PRESIDENT: And so what needs to be done in order to satisfy whether or not a person is engaged in a declared vocation?

MR WILLIAMS**:** The appropriate application has been made, signed by the parties and been approved.

PRESIDENT: And you'd be saying that all those steps would need to be fulfilled in order to establish that a person was capable of being covered by the apprentices provision?

MR WILLIAMS: Correct.

PRESIDENT: I think I've been able to extract all that from the material that you've handed to me. Well, unless you have anything further to put we'll move on to -

MR WILLIAMS: That's our proposition.

PRESIDENT: - hear the other parties. Would it be an appropriate time to take a break, do you think, and resume at two o'clock?

MR TULLGREN: I have no objection but perhaps if we could go off record just to discuss how we are going to handle it, Mr President?

PRESIDENT: Yes, off record, thanks.

OFF RECORD 12.31pm

ON RECORD 12.33pm

PRESIDENT: Thanks for that discussion. It has been agreed that you, Mr Cameron, will go next and that the other parties will follow you and that you will have a right of response to those submissions and then of course Mr Williams can wrap up. We will adjourn for half an hour.

HEARING ADJOURNED 12.34pm

HEARING RESUMED 1.12pm

PRESIDENT: I'm sorry for that delay, I tried to do too much. Mr Cameron?

MR CAMERON: Thank you, Mr President. Mr President, the matter before you, and it has been discussed at length this morning, revolves around basically a single word in the Restaurant Keepers Award in the reference to apprentices. And it

should be pointed out that under clause 8 of that award the use of those headings also refer to career structure grades - juniors, trainees, apprentices and so on - and it is interesting to note that trainees are distinguished from apprentices. Over the last number of years there has been a push on federally and there has been a blur between traineeships and apprenticeships and moved away from that set period of apprenticeships and recognising competencies and other skills to qualify people to do certain occupations.

At the end of the submission by Mr Williams we finally looked at the word 'apprentices' under that award and the reference to kitchen trades and it is the submission of the applicant, and put by yourself, that to get from there to apprentices we need to look at the *Vocational Education and Training Act* and some form of signed agreement. Now the arguments that have been run historically in this matter - before Commissioner Imlach at first instance and then briefly before Commissioner Watling - do relate to the *Vocational Education and Training Act* and whether that Act has any application to the definition of apprentices under this award and possibly under any other award of this commission.

When we are looking at the interpretation it's required, and as set out in the decision of President Koerbin in T30, that it is futile to attempt to exercise an interpretation without looking at specific facts. Now they have been highlighted in a single document that has been provided by the applicant setting out some dates and other information. However, what is missing from that document and is very relevant are a number of factors, firstly, that this particular employee, Samantha Clark, agreed to be employed as an apprentice and, secondly, that during the time of her employment she was receiving training and instruction in the skills of becoming a qualified cook or chef, depending upon the required terminology.

The duties that were set out in that document were performed, that she was receiving guidance and instruction in a lot of those things, and the transcript of the first hearing provided the evidence that she was receiving appropriate instruction and training corresponding to what applies to apprentices in that particular area.

So we need to bear in mind that when we look back there was an agreement by the employee that she enters into an

apprenticeship or as an apprentice with her employer, she agreed to the rates of pay as set out in the Restaurant Keepers Award. A dispute ensued which then brought the matter before the commission as to the speed of pay rises but that's why the matter got to the commission.

Now, what can we do when we try to interpret that word? Now it is the submission of the applicant and I'm sure that the union parties present here today will say that the *Vocational Education and Training Act* has effect and that pursuant to section 42 of the *Industrial Relations Act* that this commission must have regard to that Act when dealing with this interpretation.

It is interesting to note that section 42 says that you have reference to that Act dealing with the same subject matter, so therefore the *Vocational Education and Training Act* must be dealing with the same subject matter as we are looking to interpret here before this commission. We would argue that the points raised by Mr Williams and Mr Thomas are not relevant to a definition or interpretation of the provision for an apprentice. In that regard, we refer the commission to the definition of trainee under the *Vocational Education and Training Act* and that's been recited, it's been referred to in documents - this particular document that we objected to on the basis of someone giving their own interpretation to it.

But there is a very, very important word in that definition. Under the Act it says:

> *"trainee" means a person undergoing -*
>
> *(a) a training course under a training agreement or vocational placement agreement; or*
>
> *(b) an apprenticeship;*

Now the use of that word 'or' means that definition can be read with either of those two subparagraphs. The trainee can be someone undergoing a training course with a training agreement or is someone undergoing an apprenticeship. They are clearly distinct. They are mutually exclusive of each other by the use of that 'or'.

I think the other parties will agree and the talk around has been that this is a very poorly drafted piece of legislation. We're not here to apologise for that but in terms of looking at this

particular matter before you, if there is a problem with the legislation then the legislation needs to be fixed.

As far as this interpretation goes, it is a matter for the commission to look at the words in the award as they stand, as their simple and clear meaning indicates and then to interpret those using those words. If there is a problem because of a failure in the legislation that does not mean that the words in the award should be interpreted to incorporate the intention of the legislation. The words must be interpreted on their own. It's not a matter of now interpreting the provisions of the award to suit what the intention of the legislators might have been.

In that regard, another decision of interpretation of this very same award, which came before you in a matter T6540 of 1996 and went on appeal under T7585 of 1998, the argument there revolved around, to a large extent, the use of section 42 to look at the provisions of the *Workers Compensation Act* and annual leave, which the President will probably well remember - that interpretation.

PRESIDENT: I certainly do.

MR CAMERON: When it came back before the full bench the argument was that the same subject matter words, as set out in section 42 - and I quote the decision in that matter - *necessarily requires that there be a true correspondence of subject matter between the award and Act in question.* They were, apart from a decision of Justice Cosgrove in relation to section 84, willing to say that the use of the words 'annual leave' under the *Workers Compensation Act* and the use of the words 'annual leave' in the award were not the same subject matter when compared.

It's our argument here today that the use of the word 'apprenticeship' as being a definition of what a trainee may be and the use of the word 'apprenticeships' under the award are not necessarily the same subject matter.

PRESIDENT: Because they're not the same words, are they?

MR CAMERON: They are not the same words and in effect their meanings are used for different purposes.

It is interesting to note that under the *Vocational Education and Training Act* the only reference to an apprenticeship is that single word under the definition of trainee. There is no other reference

to apprenticeship and no reference whatsoever to apprentice. So therefore to say that the requirements of that Act necessarily flow through to the requirements for an employer and an apprentice in the workplace in Tasmania is with error, because the other aspect of that definition of trainee says that *a trainee means a person undergoing a training course under a training agreement* - that's point (a) - and training agreement itself is defined as being *an agreement or contract between an employer of a trainee in force under Division 1 of Part 6*. But that use of the term 'training agreement' and being a training course under a training agreement is separate to the definition or reference to apprenticeship -

PRESIDENT: Is it, how?

