

TASMANIAN INDUSTRIAL COMMISSION
Industrial Relations Act 1984

T No. 5471 of 1995

IN THE MATTER OF an application by the
Health Services Union of Australia
Tasmania No. 1 Branch to vary the Welfare
and Voluntary Agencies Award

re wage rates - second \$8 safety net
adjustment

ACTING PRESIDENT

HOBART, 17 May 1995

TRANSCRIPT OF PROCEEDINGS

Unedited

ACTING PRESIDENT: I'll take appearances, please.

MR T. KLEYN: If the commission pleases, appearing on behalf of the Health Services Union of Australia, Tasmania No. 1 Branch, TOM KLEYN, and with me is BECKY SHELLEY.

5 ACTING PRESIDENT: Mr Kleyn.

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

ACTING PRESIDENT: Thank you, Mrs Dowd.

10 **MR W. FITZGERALD:** If it pleases, I appear on behalf of the Tasmanian Chamber of Commerce and Industry, FITZGERALD W.J.

ACTING PRESIDENT: Thank you. Well, what is the state of play, Mr Kleyn?

MR KLEYN: Mr Deputy President, we submitted an application today to ask the commission to grant the \$8.00 second arbitrated safety net in respect of Summit Industries, an organisation covered by the Welfare and Voluntary Agencies Award

15 At this point we are seeking to have the commission grant that \$8.00 increase to that enterprise alone, not to the award in total.

So, in effect, Mr Deputy President, I believe that this is the first application to attempt to achieve the \$8.00 arbitrated safety net, or the second one, at an enterprise level.

20 My understanding is that the Tasmanian Chamber of Commerce and Industry are opposing this application, so I understand that we will be putting our respective submissions and leaving it to the commission to make its decision.

ACTING PRESIDENT: I see. Yes, to the best of my knowledge, this is the first of such applications, Mr Kleyn, but it's possible others have been dealt with without my knowledge.

25 MR KLEYN: It is possible.

ACTING PRESIDENT: What part of the wage fixing principles would you be replying upon? No doubt you have intended to come back, anyway

MR KLEYN: Yes, I do. I'll be relying upon the Principle 7 and, specifically, Principle 7(2)(1) the Second Arbitrated Safety Net Adjustment at an Enterprise Level.

30 ACTING PRESIDENT: Right. Okay, any other preliminary remarks? Mr Fitzgerald?

MR FITZGERALD: No, except that Mr Kleyn has indicated our position correctly. Obviously he and I appear in respect of our own organisations in respect to the award, but specifically in respect to some because the application only relates to that company.

35 ACTING PRESIDENT: Yes.

40 MR FITZGERALD: And I have taken instructions from that company, Mr Deputy President, and our instructions are, for a number of reasons, to oppose the application, and you may or may not be aware that this matter has been before the commission previously before Commissioner Imlach in terms of a dispute relating to enterprise bargaining, and I didn't want to transgress the whole history relating to that dispute because it is indeed complicated.

But our preliminary view is that in terms of the wage fixing principles we don't believe that the principles have been satisfied, in that there is, I submit, sir, a likelihood that

through further conciliation and negotiation there could be some agreements sought, and in that respect, we believe the principle hasn't been complied with.

ACTING PRESIDENT: I see. Is that any help to you, Mr Kleyn?

5 MR KLEYN: Well, yes, it is of help to me. It doesn't change my view or the HSUA's view on the matter.

We are of the view that it's unlikely that an agreement will be reached in the foreseeable future, and I intend to put submissions to you along those lines.

And I think certainly in our view we do meet the tests set out in the wage fixing principles, and I think I can demonstrate that today.

10 ACTING PRESIDENT: Okay. Well, look, I will let it run its course at this stage and do what I can to help as I see the opportunity, if there is an opportunity mid-way through.

MR KLEYN: Okay. Thanks, Mr Deputy President.

15 All right, Summit Industries, as you are now doubt aware, Mr Deputy President, is a supported employment organisation on the north-west coast.

It employees approximately 76 employees of whom 38 are in receipt of the disabilities support pension.

20 I believe that this organisation is one of the sites visited during the recent WAVA Award restructuring case, so I believe that you would be fairly familiar with the organisation, Mr Deputy President.

ACTING PRESIDENT: Yes, I think I do remember that particular case was with Mr Fitzgerald.

25 MR KLEYN: Yes. Mr Deputy President, the state wage fixing principles handed down by a full bench of this commission on 20 December 1994 - that was T.5214 of 1994 - provided the principles under which this application is being made.

The principle I refer to specifically is Principle 7 - Arbitrated Safety Net Adjustments - and in particular 7.2 being the second adjustment.

And I just would like to state those principles to you and demonstrate how we have met the tests that are set by those principles

30 The principles state at the enterprise level, and that is 7.2.1, that on application a second \$8.00 per week arbitrated safety net adjustment will be available at enterprise level from no earlier than 20 December 1994 subject to the following tests.

