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AUSCRIPT

TRANSCRIPT OF PROCEEDINGS

O/N 3546

TASMANIAN INDUSTRIAL COMMISSION

DEPUTY PRESIDENT P.C. SHELLEY

T No 12186 of 2005

T No 12187 of 2005

T No 12188 of 2005

MOBILE CRANE HIRE AWARD BUILDING AND CONSTRUCTION INDUSTRY AWARD BUILDING TRADES AWARD

**Applications pursuant to the provisions of
section 23(2)(b) of the Industrial Relations Act 1984
by the Construction, Forestry, Mining and Energy Union,
Tasmanian Branch to vary the above awards re long
service leave**

HOBART

9.30 AM, WEDNESDAY, 13 DECEMBER 2006

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

HEARING COMMENCED

[9.30am]

PN1

MR B. WHITE: I appear for the CFMEU. If I may, Deputy President, MR R. FLANAGAN from the AWU told me yesterday that he was coming this morning, so I assume he is running late. I will leave that in your hands.

PN2

MR P. MAZENGARB: I appear for the Tasmanian Chamber of Commerce and Industry Limited representing the Chamber in all matters before you this morning, if the Commission pleases.

PN3

THE DEPUTY PRESIDENT: Thank you. I am just checking award responsiveness. So the AWU is party to the Building and Construction Industry Award and to the Building Trades Award, but not the Mobile Cranes. Okay, well, I guess we will have to proceed in Mr Flanagan's absence. I take it he wasn't going to oppose the applications to your knowledge, Mr White?

PN4

MR WHITE: No, he certainly wasn't, Deputy President.

PN5

THE DEPUTY PRESIDENT: Well, if it is okay with the other parties we will proceed on the basis that he is supporting your application to your knowledge, so we will begin with you, Mr White.

PN6

MR WHITE: Thanks, Deputy President. I would like to start by way of seeking leave to vary the applications please, Deputy President. I have got copies of the variation.

PN7

THE DEPUTY PRESIDENT: Thank you.

PN8

MR WHITE: I am trying to think of the date; I think it was 26 August of last year that the - yes, 26 August that we appeared before the Commission and Robert Flanagan from the AWU, myself and Mark Watson from the TCCI met later on that day I think, or close thereabouts, and agreed on this variation and the variation is for all four awards: the Monumental Masons Award, Mobile Crane Award, Building and Construction Industry Award and the Building Trades Award, and the change to our application is to insert a new clause as follows: TasBuild - - -

PN9

THE DEPUTY PRESIDENT: Okay. Now, there is no transcript from that other date, which was 26 August - - -

PN10

MR WHITE: I don't believe there would be, Deputy President; it was very brief. It was opposed by the TCCI and the MBA on jurisdictional grounds, awaiting the Full Bench decision on the AWU matter.

PN11

THE DEPUTY PRESIDENT: Full Bench decision. Okay.

PN12

MR WHITE: We agree that this will probably be a better, more appropriate clause, and it is just that - insert a new clause as follows: headed up as TasBuild:

PN13

Eligible employers will be registered with TasBuild and comply with its obligations under the Construction Industry Long Service Act 1997. For the purpose of this clause, eligible employees will be in accordance with the Construction Industry Long Service Act of 1997, as amended from time to time, or as determined by the TasBuild Board in accordance with its rules, as amended from time to time.

PN14

THE DEPUTY PRESIDENT: Okay. Now, where do you propose in the award it should go, looking at the Building and Construction Industry Award? Have you thought about that?

PN15

MR WHITE: I didn't bring copies of the awards with me.

PN16

THE DEPUTY PRESIDENT: Okay.

PN17

MR WHITE: But I would imagine it would be in the section under leave, probably somewhere near annual leave, either just before or just after.

PN18

THE DEPUTY PRESIDENT: Well, even holidays with pay?

PN19

MR WHITE: Yes. I think that would be the appropriate section in all the awards.