MR CAMERON: Because it's in the alternative under the definition of trainee. A trainee is someone undergoing a training agreement or an apprenticeship - they are mutually distinct -

PRESIDENT: Yes.

MR CAMERON: - by the word 'or' and separate sub-numbers.

PRESIDENT: The trainee can be two things.

MR CAMERON: That's right, and therefore what -

PRESIDENT: And a training agreement covers an employer and a trainee and a trainee could be either -

MR CAMERON: No, because we would say on reading that Act and as we have indicated a couple of times, it would be difficult for us to interpret the exact words here today -

PRESIDENT: Yes.

MR CAMERON: - but it's in the alternative. It's either someone under a training agreement or an apprenticeship and therefore the requirements that the applicant relies upon under Division 1 of Part 6 for it to be in writing, to be submitted within fourteen days and everything, only relates to the trainee under a training agreement, not a trainee under the alternative apprenticeship.

PRESIDENT: I see. I don't agree with you but I understand what you're saying.

MR CAMERON: Now, I'm not saying -

PRESIDENT: And I understand what your argument's going to be about, whether or not we can interpret the *Vocational Education and Training Act*.

MR CAMERON: Yes, that's right. Now there are obviously problems with the Act because it's not clear. Whether this matter ends up with an interpretation before the Supreme Court, I certainly hope not, but at some stage maybe -

PRESIDENT: I'm sure it will one way or another.

MR CAMERON: - the matter needs to be looked at.

So the arguments put forward by the applicant and their historical references to previous legislation and documentation is all very well because in those days apprentices were clearly set out. They were defined, they were referred to. At some stages, for instance, there were only apprentices and not trainees. However the move towards trainees and the push in that regard has meant that when the draft people who prepared this document were involved they seemed to forget the requirements to still cover apprentices because they still exist in Tasmania.

So what do we have then to look at? We have a single word under the Restaurant Keepers Award of 'apprentices'. It has been handed to you, a dictionary definition from the *Oxford Dictionary,* of what a trainee is and we would submit that if there is no -

PRESIDENT: What an apprentice is, I think.

MR CAMERON: Sorry, an apprentice is - if there is no other legislative material dealing with apprentices, and it is our argument that there's not because of that poorly drafted legislation, then we'd have to look then as to what an apprentice is and in the absence of legislation we'll need to look at the common law. The common law definition could easily be said to be the definition from the dictionary and, historically, that's been the case. Everyone understands an apprentice to be someone who is engaged by what was previously called a master who would hand down his skills and teach that employee the necessary skills to in turn become qualified to act as a tradesperson or a craftsman, or a professional person even.

The reference even under those definitions of apprentice and apprenticeship to legal agreements does not necessarily mean that anything has to be in writing. Contracts themselves do not need to be in writing, so the use of those words there do not imply that anything needs to be in writing, so we would ask that that reference be discounted accordingly.

So we have an apprentice - the word 'apprentices' - which by the definition provided and we have other definitions provided from CCH which quotes the Macquarie Concise Dictionary of Modern Law: *an apprenticeship is one who is bound for a fixed period to serve a master in return for instruction in the trade*.

Again, it's what everyone expects an apprenticeship to be. They have gone away from the word 'master' of course these days and it is now the 'employer' but the situation is still the same. It is someone who is learning from someone else the skills of a particular trade.

The evidence that was brought forward at the commission hearing at first instance was that that was what was taking place. Ms Clark was learning from the other chefs and cooks and from Ms Hoskens, who was the owner of the business, the skills required for her to become a chef.

Now the circumstances in that particular matter were quite interesting because it was Ms Clark's opinion that she had done the necessary formal training to become suitably qualified, she was merely serving out the time of an apprentice to receive her trade papers.

So, the facts and the evidence that brought forward indicate at all times that the relationship between Ms Clark and the company was one of an employer and apprentice. There was not a written training agreement. That was acknowledged in evidence but on our submission, there does not need to be a written training agreement for an apprenticeship to exist.

In the absence of any statutory requirement, then an agreement between the parties to create a contractual relationship, is all that is required. As is the case with an employee going to an employer and applying for a position and they can say, yes, we will employ you as a level 2 or a level 3, or a particular occupation. In this case, there is provision under the award for an apprentice. It was agreed between the parties that this

person would be employed as an apprentice. That was agreed and that's what happened.

I might just address the documents that have been put forward, commissioner. Most of them are of no relevance in particular because they are historical factors. The historical factors are interesting to point out again, that apprentices have been covered over the years and that the same detail that existed in previous legislation has not been brought forward into the current legislation.

What I did wish to address however and I did at the time, is the correspondence that took place between the Workplace Standards Authority and the Tasmanian OVEC or the Tasmanian Safe Training Authority and again I stress, it was an opinion put forward by Ms Nichols. I do not mind the words in the second paragraph being looked at because it is just a repetition of the terms under the Act. There's a letter from her and she uses the adjectives very clearly defined, which means that it is her writing, it is her impression, it is her interpretation, that the apprentice is covered under the definition. It is our submission that that is not the case, or that it is the case, that a trainee can be an apprentice.

The other requirements of that legislation are excluded because they are not specifically referred to and there is the suitable alternative for the trainee between someone under a training agreement and someone under an apprenticeship.

PRESIDENT: Getting back to the definition of trainee, because it's fairly important for me to really understand what you're putting. You're saying that a trainee only means a person undergoing a training course?

MR CAMERON: No, but it does say that a trainee can be either one or the other, (a) or (b).

PRESIDENT: Okay. So, a trainee is either somebody undergoing a training course or an apprenticeship?

MR CAMERON: Yes. But the requirements then under the Act -

PRESIDENT: Then the training agreement definition does not include, where it mentions a trainee, does not include a trainee

who is undergoing an apprenticeship. Is that what you're saying?

MR CAMERON: Yes, because the training agreement is referred to in part (a) of the definition of trainee. Is that person under a training agreement? So you look at the definition of training agreement, or an apprenticeship, and therefore the requirements for registration being in triplicate, setting out all the terms and conditions, do not apply to a trainee undergoing an apprenticeship. It's only the trainee undergoing the training course with a recognised training agreement.

PRESIDENT: Yes, I just wanted to get that clear. I thought that's what you were saying, but I must say -

MR CAMERON: Therefore the steps that the applicant made to go from kitchen trades to a cook to a written agreement registered with TASTA stops after kitchen trades and cook.

PRESIDENT: Yes. And that's why you take issue with what Ms Nichols is saying?

MR CAMERON: Yes.

PRESIDENT: And that she misinterprets the definition?

MR CAMERON: Yes.

PRESIDENT: All right.

MR CAMERON: Well, to the extent that apprenticeship would include an apprentice but not the way that she's implying under the specific question from the Workplace Standards Authority.

Basically then, and when you're only interpreting one word, there can only be very short submissions.

PRESIDENT: Well, there's more to it, isn't there? There are the three segments.

MR CAMERON: The three segments, yes, but if we're looking -

PRESIDENT: You're saying that the first word excludes or includes?