35 And those tests are that the award covering the enterprise has been varied to include the first \$8.00 per week arbitrate safety net adjustment; that the employees concerned have not received the benefit of an arbitrated safety net adjustment during the preceding 6 months; that the union applicant has genuinely sought to reach an agreement with the employer but failed; and that there is no likelihood that within a reasonable period further conciliation or negotiation will result in an agreement covering the employees concerned; and, finally, that the amount of the arbitrated safety net adjustment is to be reduced to the extent of any wage increase resulting from agreements reached at an enterprise level since 1 November 1991 insofar as that increase has not been previously used to offset an arbitrated safety net adjustment

40 So they, Mr Deputy President, are the tests that the principles apply to us, and I believe that I have sufficient - or the submissions I'll put to you today - will demonstrate that the HSUA has indeed met those tests.

45

ACTING PRESIDENT: Without - presumably you intended to address each one in some detail - can we short circuit it in any way as to whether or not there are any of those tests under 7.2 which are not contested?

5 MR KLEYN: I think we can, Mr Deputy President. I think I can hand up an exhibit here that will clearly demonstrate that the first two tests - that is that the award has been varied and that it has been 6 months. I think that we can demonstrate that with the handing up of an exhibit.

ACTING PRESIDENT: Yes.

10 MR FITZGERALD: Well, I think I can assist in that process, and they are really matters of fact, Mr Deputy President -

MR KLEYN: Yes, that's right.

MR FITZGERALD: - which there is not likely to be any contest in respect of. So I'd be happy to short circuit the proceedings, if we can assist in that regard.

ACTING PRESIDENT: Well, all right. Look, I am not trying to hustle anyone -

15 MR KLEYN: I understand.

ACTING PRESIDENT: - but if there is no argument on some matter, then we ought to identify it and - well, first of all, your exhibit is HSUA.1.

MR KLEYN: Right.

ACTING PRESIDENT: And that relates to 7.2.1.1., does it?

20 MR KLEYN: It does. Well, 7.2.1.1 and 7.2.1.2. The exhibit tendered is the order issued by Commissioner Gozzi to adjust the Welfare and Voluntary Agencies Award to grant the first \$8.00 arbitrated safety net adjustment.

25 Now, clearly the award has been varied to include the \$8.00 in the wage rates, and also that that exhibit demonstrates quite clearly that the increase was paid on or after 18 January 1994, and that in fact is on the last page of that exhibit.

So tests one and two that the award has been varied and that it has been at least 6 months since the previous \$8.00 are both clearly matters of fact, and as Mr Fitzgerald has indicated there is no dispute over those two.

30 So I suppose the crux of the matter in this case is the 7.2.1.3 and 7.2.1.4. That is, that the union applicant has genuinely sought to reach an agreement and that there is no likelihood that within a reasonable period an agreement will be achieved.

They are the two matters that I think are at dispute between the two organisations, Mr Deputy President.

35 MR FITZGERALD: I think also - if I could interpose, Mr Deputy President - it seems that the final test would also be in dispute because that's certainly indicative in our - inherited in our previous negotiations - that there is I understand that the position of the HSUA on previous occasions has been that any increase at an enterprise level was not able to be offset, and that is something which we have always opposed.

So I would suggest that the last one is also in contest.

40 MR KLEYN: Well, I could assist -

ACTING PRESIDENT: 7.2.1.5?

MR FITZGERALD: Yes.

MR KLEYN: I could assist, and make this a little bit easier, by saying that that is not in dispute as far as we're concerned.

5 I mean, it is our view that if we achieve an enterprise agreement, then this \$8.00 will be absorbed against that. That is clearly understood from our point of view. So -

MR FITZGERALD: Well, that reflects a changed position from the negotiations. I thank Mr Kleyn for that.

MR KLEYN: So the issues in dispute is, I think, 7.2.1.3 and 2.1.4.

ACTING PRESIDENT: I hear what you are saying.

10 MR KLEYN: Yes. Okay. Now I intend - I would like to address both of those tests together - if I may, because they are interrelated, and I think the submission would be a far bit easier if I could do that.

Mr Deputy President, the HSUA has been attempting to negotiate an enterprise agreement with Summit Industries since at least October-November '94.

15 The negotiations over an agreement have not been successful and, indeed, this commission has been asked on two occasions to assist - in November 1994 and March this year. Those matters are T. No. 5238, which is an application by the TCCI, and T. No. 5274 which is an application from the HSUA.

20 Mr Deputy President, as I said, this matter has been before this commission on two occasions and the matter is still, in our view, a long way from resolution.

I'd like to provide a brief history of events so far to demonstrate that the HSUA has attempted to reach an agreement and that it is unlikely that we will reach an agreement in the near future.

25 I don't want to go into the arguments as to who is right and who is wrong in this matter. I just want to demonstrate that we have genuinely attempted to reach an agreement over a considerable period of time and that in our view it is unlikely - very unlikely - that we will reach an agreement in the foreseeable future.

30 Our members, Mr Deputy President, at Summit Industries advised the union in around about October 1994 that the manager of Summit Industries indicated to them that they would be paid an increase in wages in recognition of the improved productivity achieved at the plant.

Now there is disagreement between the employer and the employees whether this was in fact said, but certainly our members are adamant that a pay increase was offered and are adamant that this was offered by the management of Summit Industries.

35 Now apparently the organisation, along with many others in the community, have been suffering a downturn throughout the recession, and the information that we have received from our members - and they are adamant about it - is that they were advised that when the economic situation improved that they would be rewarded for their hard work during the recession.