PN20

THE DEPUTY PRESIDENT: Okay, yes. Yes. Okay. So after annual leave, and before personal leave. All right. So in order that we don't have to do a complete new award, it could be part 6: leave and holidays with pay, and it could become clause 33(a); is that - would that be acceptable?

PN21

MR WHITE: That would be acceptable, Deputy President.

PN22

THE DEPUTY PRESIDENT: Okay. A new clause 33(a), in Building and Construction and similarly with the other awards.

PN23

MR WHITE: And similar in the other awards.

PN24

THE DEPUTY PRESIDENT: Okay.

PN25

MR WHITE: Just a brief overview of events leading to the day, I suppose, Deputy President. On 1 August 2005, we sent letters to the various organisations that are party to the four awards. I don't know whether you require copies of those letters or not; I have got them here if you need them, but they were - - -

PN26

THE DEPUTY PRESIDENT: Well, perhaps for completeness of the file, if you do have copies?

PN27

MR WHITE: Yes.

PN28

THE DEPUTY PRESIDENT: And we will just mark them collectively as A1.

EXHIBIT #A1 COPIES OF LETTERS TO ORGANISATIONS

PN29

MR WHITE: Those letters were to the Tasmanian Country Sawmillers Federation in respect of Building Trades Awards; Tasmanian Chamber of Commerce and Industry in respect to all four awards; Master Builders Association in respect of Building Trades Award and the Building and Construction Industry Award; Transport Workers Union in respect of the Building and Construction Industry Award; Unions Tasmania in respect to all four awards, and Australian Workers Union in respect to the Building and Construction Industry Award, Building Trades Award and Monumental Masons Award.

PN30

THE DEPUTY PRESIDENT: Okay. Now, Monumental Masons Award is not sought to be varied by these applications that we are dealing with at the moment, as far as I know. Was there a further - - -

PN31

MR WHITE: Monumental Masons Award - it is there, Deputy President. It is - I will have to find which one it is.

PN32

THE DEPUTY PRESIDENT: Okay, well, it didn't get called on. Can you get the T number?

PN33

MR WHITE: T number 12185 of 2005.

PN34

THE DEPUTY PRESIDENT: Okay. Is it just those four awards?

PN35

MR WHITE: Just those four awards, yes.

PN36

THE DEPUTY PRESIDENT: Okay. Well, we don't have that file.

PN37

MR WHITE: It was one of them. A formal notice was issued.

PN38

THE DEPUTY PRESIDENT: Yes, yes. Well, it hasn't been called on, so we will record - for the purposes of the transcript that that is included in today's application and - - -

PN39

MR WHITE: I apologise for that; I wasn't taking too much notice when Marguerite was speaking to us.

PN40

THE DEPUTY PRESIDENT: Yes. No, people don't listen to things like that.

PN41

MR MAZENGARB: I did.

PN42

THE DEPUTY PRESIDENT: You did?

PN43

MR MAZENGARB: But I got notification to say - sorry, Deputy President, I got notification to say that the matter was on for hearing this morning at 9.30.

PN44

THE DEPUTY PRESIDENT: The Monumental Masons?

PN45

MR MAZENGARB: Yes, so - - -

PN46

THE DEPUTY PRESIDENT: Yes. It is just I don't have the file; it didn't come down here.

PN47

MR MAZENGARB: Certainly. I mean, if it assists the Commissioner, I have no objection from the perspective of the Chamber in relation to this matter being joined in relation to those other three matters that have already been listed. My understanding is that is why we were here, for the four matters, and I don't particularly want to come back on another day to hear the same arguments, when we have got the same position in relation to the Monumental Masons as the other three awards, if the Commission pleases.

PN48

THE DEPUTY PRESIDENT: No, and I would think that other people would concur with that, Mr Mazengarb. So that T12185 in respect of the Monumental Masons Award is joined with the other three.