MR CAMERON: We recognise that the apprenticeships can be in those three different areas, kitchen trades, greenkeeping and

food and beverage trade, but when we're looking at that overall, for someone to be employed under one of those categories it's the same as someone being employed generally as an adult. They're employed as an adult, then you find the classification or level for them. They're employed as an apprentice and depending upon which type of training you're doing as to whether it's greenkeeping, food and beverage trade or kitchen trades.

In summation, we agree with the definition of an apprentice. It's someone undergoing a period of training. Again, even the dictionary definition still refers to a certain number of years and I think it's generally recognised now that training, hopefully, is moving away from that restriction as to periods and looking at competencies. However, a number of the awards still provide for apprentices with periods of time as does this award and if I may refer the commission to another matter that came before you in the Meat Processing Industry Award, again looking at apprentices and the recognition and the requirement for them to attend accredited off-the-job and on-the-job training.

The decision in that matter was that an apprenticeship is for that period of time and it doesn't matter at which stage through that period of apprenticeship, someone does the recognised or accredited training off-the-job or on-the-job. That was upheld on appeal.

Again, in this particular case, just to assist the commission in looking at it overall, this person maintains that they'd done the necessary TAFE courses, there was another one to do. That was after the time she left the employer - the restaurant. So the fact that she didn't do any accredited training courses during the time of her employment, doesn't diminish from the fact that she was still an apprentice.

Mr President, we would submit then, subject to our right of reply to any submissions put forward by the trade unions present here today, that an apprenticeship or an apprentice - apprentices, as required under subclause (iv) of clause 8 of the award only refers to a relationship between an employee and an employer where the employee is traditionally employed to learn the trade or skills that the employer can impart to facilitate that employee becoming suitably qualified in their own right.

The requirements as set out for compliance with provisions of the *Vocational Education and Training Act* do not apply because

they cannot apply when there is no reference to apprentices and the reference to apprenticeships is very tenuous in terms of tying that to any other requirements under that Act.

Ms Clark in this particular instance was employed as such. She received the necessary training that was obligatory for the employer to provide over the time that she was employed before she left of her own volition.

We would find therefore that in interpreting this award and using the principles as set out by President Koerbin that have been adopted by this commission since, that you must look at the simple words. You don't take into account extraneous matters unless they are of assistance. And we would submit that the documentation provided by the applicants were very interesting in terms of providing a history lesson as to how we got to where we are today but the fact that apprentices previously were required to be under written agreements and written indentures, does not carry forward when the current legislation does not specifically provide so.

One of the principles put forward by President Koerbin at the time was the fifth principle, that, if there has been a drafting mistake in not properly expressing what is required the award itself could have had a definition of an apprentice, requiring them to have recourse to the provisions of the *Vocational Education and Training Act* and I believe that there are awards of this commission where those requirements are set out in the award. I think, from memory, the Meat Processing Industry Award was one such document.

If there is a problem in the drafting, then it's not for the interpretation to suit the intention. The president has authority under section 43(2) to make variations to the award or, when appropriate, to direct that an application to vary the award be made. And that may be the appropriate course of action. At this stage though we need to look at the award as it stands so that then, in this particular instance, we can go back before Commissioner Watling and argue the case on the merit before him for this particular employee.

We do not feel there is any ambiguity in the use of those words and generally, when looking at the principles outlined, the only interpretation that can be given to those words, are that a person who is in the position of receiving instruction in skills as

set out in the dictionary definition and as quoted by me from the Macquarie Dictionary. Further than that, at this stage we have nothing further.

PRESIDENT: Thanks, Mr Cameron. Mr Tullgren?

MR TULLGREN: Thanks, Mr President. Our submissions probably will be slightly longer than Mr Cameron's, but we say this, that it is common ground that an apprentice is not defined under the award. The award provides a rate of pay for apprentices at clause 4 and the parties have taken you to that and it's encompassed in the provision for kitchen trades.

Because the award doesn't define apprentice or apprenticeship, that's not fatal to attempting to interpret what the provision means or how it might be applied. We say that is the case, simply because the words 'apprentice' and 'apprenticeship' are common words in a sense that they are familiar terms. They have a currency and an understanding at least in industrial relations and training circles - and I think I've elevated training to a circle that once it would never have held - but there is an industrial relations circle and a training circle and the words 'apprentice' and 'apprenticeship' have a meaning.

You have been taken to the dictionary definition and I want to take you and address that again because the Oxford Dictionary defines an apprentice as a learner of a craft bound to serve. An apprenticeship is defined, as the position of an apprentice, or service as an apprentice, and, bound, is defined as, to set bounds to, to limit or restrict.

Now, there's no evidence but if one accepts the material that was before Commissioner Imlach in relation to these - there may have been an agreement between Ms Clark and the employer but the agreement was not one that bound the parties and that's a relevant part of the consideration of apprenticeship because an apprenticeship historically is one where there was an agreement reduced to writing - whether originally that was what was known as an indenture and remained using that term until quite recently. There was an agreement to be bound and that was, it was for a specific period and a whole series of other arrangements.

There is nothing that I can see in the decision of Commissioner Imlach that would direct the commission to believe that there

was a binding arrangement between the parties. They had different views and, clearly, the evidence that was before the decision of Commissioner Imlach indicated that there were in fact, in relation to the rates of pay progression, quite different views between Mr Cameron's client and Ms Clark in relation to those matters.

If there was an agreement that bound the parties, that would not be a matter of dispute because there would be an agreement which had provisions that dealt with progression and because my friend, Mr Cameron, can't point to those - he says that in the ..[inaudible].. statutory definition there was a common law arrangement. Using the common law basis of going to the dictionary definition, he cannot show essential factors that would have applied, did, in relation to the matter with Ms Clark.

I also note that in relation to the issue of interpretation, there are a great many approaches but one of the approaches that's used is, where there are disputes of interpretation and words are used in a particular sense, to attempt to ascertain what that sense is and how they apply. The standard text in Australia is - Statutory Interpretation in Australia which is edited by D.C. Pearce and R.S. Geddes.

We say that apprentice and apprenticeship can be interpreted as technical words because they relate to a narrow focus and operation of society in industry. They are not a general word but they have a particular technical meaning. At page 70 of the third edition of Statutory Interpretation, the authors under the heading, Technical words to be given their technical meaning say, and I quote:

> *Most statutory interpretation is concerned with the meaning to be ascribed to general words, but the courts are also frequently concerned with technical words and phrases. The cases relating to technical words fall into two categories. One group deals with the interpretation of legal technical words and the other with non-legal words that have a technical meaning. As far as the interpretation of technical legal phrases is concerned, the approach followed is best stated -*

and then they refer to what is known as the *Brewery Employees Case* which then goes on to say:

> *Where words have been used which have acquired a legal meaning, it will be taken, prima facie, that the legislature has intended to use them with that meaning unless a contrary intention appears from the context.*

And they go on to quote the case where his Honour Justice O'Connor said:

> *But it always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well known legal term.*

We say that if these words have a technical meaning, then what you look at is the usage that's been given to them over time and the understanding of those words. What we say is, it's interesting that in my friend, Mr Cameron's submission, he said that apprenticeship is not defined in the award and that the definition in the *Vocational Education and Training Act* is weak, or, perhaps non existent, I think, probably puts it more accurately.