40 Now it was at this time, I understand it, that the TCCI lodged their application T. No. 5238 alleging that the HSUA had threatened industrial action in support of a 5% pay increase.

45 We did lodge a claim with the employer for a 5% increase. We deny that any industrial action was threatened and, in fact, the application that the TCCI submitted alleging threatened industrial action was never proceeded with.

ACTING PRESIDENT: It's a contested matter.

5 MR FITZGERALD: Yes, it is a contested matter and, regrettably, Mr Deputy President, let me say that at this point - because this matter has unfortunately been characterised by a chain of people by the HSUA who have handled this matter - and I think that's one of the reasons why we are in such a mess with this matter.

We've had no less than Mr Hall, Ms Shelley, Mr Kleyn, Mr O'Byrne, Mr Stringer - in fact just about the whole of the HSUA staff have in fact touched this matter. Now that is the reason why unfortunately there is much lost in the translation.

10 I would submit that this submission has already been made by Mr Hall on a previous occasion before the commission, and -

ACTING PRESIDENT: Well, I am dealing with this particular matter of course.

MR KLEYN: Well, with all due respect -

MR FITZGERALD: I understand that, Mr Deputy President.

MR KLEYN: -you have not heard this before, Mr Deputy President.

15 ACTING PRESIDENT: No.

MR FITZGERALD: I understand that, Mr Deputy President, but it is somewhat frustrating when we have a chain of people coming from the HSUA - different people each time - who lose the continuity of the matter. And that is why I understand there is a problem.

20 ACTING PRESIDENT: Well, that's almost personal, rather than -

MR KLEYN: Yes.

MR FITZGERALD: Well, I submit not.

MR KLEYN: Well, with due respect, Mr Fitzgerald -

MR FITZGERALD: If I can just finish, Mr Deputy President.

25 ACTING PRESIDENT: Well, what do you want me to do about it?

MR FITZGERALD: Well, I'd just like -

MR KLEYN: Well I would like to continue with my submission and you can respond to it, if you like.

30 MR FITZGERALD: I am happy to do that, but I just think in terms of this matter I have been on this matter and had a continuous running of this matter now since the first application.

We have had a very lengthy submission by Mr Hall as to alleged matters before Commissioner Imlach, which really didn't assist the matter at all. We are now having simply a rehash of that. Now -

35 MR KLEYN: With all due respect, Mr Fitzgerald -

MR FITZGERALD: I have got Mr - I understand I am now able to put submissions to the commission in respect to this procedural matter.

ACTING PRESIDENT: Yes.

MR FITZGERALD: I just believe there must be some other way to short circuiting because we have heard this matter once before.

MR KLEYN: You are -

5 ACTING PRESIDENT: Do you want me to direct that they be differently represented, or what?

MR FITZGERALD: I am sorry?

ACTING PRESIDENT: Do you -

MR FITZGERALD: No, I have no control -

10 MR KLEYN: No, you don't.

MR FITZGERALD: Look -

ACTING PRESIDENT: I am just wondering about the relevance.

MR FITZGERALD: I just wonder that rather than Mr Kleyn having a conversation across the floor with me, that I can address you without Mr Kleyn interrupting -

15 ACTING PRESIDENT: Well, Mr Kleyn has actually got the floor.

MR FITZGERALD: - that's normal courtesy.

MR KLEYN: Yes.

20 MR FITZGERALD: That's normal courtesy, as I understand it. The problem which we have, Mr Deputy President, is, as I have already stated, I believe that this matter can be short circuited simply by the commission having a look at the transcript which was before Commissioner Imlach.

ACTING PRESIDENT: I can't do that.

MR FITZGERALD: Because - well, I think the commission can act in terms of its own processes, Mr Deputy President.

25 ACTING PRESIDENT: Well, I can only deal with those things which are before me.

MR FITZGERALD: I am happy for the matter to continue, but I just -

ACTING PRESIDENT: I'm glad.

MR FITZGERALD: I am just saying -

MR KLEYN: So am I.

30 MR FITZGERALD: - Mr Deputy President, that unfortunately this is Mr Kleyn's first appearance in this matter. I have already been in this matter on two occasions before the commission and we are hearing exactly the same submissions. I just make that point.

MR KLEYN: With all due respect -

MR FITZGERALD: I just make that point, Mr Deputy President.

ACTING PRESIDENT: Okay. Okay. But, please I want to let the matter flow and everybody will get the proper opportunity to make their submissions and to respond however they wish.

5 MR KLEYN: I just would like to say that the points that I am making are to demonstrate that we have not reached an agreement. I am not entering into an argument about a dispute. So - I am arguing that we have attempted to reach an agreement and have not been able to, and that is the principles that we have applied to us and the tests we have to pass.

10 So, if I can continue, Mr Deputy President?

ACTING PRESIDENT: Yes, Mr Kleyn.

15 MR KLEYN: We lodged a claim of a 5% pay rise with the employer and we indicated that we saw this as an increase - this increase as a down payment on enterprise bargaining negotiations. If you like, a demonstration of goodwill from the employer that we would then go into an enterprise bargaining situation.