PN49

MR WHITE: Thanks, Deputy President. On 2 August 2005, we forwarded section 23 notices to the Commission with a request to vary the four awards, and on 2 August we received confirmation from the Commission advising the registration numbers. Hearings for each were listed and held on 26 August 2005. These were adjourned at the request of MBA, Master Builders Association, and Tasmanian Chamber of Commerce and Industry, until the Full Bench decision and appeal against Commissioner T.J. Abey's decision in matter number T11961 of 2005, and Full Bench decision of T12182 of 2005, to dismiss - I will get this straight in a minute, sorry about that - until the result of the Full Bench decision in 12182 of 2005 was known.

PN50

That appeal was dismissed so on 7 November 2006 CFMEU requested the four matters be relisted. They were relisted for 16 November 2006 at the request of TCCI. We, on 9 November 2006, sought a further adjournment. Then on 20 November 2006, the CFMEU again requested that the matters be relisted, and we are here today. The application by the AWU to vary the Metalliferous Mining and Processing Award, do you require copies of that, Deputy President, that decision?

PN51

THE DEPUTY PRESIDENT: Yes, please. Yes, please.

PN52

MR WHITE: And if I may I will hand up as well the Full Bench decision. The essence of the TWUs application in T11961 of 2005 was to vary the Metalliferous Mining and Processing Award. The application sought to insert a new clause titled Portable Long Service Leave, which would see employers required to make monthly contributions for employees' to TasBuild. The employers argue that the subject matter was not an industrial matter within the meaning of the Act. The employers also argue that that application would be disallowed by section 42 of the Act.

PN53

Commissioner Abey did not agree with the employers' arguments and found the Commission had jurisdiction to deal with the latter, although he did

emphasise he would not consider the merits of the application. The matter was appealed to the Full Bench. The Full Bench decision in matter number T12182 of 2005, at 33, said:

PN54

Accordingly we find that long service leave is an industrial matter and refer the matter back to Commissioner Abey to hear and determine the application in its entirety.

PN55

The Full Bench, in other words, found that the Commission has got jurisdiction to hear the matter so because of that we have requested the matter be relisted, which it is.

PN56

THE DEPUTY PRESIDENT: Did the matter get - has Commissioner Abey dealt with the merits of the matter in the Metals - - -

PN57

MR WHITE: The AWU didn't follow it through, and if Robert was here he would be able to explain better than me, but my understanding from Robert Flanagan was that because all the employers involved are under the Federal system, since the WorkChoices legislation didn't see the merits in going ahead with it. So with all the history out of the way and the reason why we have requested the matter to come back on we submit that our application is in the public interest. It is commonly said in the construction industry that less than half of the ultimate employees are receiving their long service entitlements by way of employer contributions to TasBuild. In support of that, I might put up a of evidence.

PN58

THE DEPUTY PRESIDENT: Which one are you referring to first?

PN59

MR WHITE: TasBuild Statistics, used for the board.

PN60

THE DEPUTY PRESIDENT: And we will mark that A2.

EXHIBIT #A2 TASBUILD STATISTICS

PN61

MR WHITE: And these are - I did have these prepared for the hearing back in August 2005 so they may be a little bit out of date, but they are still relevant. In A2, it shows the workers registered, and that would have been over a period of the previous four years, as 10,887; currently employed, is 6394. If we look at the Tasmanian Building and Construction Industry Training Board statistics - - -

PN62

THE DEPUTY PRESIDENT: And we will mark that A3.

EXHIBIT #A3 TASMANIAN BUILDING AND CONSTRUCTION INDUSTRY TRAINING BOARD STATISTICS

PN63

MR WHITE: For the same period we - I will go to the second page, up the top. It starts off:

PN64

As forecast by the board construction work available -

PN65

etcetera. In says:

PN66

Employment in the industry also increased from 12,300 in 2002/03 to 13,200 in 2003/2004.