He doesn't then go on to say, well, what do these words mean? What is the understanding of them? He says, in that case then you can have a common law arrangement about an apprenticeship. Well, leaving aside the efficacy of that submission, he doesn't take you to showing what the word or words, that's 'apprentice' and 'apprenticeship' mean and how they could be applied.

In looking at the issue of the interpretation of, say, non legal technical words, at page 72 of Pearce, they say that you have to look at the words that have been used in a commercial trade or other technical sense and they refer to a number of authorities but in particular they say that in the authority of *Re Pacific Film Laboratories Pty Ltd v Collector of Customs*, which is 1979, Volume 2 of Administrative Law Digest at page 144, they say:

> *With respect to revenue laws directed to commerce, courts are more ready to conclude that items have been described according to common commercial or trade usage rather than in their natural or ordinary sense.*

They go on to say:

> *Whether there is a common commercial or trade usage in relation to a particular item is a fact to be proved by evidence.*

We say that the words 'apprentice' and 'apprenticeship' are more appropriately non legal technical words in that they have a meaning in a commercial and trade sense, in the sense that people who have been in business, whether it be the cooking

trades, boot trade or the meat trades, as my friend has referred to, they are in a commercial operation. Part of that commercial operation is, they provide a service and in the case of the restaurant, it was cooking in part, the preparation of meals and to be able to perform that, at least apart from more unskilled or lower level requirements was that you needed to have skills and competencies and that's effectively no different than, for instance, in the meat trade where a person who is in the business of slaughtering animals for the sale of meat, there are a number of processes and that one of those is slaughtering animals which is a quite skilled job.

People who are in commerce or trade and where they have had or require apprentices and apprenticeships, use and understand those words and that they are a structure and an agreement where parties are bound.

That hasn't in fact been shown on Mr Cameron's evidence, we submit, to be the case in relation to Ms Clark. We also say that when you're looking at the question of interpretation, the decision of President Koerbin that has been referred to by Mr Cameron is of assistance because he sets out seven canons of construction and the third of those canons is:

> *Provided the words used are in the general context of the award and its application to those covered by its terms, capable of being construed in an intelligible way, there can be no justification for attempting to read into those words a meaning different from that suggested by ordinary English language.*

The fourth canon is:

> *An award must be interpreted according to the words actually used, even if it appears that the exact words used do not achieve what was intended. Words can only have attributed to them their true meaning.*

Applying those two canons of construction to the argument, the use of the word 'apprentices' in the award can be applied in an intelligible way but not according to the proposition that Mr Cameron advances. It is in relation to the course that's advanced by the Workplace Standards Authority, effectively, because the intelligible way is to look at what those words generally mean and have an understanding, and that that brings you back to the *Vocational Education and Training Act* - and I'll come to that.

I will also say that applying a fourth canon of construction, you've got to apply it according to the words that are used. The words have currency and understanding and they can't be construed in a manner contrary to that.

In relation to the issue of the choice of interpretation, it can clearly, I think, be summarised on what I've said, that you approach the award by reading the document itself to give the words used their ordinary commonsense English meaning.

The question that we would pose is, is there any reason to assume that the term used in the award is different than the term used in relation to apprentices concerning the issue of training. And that raises the next issue, because we say that if the award is silent about a definition, then it is appropriate to go to the legislation that governs the arrangements and consider what that legislation deals with.

We would submit, firstly, that both the *Industrial Relations Act 1984* and the *Vocational Education and Training Act 1994* are effectively beneficial pieces of legislation. They seek to provide benefit, particularly in relation to the *Industrial Relations Act,* to overcome the mischief that is about not properly regulating award wages and conditions.

The *Industrial Relations Act* has as its short title: *establishment of a Commission having jurisdiction to hear and determine matters and things arising from, or relating to, industrial matters, including the making of awards*, and then it goes on.

The *Industrial Relations Act* and we say this needs to be clearly enunciated - that the *Industrial Relations Act* and the *Vocational Education and Training Act* both have a role to play in relation to apprentices and apprenticeships but the role is markedly different but not mutually exclusive. The *Industrial Relations Act* sets out to relevantly prescribe just and reasonable wages and conditions for work done, whether that work is done by an adult, by a junior or by an apprentice, is, it terms them as employees.

The Act does not exclude coverage of apprentices in setting wages and conditions. There is a very broad definition of employee. The Act does, for instance, have specific provisions that point to people who are on vocational placements not being paid. That is a specific example where there is a deliberate exclusion in dealing with a particular group. We say that there is

no intention to exclude apprentices and that therefore the legislation should be interpreted to allow regulation and the award clearly does that.

The *Vocational Education and Training Act* contains as its short title: *an Act to provide for the administration of a vocational education and training system*. That is different than regulating industrial matters. It sets up a schema in relation to training.

We say that that legislation, because it deals with the administration of a training scheme, can be considered as being of assistance in relation to interpreting the issue before you because of that relationship. And one of the matters I want to deal with here is, reference has been made to the possible role of section 42 of the *Industrial Relations Act*. With the greatest respect, I think that is a monumental red herring in these proceedings because that deals with an issue that is not related to the interpretation of an award. It deals with awards having effect, subject to the provisions of any Act dealing with the same matter.

It cannot be said that the *Vocational Education and Training Act* deals with the same matters as the *Industrial Relations Act* or the Restaurant Keepers Award because the Restaurant Keepers Award regulates wages and conditions. It does not set up a schema for training. An argument that there is a relationship or that section 42 comes into play, I respectfully submit, is not a relevant issue.

In relation to a trainee under the VET Act, it's defined as a person undergoing:

> *(a) a training course under a training agreement or vocational placement agreement; or*
>
> *(b) an apprenticeship;*

So it is one of either.

Now, an apprenticeship - that is the only specific reference to apprenticeship in the legislation. Section 33 of the Act says:

> *The Minister, by order and on the recommendation of the Training Authority, may declare that a vocation is a vocation in respect of which a training agreement must be made before an employer may provide a training course for a person.*

Now, among the exhibits provided by the authority is a confirmation that cooking is a vocation, a declared vocation. So that fits within the requirement of section 33 that they may declare that a vocation is a vocation in respect of a training agreement, which cooking is, and which I think it would have to be common ground, that Ms Clark would fall within, in relation to the type of apprenticeship or vocation she was involved in.

Section 34 then prohibits an employer undertaking *to train a person in respect of a vocation declared under section 33 without entering into a training agreement*. It's common ground that there was no training agreement between Ms Clark and Mr Cameron's client. Other sections deal with the manutii of the training agreement.