Summit Industries rejected that claim and stated that they were not prepared to negotiate whilst there was a threat of industrial action, and Mr Deputy President, there was no industrial action at the time, there was no threat of industrial action and, as I said earlier, the TCCI decided not to proceed with their application when the matter finally got to the commission in November 1994.

20 Now in an attempt to get the issue back on track, because at this time there had been some mistrust building up between employer and employees, the State Secretary of the HSUA, Mike Hall, met with members at Summit and with the manager, and as a result of these discussions it was decided that a consultative committee would be established to progress an enterprise bargaining agreement.

25 It was our members' claim that Summit pay an increase of 5% to demonstrate good faith

Now I don't deny that. We did lodge a claim for 5%.

30 It was at about this time that the manager of Summit Industries objected to the state secretary of the union being involved in the consultative committee. Now, despite the fact that the secretary of the HSUA indicated to the manager that it was his intention to attend the first meeting only to establish the ground rules, to try and assist with how the consultative committee would operate in the future, the general manager of Summit Industries restated his objection.

35 Now on reporting back to the members the members were generally getting more frustrated about this and advised the union, or requested the union, to refer the matter back to the Industrial Commission - well, refer the matter to the Industrial Commission. So then we lodged an application with this commission which was T. No. 5274 of 1994.

40 So we attempted at that stage from our members' request to seek the assistance of the commission to try and progress this matter, and the reason for lodging that application was basically that Summit Industries were objecting to the state secretary of the union being involved in a consultative committee process.

ACTING PRESIDENT: That was a section 29 application, was it?

MR KLEYN: Yes. In effect, we were dealing - I believe, Mr Deputy President, the HSUA was acting in good faith. We were acting consistent with the grievance handling provisions of the Welfare and Voluntary Agencies Award.

5 Summit Industries had been advised that the secretary did not intend to continue on the consultative committee and, in fact, was advised that one of our organisers would take the running on it; that he was simply there to try and get things moving along.

10 Further to that, Mr Deputy President, discussions were held between the HSUA and the TCCI - I believe Mike Hall and Bill Fitzgerald met - and a range of issues was discussed, including the pay claim and the consultative committee, and it was agreed at that stage, or as a result of those discussions, that the HSUA reduced its up-front claim on the employer from 5% to 3% and that in addition to that we agreed that the composition of the consultative committee would be altered as management had some concerns about one of the representatives on the union's side of the consultative committee representation, arguing - and I think correctly - that this particular person was part of management and should have been on the management side.

15 Now we had no objections to doing either of those things and, in fact, we thought that if we reduced our claim, if we compromised on the consultative committee, it would demonstrate some good faith on our part.

20 Summit Industries knocked back the 3% claim, so we were still in a situation where the employer was refusing to show - well, certainly from our members' point of view - any goodwill at all in terms of paying anything up front to provide some kind of incentive.

Now, Mr Deputy President, the two applications to this commission - one from the TCCI and one from ourselves - were initially heard on 24 November.

25 Now, as I said earlier, the TCCI decided not to proceed with their application as it was stated on the day that there was no threat of industrial action.

So, after -

MR FITZGERALD: Stated by us.

30 MR KLEYN: Stated by yourself, Mr Fitzgerald. But after both parties gave reports to the commission - I believe that there were private conferences held - and the matter was adjourned to allow the parties to continue the negotiations.

35 As I understand it from there, Mr Deputy President, it was agreed to set a date for the first consultative committee meeting and it was also agreed that the HSUA state secretary and Mr Bill Fitzgerald from the TCCI would attend the first meeting to get things going. I understand that that occurred on the 12th of December.

40 But I would also make the point that it was clear at this stage, and certainly the feedback that we were getting from our members was that with the difficulty we were having in just getting the consultative committee going by having to refer the matter to the Industrial Commission just to get a consultative committee off the ground, the fact that the employer had refused to, in our members' view, to demonstrate any goodwill by paying an up front pay increase, in the context of a perception from the members that they were going to be paid an increase, as was advised to them by their employer.

45 So the perception of the payment, the 3% if you like, was that they believed that the management was going to pay them a pay rise, so from our members' point of view it was an honouring of a commitment, it wasn't an outright demand from ourselves

saying we want a 3% pay rise just to go into enterprise bargaining, it was in the context of a perception that a promise was made on the part of the employer.

5 So, as I said, the increase sought from management was rejected, and there were difficulties in establishing a forum for negotiations, let alone progressing any of the issues.

So at this early stage of the proceedings, Mr Deputy President, any mutual trust that had existed between the employees was dissipating fairly rapidly.

So the climate that was being created at Summit Industries was certainly not one that is conducive to enterprise bargaining negotiations.

10 The consultative committee met for the first time on 12 December 1994. As I understand it the committee discussed the terms of reference for the consultative committee. The HSUA and the TCCI provided drafts of terms of reference from similar forums for their consideration and to try and streamline the process. The committee met again on 19 December with the main agenda item being the terms of reference.

15 No agreement was reached on those terms of reference, and I understand the process of drafting them was considerably frustrating at times due to the insistence of Summit that all decisions be made by consensus.

20 Mr Deputy President, on 8 December Summit then made an offer of an increase of \$14.00 per week for award-based employees - that is, those employees not in receipt of a disability support pension.