PN67

If you compare that to the figure in A2, TasBuild same as currently, 6394 - registered from the date on that A2 is 17/8/2005. In 2004 there were 13,200 employees according to Tasmanian Building and Construction Industry Training Board in the industry, so around about half were registered with TasBuild. By way of explanation TasBuild is the construction industry employee long service fund, which was established in 1998. Employers are obligated by the Construction Industry Long Service Act 1997 to submit monthly returns, detailing each employee's ordinary time hours at work and their rate of pay in TasBuild. TasBuild then invoice employers, and provided payments are made on time, a discount rate of .3 per cent applies - .3 per cent of their ordinary time earnings. There are a number of employers in the industry - we know from fact of working in the industry - plus backed up by the statistics from A2 and A3 - who shirk their responsibilities under the Long Service Act.

PN68

TasBuild does pursue the moneys only then through the Court system, but unfortunately TasBuild does not have automatic right of entry, and if an employer claims to not have any employees and refuses TasBuild access to time and wage records, there is little TasBuild can do. The situation is similar if an employer, for example, employs 10 workers but submits returns for only five. Obviously if less than half the workers in the industry are recorded as actively employed by TasBuild, these two scenarios are common. On quite a number of occasions the CFMEU has caught out employers on sites who are not registered. We then seek assistance through the principal contractors and TasBuild to rectify the situation; it is not always successful.

PN69

The amendment we are seeking is not new to the Commission. Examples are - I have got some examples of other awards and enterprise agreements,

section 55 enterprise agreements registered in the Commission to hand up, if I may.

PN70

THE DEPUTY PRESIDENT: Mark those A4.

EXHIBIT #A4 EXAMPLES OF OTHER AWARDS AND ENTERPRISE AGREEMENTS

PN71

MR WHITE: A4 as a bundle? The first is just an extract from the Risdon Prison Development Project Enterprise Award, an award registered with the Commission, clause 33 is long service. It merely states:

PN72

Employers will be registered with TasBuild in accordance with its obligations under the Construction Industry Long Service Act 1997. Contributions will be made in accordance with the requirements of the Act.

PN73

That was an award that was made by the Commission and heard by President Leary. The second one is the Meander Dam Development Project Enterprise Award, a Full Bench decision of the Commission. Did I not give you that one? Sorry. It is clause 31:

PN74

Employers will be registered with TasBuild in accordance with its obligations under the Construction Industry Long Service Act 1997.

PN75

It is exactly the same as the clause in the previous award. The next example is Noble Concrete and Excavations, section 55 of the enterprise agreement, clause 11, long service provision; exactly the same wording again as the two awards. And the next one is the Carpet Company, section 55 enterprise agreement, clause 15.2, long service provision; once again, exactly the same wording. The Commission has decided on the long service provisions under at least two other awards and a number of section 55 agreements; they are only examples of section 55 agreements.

PN76

As we have already submitted we believe our proposed amendment to be in the public interest, for both sides, industry and participants. Employees have a statutory right to the entitlement and the industry has an obligation to see that all employers are contributing, which may see contribution levels remain at a similar - contribution rates, sorry, remain at a similar level as they are currently. TasBuild has an obligation to collect employees' entitlements.

PN77

If TasBuild fails in this obligation this does not mean that the employees' entitlements to long service is reduced, just unfunded, meaning TasBuild, or more realistically, the employers that do contribute, pay for the unfunded long service. This has the potential to cause contribution rates for those complying employers to rise, while the "shonky" employers' long service costs remain the same, nil, and also creates a problem for the employees if their leave is unfunded because then the proof is on those employees to prove that they did work with that employer - or producing proof certificates, tax records, whatever. Once they are produced, well, TasBuild has to fund their entitlement.

PN78

We believe the most effective way to fix this problem is through the Commission. Like I said before, TasBuild have to proceed through the Courts once they get the evidence, and they haven't got the right of entry to get that evidence. I have just got one more item of evidence to hand up, please, Deputy President.

PN79

THE DEPUTY PRESIDENT: We will mark that one A5; that is the Workplace Health and Safety regs?