The point to be made here is, that the Act mentions apprenticeship. It provides that a trainee can be an apprentice. It means, an apprentice. Section 33 establishes that there are vocations to which a trainee can be involved and the evidence shows that cooking has been a declared vocation. Section 34 provides that you cannot train a person in respect to a declared vocation unless there is a training agreement.

It is clear that the legislation envisages that a person involved in being an apprentice or doing an apprenticeship can only do so as long as there is a declared vocation and more importantly, as long as there is a training agreement. One of those factors has been complied with, that is, the declared vocation but not the training agreement.

I think I'm prepared to concede the point Mr Cameron makes, that the legislation, if not badly worded, is perhaps inelegantly worded to the point where it needs a degree of beefing up perhaps to make more specific the intention. But even accepting making that concession, when you follow the logic of the Act and the references to apprenticeship and vocations and training, it is beyond doubt that the legislation encompassed and meant to encompass apprentices and apprenticeships.

In fact, that's further reinforced, if you go to schedule 4 of the legislation, which in section 3 of schedule 4 which is the Savings And Transitional Provisions, under the heading Occupations:

> *Any occupation declared as a trade or a vocation by a proclamation in force under the repealed Act* [and the repealed Act referred to the

> Industrial and Commercial Training Act 1985] *immediately before the commencement day is, on that day, a vocation declared under section 33 of this Act.*

So there was an intention to continue the concept of vocations being declared for the purposes of training and apprentices. What occurred was, that instead of having quite specific provisions that dealt with apprentices and apprenticeships, they were deemed included to come under the definition of a trainee. That maybe a short-cut method and some might consider intellectually and draftingly lazy but be those private views of some people.

It is clear that there was an intention to preserve apprentices and apprenticeships and the method by which they were to be regulated and the Act does that. Therefore, the failure of the employer to enter into the agreement is fatal, in our submission, to the argument that there can be any other form of apprenticeship because Mr Cameron's argument, as I understand it, is that because the legislation doesn't deal with this issue with any degree of specificity, in his submission, then you can have recourse to a common law arrangement and that common law arrangement is what in effect occurred, simply because there was a contract between the parties.

That argument must fail because the *Vocational Education and Training Act* actually is far more specific and proscriptive in relation to these matters and on the basis that the *Industrial Relations Act* doesn't contain a definition of apprentice or apprenticeship, by going to legislation which deals with the scheme of training, the commission can draw guidance from what is meant to be there.

What Mr Cameron, I think, puts to you is, that the award contained no definition so it sits there. The VET Act doesn't contain any real or proper definition, so because neither of them contain a definition what one reverts to is a common law arrangement and that protects his client. Well, that can't be the case, based on the structure of the VET legislation.

The other thing in relation to the common law argument, we respectfully say means that it can't survive, is that the authority is shown by a trace of history that at least since at best 1960 there has been a specific legislative intent by the Parliament of Tasmania to displace the common law in relation to apprentices

and apprenticeships by regulating them by statute - that statutes have many names and many changes - but that that continues.

There has never been, and Mr Cameron can't point you to a situation where parliament has abrogated that desire to avoid statutory regulation by reverting to the common law. What he says is, well, there might have been a bit of drafting which doesn't contain all the detail and because of that, that goes to the common law. Well, that's not good enough, with respect, because there would have to be a specific intent to show that parliament had decided that it no longer wished to regulate in relation to the training of apprentices and the control of apprenticeships and that that would revert to common law arrangement.

That evidence is not before the tribunal and in the face of that not being there, the tribunal can't interpret or import that that was the intention of parliament. Thankfully, in some ways - perhaps, not thankfully, only their Honours of the Supreme Court of Tasmania and potentially the Justices of the High Court as a group of humans are able to make these interpretations about what the intention of parliament was. But in accepting that, there is no evidence that there was going to be a vacation of the statutory field then the common law proposition can't succeed.

We would submit therefore in closing that the canons of interpretation allow you, where the word is not defined but the word has a meaning or understanding, to look around as to what that meaning is, to look at how it might be applied and in this circumstance, the technical and commercial application of apprentice and apprenticeship are contained in another piece of legislation which doesn't seek to cover the field but seeks to establish the training regime and that, it is fair and reasonable for you to seek guidance. But even if you were against me totally on that proposition, we would say that when you look at the general understanding of apprenticeship and its general application, that the arrangement between Ms Clark and her previous employer was not an apprenticeship and she was not an apprentice in the normally and generally accepted meaning of those words as they apply because there was no binding agreement.

At best, based on the evidence before Commissioner Imlach, there was no commonality in relation to most of the significant matters about the arrangement. The only thing that can really be said is, there was an agreement that they'd enter into some form of arrangement. If the agreement was clear, they would have been clear about what the rate of pay was and that's not clear, they would have been clear about the training and when the training was going to finish and that's not clear.

As I recall, the evidence of Mr Crow in those proceedings, was that he understood that training arrangements were changing and that people could be assessed. There is nothing in the evidence of Mr Crow, which is reflected in the decision of Commissioner Imlach, to show you that he had a clear and unequivocal understanding of what the arrangement was that he was being bound to because both parties have to be bound to the terms of an agreement.

It's fair, we say, that if neither of the parties themselves can actually tell you what it is they were being bound to, it is very hard to actually construe that there was a common law arrangement between them. What you can go to, with far more surety, is to look at the definitions in the VET Act to provide assistance. As I say, you're not totally bound to accept those but they are there as a matter of guidance and the canons of construction either set down by President Koerbin or that I've referred to in Pearce show you that you can look at those words to try to adduce their meaning.

PRESIDENT: Would you say that second reading speeches, where directed to the points at issue, a concern might be useful?

MR TULLGREN: Only as an absolute last resort. If it is not clear on the face of other material that might be available or other assistance, because the use of the language as I've referred to, is based on the presumption that if a word is used, the word has a meaning - all words have a meaning, but many words and terms have meanings that are drawn from the arrangements that they reflect and that that is the course to go to.

On that basis, we would respectfully submit that the argument of Mr Cameron should be rejected. It is enticing as an argument, we say - it is enticing but it is only enticing until you start to look very closely at what arrangements did exist or purported to

exist and how they would apply and also to look clearly at what other legislation is around.

We say that leaving aside provisions about whether section 42 applies and whether the commission can interpret another piece of legislation because at the end of the day, the commission's not being asked to interpret the *Vocational Education and Training Act*. It's being asked to read it and on the face of it, the words are there, even excluding the views of executive officers in the Vocational Education and Training Office and so on. They might have an opinion but at the end of the day, it's what the legislation says. If the legislation makes sense and there's a logical progression and that can be of assistance, then that should be applied and that is the argument we respectfully put.

PRESIDENT: Thank you, Mr Tullgren. Mr Paterson?

MR PATERSON: Thank you, Mr President. I wish to follow up some of the matters and probably hopefully - although I don't think anywhere near as comprehensively as Mr Tullgren has.

I take a slightly different starting point, given that we're interpreting this particular clause of the award. For the moment I've set aside the question of apprentice and apprenticeship and look at the question of trades. We're looking at kitchen trades in this case. There doesn't seem to be any disagreement that that's what we're looking at.