ACTING PRESIDENT: 8th of December?

MR KLEYN: 14th of - 8th of December? Oh, sorry, that was before the consultative committee met, yes. They made an offer of \$14.00.

25 Now this \$14.00 was an up-front payment but it was conditional on a number of factors, and those conditions - and I would like to tender a document here that is a letter from Summit Industries outlining the offer to the employees.

ACTING PRESIDENT: That will be HSUA.2. It's a letter headed, or it is a document headed, 'Summit Industries' dated 8 December 1994.

30 MR KLEYN: Mr Deputy President, I take you to the second paragraph of the letter, and I quote from the letter:

35 *The increase is being offered conditional that employees work in an environment of mutual trust and cooperation with the employer towards enterprise bargaining and the commencement of negotiations by both parties towards achieving an enterprise agreement with the objective of increased efficiency and productivity outcomes at Summit Industries.*

Now I stated earlier that the employees did not consider there was an environment of mutual trust and cooperation at this stage and were becoming a little bit frustrated with the whole process.

40 Indeed, management's rejection of the initial claim had left a somewhat sour taste in their mouths, I could say.

Now the letter goes on to say in the third paragraph that - it's about the third line down:

We therefore believe that the WAVA Award is not entirely appropriate to our situation and believe that both parties can cooperate and achieve a mutually acceptable Section 55 agreement.

5 Now to industrial practitioners such as ourselves that is probably not - doesn't have a great deal of consequence - but to a number of our members it was considered that what the employer was attempting to do was to get away from the Welfare and Voluntary Agencies Award and set up a section 55 agreement, which in their eyes was a somewhat frightening prospect, in that it meant that there were a number of people that felt that their award conditions could be undermined.

10 Now, whether that -

ACTING PRESIDENT: Only if agreed.

MR KLEYN: I beg your pardon?

ACTING PRESIDENT: Only if agreed.

15 MR KLEYN: Only if they agreed, yes. But they - it was still a situation that could be considered to be threatening.

Now I turn to the second page of the letter, Mr Deputy President, and the further conditions are, and I quote from the letter:

20 *It must be understood that the above over-award increases will form part of the outcome of any future increases flowing from an enterprise agreement, safety net increases as awarded by the Tasmanian Industrial Commission, and additionally may be partly or wholly absorbed in the translation process to the new classification levels resulting from the award-restructuring decision of the Tasmanian Industrial Commission dated 28.11.94.*

25 So, Mr Deputy President, this offer was overwhelmingly rejected by our members because of the conditions attached.

Now, as Mr Fitzgerald indicated earlier, that one of the areas that he felt we were in dispute with was the issue about the absorption of the \$8.00.

30 We are not in dispute about that, but this certainly we were particularly concerned about - any increases or anything that may occur as a result of the translation process being absorbed, and it could well be, Mr Deputy President, that in most cases any \$14.00 increase that were paid as part of an enterprise bargaining process would have been absorbed completely.

35 So, in effect, the members may not have got anything at all out of the whole process, in which case they may well have had to negotiate away some of their conditions. They felt that unless there was some benefit to them, should they really go into this.

40 So the other thing that I would like to make - the comments that I would like to make about this letter - is the general tone of it, and that is that if we go back to the second paragraph and the end of the second paragraph on the first page, that where Mr Sneddon the General Manager of Summit Industries talks about the enterprise bargaining and a negotiation towards achieving an enterprise agreement with the objective of increased efficiency and productivity outcomes.

While I don't have any difficulty or dispute with those comments, I think the general tone of the letter is that the intention and the purpose of enterprise bargaining is solely to achieve efficiencies and improvements in productivity outcomes. That there is no intention, and there is certainly no intention stated in this letter, nor is the tone indicated, that there is any benefit to be achieved by employees through an enterprise bargaining process.

So I think the general thrust of Summit Industries' approach in this whole exercise has been driven by a desire to increase efficiency and productivity outcomes, but not to award employees for their increased efforts or for their full integrated productivity.

10 MR FITZGERALD: Fourteen dollars.

MR KLEYN: That will be absorbed by almost everything. Now, Mr Deputy President, it's our view that enterprise bargaining is a two way street. There has to be something in it for both parties if progress is to be achieved. Mr Snadden made mention of the commitment and efforts of the employees during the more difficult times, but doesn't make any mention throughout the offer that there will be anything - any rewards for employees at a future time.

Mr Deputy President, as I said, members resolved to reject this offer and to withdraw from the enterprise bargaining process. They believed at the time that the process was getting very frustrating, that they couldn't see any progress and there was a feeling of suspicion towards management being built up. They believed, rightly or wrongly, that enterprise bargaining may or may not be used to undermine their award conditions and to reduce their conditions of employment. So there was a feeling of mistrust being built up, if you like, Mr Deputy President,.

And the important point that I've been stressing is that the climate for successful enterprise bargaining negotiations does not exist at Summit Industries. The history that has occurred, whether - and I'm not arguing who's right and who's wrong on this side, but there is ill feeling on both sides, both employer and employees now. And certainly every indication that we have received is that environment will not improve in the immediate future. There is clearly a lack of trust between Summit management and its employees and, as I said, regardless of whose fault it is, it's a fact and in such an environment it's not possible to successfully negotiate an agreement, particularly under the Tasmanian Industrial Relations Act which, where an agreement is required to be conducted by reaching agreement, there is little scope for arbitration other than private arbitration. So in our view, there is very little likelihood of us reaching an agreement with Summit Industries in the present environment.