EXHIBIT #A5 WORKPLACE HEALTH AND SAFETY REGULATIONS

PN80

MR WHITE: Yes. Just an extract from the regs, Deputy President, in relation to regulation 116 of the workplace facilities. Without reading it through that is a requirement on employers to provide drinkable water, sanitary washing, change in dining amenities and ensure that they are kept clean, as far as reasonably practical, they must be supplied. During the course of a number of years now, then CFMEU will visit 10 business sites next door to each other; one has got all the correct amenities on site, and the next one hasn't; the same space on the site, so it must be reasonably practical, but it is very hard, almost impossible, to go through any legal means to enforce that.

PN81

THE DEPUTY PRESIDENT: So how is that relevant to the portable long service leave?

PN82

MR WHITE: Well, since the inclusion of the comprehensive amenities clause in the Building and Construction Industry on 17 December 2004 most of the operators in the industry are now starting to supply proper facilities on the jobs. Mostly - I won't say mostly - a number of the recalcitrant employers that had refused in the past to provide amenities on their jobs, after threat of a visit to the Commission, under the award provisions, they do provide the amenities. On three occasions - - -

PN83

THE DEPUTY PRESIDENT: I think I might have had that case, Mr White.

PN84

MR WHITE: Yes, that is right, Deputy President. On three occasions we have had to lodge a dispute notice with the Commission, two of these cases were withdrawn after the employer co-operated. Co-operation only came about after they received the notice from the Commission. One didn't; I won't go through the history of that too much, but they claimed that all employees were subcontractors but in the end - I think we put it on public record - in the end they said they wouldn't comply with their obligations under the Workplace Health and Safety Act. We believe the clause we are seeking to insert into the awards, the four awards, in regard to long service were of a similar effect.

PN85

THE DEPUTY PRESIDENT: Will it encourage compliance?

PN86

MR WHITE: It will encourage compliance and I believe that once again to be in the public interest. Thanks, Deputy President.

PN87

THE DEPUTY PRESIDENT: Thank you, Mr White. Mr Mazengarb?

PN88

MR MAZENGARB: Thank you, Deputy President. I should say at the outset that the TCCI is not opposing the application, and I will address you on that fairly briefly in a few moments, but I can't resist the opportunity to take up and comment on the observation made by Mr White, on behalf of the CFMEU in relation to a number of - I think he referred to "shonky" employers out there who do not comply with the requirements and provisions of the Construction Industry Long Service Leave Act 1997.

PN89

In relation to that, from the TCCIs perspective we are not opposed to TasBuild; we actually also support it, we are on the board on TasBuild. Having said that, I know for a fact from where I sit in relation to a number of queries that come up for myself that the issues that are being raised by employers are not necessarily how do I get out of compliance, but in actual fact am I required to contribute? In a lot of instances, and I would suppose that some of the "shonky" employers that may be referred to by the CFMEU are those employers who are questioning whether or not they are required to comply because of the intricacies of the act, whether or not they are employed on-site or they have employees on site, etcetera, so I do take objection to the fact that if an employer - and I am not quite sure if Mr White is referring to these - but if an employer in a circumstance queries or questions whether or not they are required to comply with the Act, by doing that, they are in effect being a "shonky" employer, and again, the ones that I deal with are those employers - or to the best of my knowledge for the last

four or five years - those employers are the ones who are saying, "Am I required to contribute," and their normal response, "If I am required to contribute, if I meet the requirements of the Act, I will contribute; but I do need to question whether or not I need to contribute." So I just take - - -

PN90

THE DEPUTY PRESIDENT: Yes. So at least that will - these applications will clarify that for those who are subject to these awards.

PN91

MR MAZENGARB: Yes. Yes, so I am just pointing out that fact that - - -

PN92

THE DEPUTY PRESIDENT: Yes. But you are not of course - - -

PN93

MR MAZENGARB: - - - Mr White might have some issues with regard to some of my members that I particularly represent, either directly or indirectly, or the Chamber represents to be more clear on that, but certainly, in a lot of instances, they have questioned - - -

PN94

THE DEPUTY PRESIDENT: The problem is probably with those who never make enquiries at all.