The nexus between the award and the *Vocational Education and Training Act 1984* I believe lies in section 33 of the *Vocational Education and Training Act*:

> *The Minister, by order and on the recommendation of the Training Authority, may declare that a vocation is a vocation in respect of which a training agreement must be made.*

Vocation includes an occupation or trade, therefore I suggest the nexus that is critical to this interpretation is more the trade than the apprenticeship. The rates are there for a person undertaking that work in that trade. Therefore, having as we've, I think, fairly reasonably clearly established, I think it was exhibit 15 by the applicant, there is a trade to which the work of this person had application, being a trade which is declared being a vocation then therefore a training agreement must be made and a training agreement - before moving to that, a training course

doesn't only mean a course, it means a program of training and therefore for those rates to have application, I'd suggest that that's the line of entry into the meaning of the word 'trades' is via the vocation being a trade, the vocation being declared by that consequence of the provisions of Part 6 Division 1 of the *Vocational Education and Training Act* therefore have application.

To some extent, the issue of apprentice or apprenticeships is in fact not necessary to be resolved. The provision of the VET Act in relation to the two types of trainees also in a sense doesn't need to be resolved in order to have a look at whether the declared vocations and training agreements provision has effect because it has to do with an employer not undertaking to train any person or a person without entering into a training agreement with that person. It is not limited to one or other sort of trainees. It in fact only talks about employers entering into training agreements with a person.

My submission, reinforcing Mr Tullgren's, is that in the absence of a clear definition within the award the *Vocational Education and Training Act* is the source of application. I would submit, on a slightly different level and maybe it's somewhat semantic but I believe they do deal with the same matter. They deal with the matter of what governs the rights, duties and responsibilities of a particular sort of relationship. The sort of relationship we're talking about is the apprenticeship and I'd just like to throw a few words on the table, if you like, alongside that - stewardship, kinship, internship, mateship, fellowship, premiership and even, traineeship.

I think if you look at all those words you'll see that that word implies the existence of the derivative root word, a mateship implies the existence of a mate and mateship is the relationship between mates. Apprenticeship in that sense, I would suggest and the relevance of this is, that it is the same matter being dealt with by the Restaurant Keepers Award, dealing with apprentices and apprentices are persons who enter into the relationship with another party now being the employer and that relationship is called, the apprenticeship.

I think there is no need - and I think it gets to ultimate humpty dumpty semantics to say that there's a difference between an apprentice and an apprenticeship. To reinforce further the arguments put by Mr Tullgren, the Acts of parliament governing apprenticeships in this state go way back hundreds of years in

fact. At the very earliest stage they were common law to the extent that they relied on English Acts of parliament, I believe, dating back to 1623, shortly after the Black Death when there was a huge labour shortage. My recollection is, that the first apprenticeship Act in this state was passed in around about 1850. Clearly, it was superseded by the 1842 Act and subsequently the 1842 *Apprentice Act* was repealed by the 1985 *Industrial and Commercial Training Act*.

Certainly, from the 1942 Act through until now, the vocations which were declared as trades or occupations where an employer who undertook to provide training had to meet certain requirements, those requirements were dealt with by the relevant industrial training legislation and the industrial arrangements in terms of wage rates, conditions of employment for the employment component or the employment aspects of that relationship were left to be dealt with by the *Industrial Relations Act*.

Unless something is done to repeal that history of legislation and regulation, it would be my submission, that at the time that this dispute arose, those same provisions were in effect, that there was a relationship called an apprentice, or an apprentice being in the relationship of apprenticeship and that the training aspects of that contract of training or that apprenticeship were dealt with by the VET Act and it's been the clear intention of the regulators and the law makers in this state to have the industrial employment conditions, wages, annual leave, sick leave and the like governed by the relevant award.

One of the difficulties created, I think, by sloppy legislation, is in fact the way in which the two Acts of parliament relate to each other. The 1985 Act had attached to one of its regulations something that it more clearly specified, that in addition to a dollar per exam, that an apprentice successfully passed, was payable in addition to the rates that applied under any relevant award. A provision like that did not survive into the subsequent VET Act.

Again, back to humpty dumpty - the question is not whether - there are two meanings to the question, who is to be master in this case, and I think the master in this case needs to be yourself interpreting the meaning of kitchen trades and apprenticeship, to have a meaning that is consistent with in dealing with the same matter as the VET Act and as such where

the provisions relating to the VET Act have not been adhered to, there can be no apprenticeship.

That doesn't require an interpretation of the VET Act. It requires an assessment that the award, apprentice kitchen trade is dealing with the same thing as an apprenticeship in the vocation of cooking as a trade. If that is the case, that they deal with the same matter, then all aspects of those relationships must be adhered to and the failure to adhere to the VET Act provisions in terms of section 6 Division 1, the registration of a training agreement, failure to do that voids, in my submission, the application of apprenticeship to the industrial relation provisions. If the commission pleases.

PRESIDENT: Yes, I understand. Thanks, Mr Paterson. Ms Fitzgerald?

MS FITZGERALD: Thank you. I shall be brief and deal with a slightly different matter to the matters that have been dealt with by Mr Tullgren and Mr Paterson.

Section 20 of the Act requires the commission in the exercise of its jurisdiction to act according to equity, good conscience and the merits of the cause without regard to technicalities or legal forms and amongst other things, to have regard to the public interest, and I particularly want to address that.

There have been significant changes to Australia's vocational education and training system over the last few years and particularly over the recent few years. We now have a national framework for the recognition of skills and for awarding of qualifications. Clearly, it is important to Tasmanians, and indeed the Tasmanian economy, that skills acquired and qualifications obtained by Tasmanian workers are consistent with this national framework.

It's not unreasonable to predict that a workforce whose skills do not accord with those determined by national and state industry training bodies and recognised at a state and national level would adversely affect investment in this state and by extension, adversely affect employment levels.

Failure of Tasmanian workers through appropriate training to acquire nationally recognised skills and qualifications has the

potential to undermine employment levels and is a threat to investment.

Quite clearly, Mr Cameron has indicated that Samantha Clark agreed to be employed as an apprentice receiving training and instruction to become, in his words, a qualified cook or chef. I argue that it cannot be left to the individual employer and the employee to determine the relevant skills to be acquired and the training to be provided to ensure the attainment of a nationally recognised qualification.

The *Vocational Education and Training Act* amongst other things requires that training be directed to the development of vocational competencies and that's set out in its objectives in section 4(b) and these vocational competencies are state endorsed competencies. So it is quite clearly inappropriate and the VET Act quite clearly regulates the conditions around training. My colleagues have talked about the requirements for formal training agreements, both for trainees, apprentices and certainly in terms of the more current terminology when we talk about new apprenticeships, new apprentices.