Now there's more to this, Mr Deputy President. Summit Industries to their credit, revised their offer of \$14 on the 13th January by removing the condition that the increase would be absorbed by translation. The other conditions remain the same, as did the general tone of the letter. So I'd like to submit that as another exhibit, Mr Deputy President.

ACTING PRESIDENT: HSUA.3.

MR KLEYN: I don't intend, Mr Deputy President, to go through this letter in detail. I believe that it's very similar to the letter HSUA.2 that was submitted earlier. The difference is that the absorption against translation, any increases resulting from the award restructuring decision would be removed but, at the same time, the general tone of the letter remains the same. And in going back to the members with revised offer it was again decided by the membership not to accept it, and largely because of the build-up of ill-feeling, I suppose you could say, as a result of the history of this particular case.

Now on the instruction of our members, this matter was brought before the Industrial Commission again on the 13th March 1995 to try and resolve this matter. Now I understand that as a result of that hearing the matter was adjourned again, and again the parties were advised to continue to negotiate. Now in our view, the HSUA has always been prepared to continue that negotiation. There was on the 16th March 1995 - we attempted to get the ball rolling again as far as enterprise bargaining was concerned. And in fact we drafted an enterprise bargaining agreement and sent it to Summit Industries, which was quite a lengthy document, about 4 or 5 pages, which basically went to a whole range of issues to be discussed under the framework of enterprise bargaining.

Now that was sent to Summit Industries on the 16th March 1995. As I said, we were prepared to continue to progress this matter through enterprise bargaining model. We were prepared to continue to meet on the consultative committee and we advised Summit Industries in writing of a list of dates that we were prepared to discuss the matter. In response, Mr Deputy President, we received a letter from Summit Industries dated the 30th March 1995, which I would like to tender as an exhibit.

ACTING PRESIDENT: HSUA.4.

MR KLEYN: Mr Deputy President, this letter from Summit Board of Management advises the HSUA that the Summit Board of Management - and I take you to the second paragraph of the document, that:

The Summit Board of Management met on Tuesday the 28th March 1995 and discussed current developments of the dispute along with the proposal. The Board is of the view that the HACSU proposal is not altogether consistent with the principles of enterprise bargaining.

On seeking - trying to attempt to get clarification of what the Board of Management meant by that, we didn't receive a response - or we did receive a response which I'll get to in a moment, actually. As a result - and the third paragraph and the final paragraph:

As a result, the meeting decided that any further enterprise bargaining negotiations at Summit will be put on hold pending the translation to the new classifications of the award. Once this process has been completed and agreed to by all parties involved, and translation costs are known, it may then be appropriate to recommence negotiations.

Now in our view, Mr Deputy President, this letter clearly indicates that Summit Industries no longer wishes to continue down the enterprise bargaining path. It wishes to put on hold any discussions on enterprise bargaining until translations have been completed and the costs of translations are known, and then it says, quite clearly, that it may then be appropriate to recommence negotiations.

Now, Mr Deputy President, we don't know for sure whether that means that they will re-enter negotiations, when they will re-enter into - or recommence negotiations or whether, as a result of translation costs being, in their view, too high, whether they will want to scrap the idea of enterprise bargaining at all.

This letter gives us no hope at all that there will be further negotiations over enterprise bargaining and, in our view, this is a letter stating that they wish to withdraw from the process.

Now going back to the second paragraph, I said we wrote to them asking what they meant by our proposal was outside the principles of enterprise bargaining and the response we received, I think, was that they had written to us saying that they no

longer wished to proceed with this until such time as the translation and associated matters had been finalised.

5 So, Mr Deputy President, I believe that I've given you sufficient information to demonstrate quite clearly that there is little likelihood that agreement can be reached in the current environment. And given the breakdown in communications between the employer and employees, I consider it unlikely that enterprise bargaining negotiations can continue without some form of circuit breaker.

10 The final test is no longer in dispute so I don't need to cover that. But I would like to make one final point, Mr Deputy President, about the principles themselves. I consider that the principles were framed with a view to provide an incentive to parties to go into enterprise bargaining. I think for employees it's a down payment on any increases that they may get through enterprise bargaining. And if you look back on the history of that - of this particular matter, I think that what they were seeking was a demonstration of good faith from the employer and saying: Well look, you said at some stage that when things got better you would give us an increase on the basis that we will go into enterprise bargaining. The employer said: No, we're not going to but we want you to go into enterprise bargaining at all - in any case.

15 I think for employers it demonstrates that - well it provides for them or encourages employers to negotiate with employees and their unions to seek improvements in exchange for a pay rate. So I think these principles were laid down quite clearly to provide an incentive to all parties to go into enterprise bargaining. And I think that in particular, in this case, in Summit, I think there is definitely a need for a circuit breaker here because there is very little capacity from either side, I think, to get through the breakdown in communications that we're currently witnessing.