PN95

MR MAZENGARB: It could be. There are a lot of employers out there that are not members of the TCCI but in relation to the advice we give them it is along the lines, if you are compliant or - sorry, if the Act doesn't apply to you - or apply to you, then you are required, and you must contribute. So that is the situation that the chamber takes in relation to the advice or in relation to the advice it gives to its members.

PN96

Deputy President, I can indicate that the chamber has examined the decision from Commissioner Abey of 18 July 2005, T11961 of 2005, and also, but in more particular, we have examined the decision of the Full Bench, incorporating yourself on that Full Bench, of 20 March 2006 being T12182 of 2005. Having examined those two decisions, and again more particularly the decision of the Full Bench of March of this year, I am pleased to indicate that we do not oppose the application. It is quite clear that the Commission does have the power and the jurisdiction to hear this matter and in light of those decisions and in light of the evidence that has been put before you this morning in relation to the exhibits and the submissions made by Mr White on behalf of his organisation, we do not oppose the application.

PN97

There is one issue that I will address that hasn't been addressed by Mr White. In actual fact, there are two issues, to just let you know that I do actually listen to what is being said when I am sitting there listening to advocates. I think Mr White made a slip of the tongue when he referred to T11961, the original application that was made by the AWU to the

Commission to amend the Metalliferous Mining and Processing Award; I think he referred to the TWU.

PN98

THE DEPUTY PRESIDENT: He did say TWU.

PN99

MR MAZENGARB: See, I do listen.

PN100

THE DEPUTY PRESIDENT: Yes.

PN101

MR WHITE: Thanks for correcting that.

PN102

MR MAZENGARB: But I am not going to raise any issue on that, just to indicate that yes, some people are listening to what is being said. The other issue that I need to address, and I think Mr White needs to address this also, is the operative date. Whilst there has been no submissions made relative to the operative date, and I understand the application obviously was made back in 2005, and as a consequence of discussions of the parties at that time I understand it was agreed that we would wait the outcome of the Full Bench decisions and I do appreciate Mr White, when the matter was going to be brought back on in November, I made a request of Mr White that the matter be deferred until a later time so that I could have a better opportunity to examine the claim because it was previously handled by Mr Watson, and then myself, in the absence of Mr Watson, so I appreciate that, but with regard to operative date, without hearing the submissions from Mr White we would not be opposed to an operative date being - I don't think there is any point in saying the first full pay period either. I have no objection if it is operative from today's date, and I think I have no more to say to that. Thank you, Deputy President.

PN103

THE DEPUTY PRESIDENT: Thank you. And Mr White, 13 December 2006, operative date?

PN104

MR WHITE: Certainly, Deputy President; we are not looking for retrospectivity, but that would be something that TasBuild would be chasing up under their rules anyway.

PN105

THE DEPUTY PRESIDENT: Do you wish to say anything else in response to what Mr Mazengarb has said?

PN106

MR WHITE: Yes, just in relation to the "shonky" employers - - -

PN107

THE DEPUTY PRESIDENT: Yes, I think you also used the word "recalcitrant".

PN108

MR WHITE: Recalcitrant, yes. I am certainly not having a go at all employers; I know that there are a number out there that are not aware of their obligations, but I also know a number of them - I am not saying that they are members of any organisation; some may be, and I would be surprised if there are not, but there are many that avoid, ought to be made of their obligations one way or another. Thanks, Deputy President.

PN109

THE DEPUTY PRESIDENT: Thank you. Well, I indicate to the parties that the four awards the subject of these applications will be amended to include the new clause within the leave sections of those awards with an operative date of 13 December 2006, and decisions and orders will issue shortly. That concludes proceedings.

ADJOURNED INDEFINITELY

[10.10am]

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