I would suggest that it would be inappropriate for an award of this commission to purport to prescribe provisions which are inconsistent with an Act of Parliament, in this case, the *Vocational Education and Training Act*, which does deal with the same subject matter, although different elements of it. One deals with the training requirements, the other deals with the employment matters. Certainly, to find that an award meant something other than - or that was in conflict with the Act of Parliament, so that our award cannot have a meaning that is in conflict with the VET Act.

I think the president should find that the apprenticeship provision needs to be interpreted, that it should be interpreted subject to the VET Act and thus that the award needs to be varied to remedy the view held by, for example, Mr Cameron, that there can be an apprenticeship and thus an apprentice rate of pay paid pursuant to the terms of the Restaurant Keepers Award without there having to be some written document that is approved by the training authority. Such interpretation or view arguably ignores the national framework and arguably suggests a back door to subvert it.

In summary, in the public interest, the president should declare the meaning of the word 'apprenticeship' by reference to the VET Act and then seek to have the award varied to remedy that defect and to give full effect to the declaration. If it please the commission.

PRESIDENT: You used the word 'apprenticeship' but you really meant 'apprentices'?

MS FITZGERALD: Apprentices.

PRESIDENT: Yes. Thank you, Ms Fitzgerald. Any other submissions? Mr Noonan - no. Mr Cameron?

MR CAMERON: Thank you, Mr President. A number of matters arose in each of those submissions by the respective union representatives here today. I suppose the main point that crops up is that we are here for an interpretation. Mr Tullgren kept referring to the canons set out by President Koerbin in T30 of 1985. I suppose I should address each of those in relation to the submissions put forward by the union representatives.

I suppose firstly, I may start with the submissions of Ms Fitzgerald, for the public interest. In that regard I refer the commission to the second principle set out in that decision which says:

> *It must be understood that in presenting an argument in support of or in opposition to a disputed construction relating to an award provision it is not permissible to seek determination of the matter on merit; that is, on the basis of what one party or the Commission believes the provision in question should mean.*

The submissions in relation to public interest purely go to merit. At the end of the day, the words themselves must be interpreted as to their true and general meaning. If that has an adverse effect the president has recourse under section 43(1A) to direct the parties to amend the award appropriately.

That is the avenue that can be followed if the interpretation that comes through from this is contrary to the public interest or contrary to the provision of training in Tasmania. It is not a matter for the award to be interpreted to fit into what is required. It is a matter for the award to be interpreted in accordance with the words that are in existence in that award.

I think that was acknowledged by Ms Fitzgerald anyway, the way she finished her submissions by suggesting that the president recommend that the defect that exists be remedied. I think it is an acknowledgment that the problems that we're highlighting do exist, that the requirements for there to be written training agreements, recognition of apprentices under the VET Act, all need to be addressed. That's not probably going to be argued by us. What we're saying though, the circumstances of the dispute between Ms Clark and the restaurant and the circumstances of that matter coming before this commission, we are only looking at the award as it stands. We cannot look, even into the past, in relation to second reading speeches and the intentions of the parties in either making the award or the legislation.

Again, we would submit, that it is not for us here to look at interpreting the Act. It's been submitted that we need to have reference to the Act. Fine. If that's the case though, we need to look at the words that are clearly set out in the Act and there is doubt as to the application of sections 33, 34 and onwards under Division 1 of Part 6 in the application to apprentices in Tasmania.

Even the submissions in relation to the award and the trades that Mr Paterson put forward. Again, yes, there are provisions under section 33 for there to be proclaimed prescribed vocations but, at the end of the day, section 33 may only come into account when you're looking at training agreements. And training agreements as they affect trainees, affect those trainees doing a training course under a trainee agreement, not those trainees under an apprenticeship.

Mr Tullgren referred to: there was no intention by the parties to remove provisions for apprentices yet the *Industrial and Commercial Training Act* which clearly defined apprentices was repealed. There was a deliberate Act of Parliament to repeal that legislation. In its place, they have put in the *Vocational Education and Training Act 1994*, which does not cover apprentices properly. Therefore, to say that it wasn't their intention, all the previous legislation that's been referred to historically under the *Apprentices Act 1942* referred to by Mr Paterson and Mr Tullgren and the Workplace Standards Authority, each of those pieces of legislation have been repealed. All we have to look at now is the *Vocational Education and Training Act* and the one word in that, as there's one word in the award, 'apprenticeship'. In the award, we've got 'apprentices'.

Under the *Vocational Education and Training Act* it is clearly distinguished from any of the requirements to have a training agreement.

PRESIDENT: I hesitate to introduce this, but I've been trying to find out from the parties whether they are prepared to entertain this sort of material and I haven't been treated with a great deal of enthusiasm on that but I'm going to introduce it now because I feel it's important that everybody has it before them.

When the VET Act was introduced in 1994 the second reading speech contained this passage, and it's fairly important in terms of what you were alluding to, Mr Cameron. The Minister, Mr Beswick, was recorded in Hansard on 19 October 1994 at page 3248 as saying:

> *The provisions of the Industrial and Commercial Training Act 1985 as amended relating to the administration of training contracts for apprenticeships and traineeships are incorporated in this Bill in relation to training agreements.*

That, to me, means that the government believed, or the minister believed, that the training agreements provision included references to apprenticeships and traineeships, that there was no exclusion which is the point that you've been arguing, Mr Cameron, and I have some difficulty with it, not because I've read the Hansard but because what the construction of that definition to me is very clear, that there are two particular categories of traineeships, one of them being an apprenticeship and that requires a training agreement. I just want to alert you to it because I feel fairly - unless you can convince me otherwise from here on in, I feel fairly convinced that what you've been saying about the training agreement provision isn't acceptable to me.

MR CAMERON: What we would say is, that on the interpretation of the Act and on the interpretation of the award, the words must be read on their own.

PRESIDENT: Yes.

MR CAMERON: Therefore the intention may have been of the government at the time to incorporate these training agreements to cover trainees and apprentices but that hasn't been related in the Act and on reading the Act, they are separated, therefore even the court would, on looking at that, have to read the words

on the principles of interpretation that have been passed down from the High Court and adopted by this commission and by the Supreme Court, that you look at the words and if they can clearly be explained, then that's what applies.

Now, yes, and there may be reference in the second reading speech of the minister to refer to the intention to import into the Act certain aspects of it but if the words are not there to cover that, it does not necessarily mean that that's what the Act reads and says.

PRESIDENT: Look, I follow that argument, and I just really have great difficulty in understanding how you can construct the training agreement definition to exclude apprenticeships?

MR CAMERON: Because the reference that we made are that they're given in the alternative - a trainee doing a training course under a training agreement or an apprenticeship.

Now what I was going to suggest was the drafts people of this legislation could easily have said by the use of a few extra words from the typewriter, an apprenticeship under a training agreement. They have not done that. They have not gone on to further say what the requirements are for an apprenticeship; all they have said is it's a trainee under a training agreement or an apprenticeship, not or an apprenticeship under a training agreement. Now it's not uncommon in legislation and other documentation for words to be repeated.

PRESIDENT: But what does that do then to support your argument?