20 So I ask, Mr Deputy President - well I believe that we have met all the tests laid down in the principles for the second arbitrated safety net adjustment. I request that the commission grant the \$8 a week increase for Summit employees, effective on or after the first full pay period after the date of decision. I also advise that I have not provided the commission with draft orders, as I understand that the commission would like to be involved in the drafting of orders in the event that my application is successful, as this is the first case of its kind before the commission. If the commission pleases.

25 ACTING PRESIDENT: Thanks, Mr Kleyn. Before you sit down, I've got a question or two. Is your application in respect of all classifications employed by Summit, and what are they? Are they operatives on the floor, production people, clerical people as well, or what?

30 MR KLEYN: Yes, the application is for all award workers - well all workers in Summit Industries. So that covers - well from our application we'd like to cover the workers on supported - disability support pension as well, if that is a possibility. But certainly it's for all workers who are currently covered by the Welfare and Voluntary Agencies Award.

35 ACTING PRESIDENT: Mm. And why would you be seeking an \$8 a week second safety net adjustment at one place when the principles go on to say that, at an award level, that as from the 20th June 1995 everybody covered by the award may be able to qualify for the \$8 anyway on the criteria which is there. And I can't comment on whether they can be satisfied or not. But you're seeking \$8 when an offer has been made for \$14.

40 MR KLEYN: Well yes, but there's a fair bit of history in this, that the \$14 was offered at a time when the level of frustration amongst employees had got to a point where they'd said: Well look - you know - we don't to go into enterprise bargaining on this. There is some demonstration of goodwill. What are we going to get out of enterprise

bargaining, given that it's been so difficult to negotiate just on the make-up of the consultative committee?

5 I understand what you're asking. In terms of the award increase, that is another month down the track before we would be eligible to get that. I think that it's important that we sort this \$8 at an enterprise level to try and break the - well to provide a circuit breaker at Summit Industries and try and demonstrate to our members that the system does deliver, that there is something that can be gained for employees out of enterprise bargaining so that we can go back to our members and say: Look, all is not lost. Enterprise bargaining is with us. It is something that you can get something out of and it's worth pursuing.

10 And I think at the moment the fact of the matter is that our employees are saying: Well enterprise bargaining is not doing us any good so why bother? So I think it's that kind of environment.

15 ACTING PRESIDENT: Yes, but 7.2 of the second arbitrated safety net adjustment deals with the very question of seeking earlier than is otherwise available -

MR KLEYN: Yes.

20 ACTING PRESIDENT: - on the basis of genuinely seeking an agreement and exhausting that process. And 7.2.1.4 that one of the conditions is for arbitration of such an amount before the rest under the award are eligible, is that there is no likelihood within a reasonable period further conciliation or negotiation will result in an agreement.

MR KLEYN: Well it's our view -

ACTING PRESIDENT: Isn't the commission thereby invited to conciliate?

25 MR KLEYN: Well I think the commission has attempted to on two occasions now. And there is still no breakthrough between -

ACTING PRESIDENT: Has the commission actually dealt with the claim and the conditions?

30 MR KLEYN: Well no, it hasn't - it's dealt with enterprise bargaining. It's dealt with the difficulties that we have had in enterprise bargaining. It hasn't dealt with the - well it hasn't dealt with this particular matter but it's dealt with the matter of enterprise bargaining and the claim and the associated -

ACTING PRESIDENT: But it was a dispute notification or two dispute notifications, weren't they?

MR KLEYN: Yes.

35 ACTING PRESIDENT: Well were they - could they get involved in settling a claim - money claim - and a conditions claim, presumably?

MR KLEYN: Well I'm not sure if they can, given that it's under enterprise bargaining.

40 ACTING PRESIDENT: Well they used to be able to. They put something in the act and it says that under section 31 the commission shall not do anything which has the effect of making or varying an award.

MR KLEYN: Mm.

ACTING PRESIDENT: And I think it's quite a significant change to what used to apply years ago, rightly or wrongly. But however, you know, I have to be satisfied that there is no likelihood within a reasonable period that further conciliation or negotiation will result in an agreement. And Mr Fitzgerald has foreshadowed that he
5 doesn't think that the door is closed.

MR KLEYN: Well given that the letter that we have received from Summit Industries advising us that they no longer wish to proceed with negotiations on enterprise bargaining pending translation to the new classifications is completed and once the costs are known. Now I would submit that that could be months. I mean, it depends
10 on what your definition of a reasonable period is, I suppose. In my view, the approach being taken by Summit Industries indicates that it is not likely within a reasonable period that we will reach an agreement because it could be another month or two before translation is finalised. It could well be that a number of translation matters are disputed. And it could be, you know, that those matters will be brought before the
15 commission, and it could be 3 or 4 months.

ACTING PRESIDENT: Yes, well HSUA.4 is a letter dated the 30th March.

MR KLEYN: Yes.

ACTING PRESIDENT: We're now well into May. I wonder whether the position which pertained at that time is the position today.

20 MR KLEYN: Well the translations haven't been completed.

ACTING PRESIDENT: Haven't they?

MR KLEYN: No.