MR CAMERON: What I'm saying then is that it's the alternative that you have either a trainee under a training agreement, and a training agreement is defined as being the provisions set out in Division 1 of Part 6 from memory, sections 33 onwards, or an apprenticeship.

PRESIDENT: But the whole purpose of the reference to training agreement is to identify what it is that certain people have to do.

MR CAMERON: Yes.

PRESIDENT: So a training agreement has to be entered into between an employer and a trainee. That's what the definition of training agreement says.

MR CAMERON: The definition of training agreement - I'll just have to grab that because I haven't got it in front.

PRESIDENT: It says that an employer and a trainee enter into a training agreement.

MR CAMERON: Well, the definition of training agreement means: *an agreement or a contract between an employer and a trainee in force under Division 1 of Part 6.*

PRESIDENT: Yes.

MR CAMERON: Now if you then look at Part 6 rather than reading backwards, if we look at the training agreement definition, yes, that's what the training agreement is; it's required to be in writing, submitted within fourteen days and so forth. However, I'm saying that we don't even get to that stage because it's been excluded from the definition of a trainee.

PRESIDENT: Yes.

MR CAMERON: But again, that's something that we cannot interpret here.

PRESIDENT: No. We can't finally determine.

MR CAMERON: No.

PRESIDENT: But I guess I have to have a view about it and I'll have a view about it and the courts will determine whether I'm right or wrong.

MR CAMERON: In that regard too, it was the submissions put by Mr Tullgren that in relation to section 42, he said in one instance that it's not an issue, and yet on the other hand he's saying we need to take into account the provisions of the *Vocational Education and Training Act* and the only way you can do that is by utilising the provisions of section 42.

PRESIDENT: I'm not altogether certain about that. I would have thought that the existence of the legislation affecting some of the material that's before us -

MR CAMERON: Yes, the subject matter.

PRESIDENT: - is common knowledge that has to be taken into account.

MR CAMERON: Yes, but the subject matter - similar subject matter under the Act.

PRESIDENT: Yes, section 42 comes in and kicks in where the subject matter is the same.

MR CAMERON: Similar subject matter. Yes.

PRESIDENT: I accept that.

MR CAMERON: And it would be our submission that - and it was highlighted by Ms Fitzgerald - that there are two aspects to a relationship between an employer and the trainee because there is a contract of training and there is a separate contract of employment and that is a matter that this commission on a number of occasions has highlighted to put forward that there are two distinct contracts, and the Act itself says there are two distinct contracts; that they are separate and therefore separates the *Industrial Relations Act* from the VET Act.

PRESIDENT: Yes.

MR CAMERON: But as indicated, it could have been so easy for the drafts people to put those words in to make it clear and to reflect perhaps what was the intention of the government of the day.

Mr Tullgren also referred to looking at the words, the requirement to look at them and what is their common meaning. Now he referred to the commercial reality. However, what is the commercial reality and what do people interpret an apprentice to be? They don't interpret an apprentice to be someone who has a signed agreement, who is doing a four year course or whatever; they understand it to be someone who is employed by an employer, receiving training to acquire the skills. They're not worried about the technicalities that may exist in conjunction with that.

PRESIDENT: I hear what you're saying. I certainly don't agree.

MR CAMERON: Well, the only reason that the technicalities have come in have been through legislative imposition. They're previously -

PRESIDENT: You ask any person whether their son or daughter is going to get an apprenticeship, they know what they're talking about. They're talking about some agreement that's entered into between the employer and the employee that is registered by an appropriate authority.

MR CAMERON: Well, I've already queried whether it's registered. They would acknowledge that there are documents of indenture that have been signed often by the parents.

PRESIDENT: All right.

MR CAMERON: But the other aspect of that too, is that Mr Tullgren referred to the definition whereby there has to be a binding agreement and he's saying that the parties here do not agree to be bound because there was some conflict as to their understanding. That happens in any contractual situation. These parties are going to have their own version of what they've agreed to do when there is a dispute.

PRESIDENT: Yes. I suspect - or that to me though is irrelevant because the question is: what is an apprentice for the purposes of this award?

MR CAMERON: Yes. And we would say though that there needs to be the agreement between the parties to be an apprenticeship, and that any agreement as such is binding because the parties have agreed to partake of that agreement. In response to receiving the training and pay, the employer is obliged to provide work and provide the training in those skills.

PRESIDENT: Yes.

MR CAMERON: And the other aspect that was put forward by Mr Tullgren relating to the particular circumstances of this case as indicated by yourself would probably be irrelevant at this stage.

I would just point out though that we need to be careful that we don't get away from clearly interpreting the words in the award, that we're not influenced by things such as public interest or by repercussions that may flow from this. They will have to be

addressed in due course by the appropriate amendments to any awards or legislation.

At the moment we have the word 'apprentices' under subclause 4 of clause 8 referring to kitchen trades, greenkeeping and food and beverage servers; that's what we're here to determine so that in due course Commissioner Watling can look at the particular merits of this case and working on that interpretation know where Ms Clark fits into the classifications under the award.

I would again highlight that it is not for this commission to interpret the award to suit what is required. That can be done by those variations and changes to the award. All we have to look at is -

PRESIDENT: Yes, I learnt that the hard way.

MR CAMERON: All we have before us is the award and what would be a very doubtful piece of legislation in terms of clarity and application to an apprentice.

PRESIDENT: Yes. I thank you. Do you want to wrap up, Mr Williams?

MR WILLIAMS: Just a few words and I don't intend to repeat any words which I've previously put before, or add to those.

When Ms Clark commenced, she wished to be an apprentice. It was agreed she would be an apprentice because she'd already had experience as an apprentice before. She'd been an apprentice for nine months with a previous employer. She understood fully what was involved. She understood that the documents were signed and registered. What she perceived when she commenced there was that her previous nine months' experience would continue on as an apprentice at that particular level.

They talk about the employee receiving some training. All employees when they start with a new employer get some training. That in itself doesn't go to being an apprentice with an employer.

You were asked to take note of the words in relation to the interpretation in relation to the Restaurant Keepers and the annual leave matter. That matter was finally appealed to the Supreme Court and the decision quashed and therefore I would

believe that any comments within those two decisions cannot be useful here today.

It has been put by Mr Cameron that Ms Clark did not get any formal training during her period of employment there. I would put to you that the training she got was only on-the-job training and therefore if she didn't get any formal training then she didn't get full training as required for an apprentice. She never got the full training as required.

And finally, the final submission - one of the union submissions - if you were to direct that the award be amended in relation to this matter, then I would put to you that the amendment should be retrospective to cover the period of employment of Ms Clark in relation to this situation.

PRESIDENT: I don't think I can do that, if I'm going to direct that the parties apply. That's all that I can do.

All right, well thank you very much for your submissions through what has turned itself into quite a saga. I think there are a few more steps for us to go through but I will issue a decision/declaration in due course in writing and it will have to be before July 7, the day upon which I retire.

This hearing is concluded.

HEARING CONCLUDED 2.45pm