ACTING PRESIDENT: And the costs not -

MR KLEYN: And the costs are still not -

25 ACTING PRESIDENT: - therefore not estimated.

MR KLEYN: No. And as I understand it, there may well be some disputes and some arguments between the parties over translation. So as I understand it, it certainly isn't a completed process yet and, as you say, the letter is dated 30th March. We're now halfway through May. I would estimate that it would be at least another month or so
30 before this process is finalised.

ACTING PRESIDENT: Will there be any application to vary the award as a whole?

MR KLEYN: To vary the award as a whole, there may well be, yes. It's quite likely that at some stage we will be seeking to vary the award as a whole. Yes.

ACTING PRESIDENT: For \$8.

35 MR KLEYN: Mm.

ACTING PRESIDENT: I see, okay.

MR KLEYN: But I think - just to make that - I think to reiterate that point, I think that in this case some kind of circuit breaker is required because I think that the situation at Summit has got to a point where I think that, you know, if we just wait for the award to be varied to achieve the \$8, then I think the members at Summit are
40 going to think: Well there's really not much in this for us other than - well I can

understand what you're thinking, that \$8 at an award level or \$8 at an enterprise level is still \$8. But I think you've got to understand the feeling of mistrust, of suspicion that's built up here. And I think that in some cases a decision is needed, you know, to cut through that.

5 ACTING PRESIDENT: I must say to you in all frankness that I don't get overly influenced by people using emotive reasons for varying an award. I tend to become a little immune to -

MR KLEYN: Yes, I understand. Yes.

ACTING PRESIDENT: - even hardened, perhaps, to people -

10 MR KLEYN: Well I can understand that. The same occurs in a union environment.

ACTING PRESIDENT: - saying: Well you must recognise the feelings of people which has motivated their decision, to get down what things that are required by the act and the principles, you know. And I'm more influenced, of course, by evidentiary material.

MR KLEYN: Yes, which I have attempted to put.

15 ACTING PRESIDENT: I don't know how the reasons for decision would fit if they were on the basis of what these people feel in their hearts that they're not happy.

MR KLEYN: Yes, I understand that and I just add -

20 ACTING PRESIDENT: I mean, if I was to do that I would need to be even handed, and to find whether the employers slept comfortably at night because of the disputation which was going on and take that into consideration, and attribute weight to it.

MR KLEYN: Yes. I do stress though that I think that - I mean, the basis of my submission has been to address those principles.

ACTING PRESIDENT: Yes.

25 MR KLEYN: And I do think that particularly principle 7.3.1.3 and 7.3.1.4 - I think that we have demonstrated that we have met.

ACTING PRESIDENT: I understand what you say to me.

MR KLEYN: Right, okay, thank you, Mr Deputy President.

ACTING PRESIDENT: Is there any response? Mrs Dowd, do you wish to say anything?

30 MRS DOWD: No, Mr Deputy President, the main reason that I was here today was because it is a unique application in relation to this particular issue. And also I needed to find out whether it was actually applicable to clerical employees at Summit Industries as well. That was my main reason for being here.

35 ACTING PRESIDENT: Yes, well the response to my question was all employees of Summit who are covered by the award.

MRS DOWD: That's right.

ACTING PRESIDENT: Thank you. Mr Fitzgerald?

MR FITZGERALD: I'll try to be brief in response Firstly, something which I failed to do in announcing an appearance. Can I thank the commission for re-arranging hearing times for my purpose. I appreciate that.

ACTING PRESIDENT: Oh, we understand.

5 MR FITZGERALD: And secondly, I do apologise for somewhat of an outburst in respect to some of Mr Kleyn's submission. I suppose it does indicate some frustration on my part in being involved in this matter for some time. And regrettably, I think, it is very much characterised by - and again it's not coming down to personalities, but there have been a chain of people involved with this matter and I think, even though
10 that may not seem to make much difference, it does unfortunately lose something in terms of the translation process from person to person.

We've had no less than eight individuals from the HSU who've been involved with this at some stage. And Mr Kleyn's submission, you'll notice, was characterised by the words, in each case, I understand. Now most of that understanding comes from
15 obviously, in my submission, discussion with fellow officers.

But this matter has not had a happy history, as you're probably aware. It's been before the commission on two occasions in respect to - the first occasion was a matter before Commissioner Imlach where the TCCI notified, on behalf of Summit, a threatened industrial action. That was denied. I don't want to get into, as Mr Kleyn indicated, a
20 who's right and who's wrong exercise. But nevertheless it was put to the commission and it's doubtful that an application would be made unless it was of some substance behind the so-called threat. And if necessary, to settle this matter for once and for all, the employer is prepared to come forward, together with an employee, to corroborate the evidence that a threat was in fact made. Mr Kleyn wants that to occur, then
25 we'll do that.

ACTING PRESIDENT: Well I don't think that going back in history as to what applied at that time is necessarily relevant.

MR FITZGERALD: No, I understand that, Mr Deputy President. But I feel that I'm compelled to respond to it because Mr Kleyn has put it on the record. On one hand I
30 feel compelled to respond, but on the other hand I feel reluctant to because I don't think it - I agree with you, I don't think it's going to add.

Now I just wonder whether, in fact, I can short-circuit this matter by just repeating what I've already put on record, and that is, in our submission, the company - and it's the instruction of the company - is prepared to attempt to further arrange discussions,
35 or take part in discussions within a reasonable time within the terms of the principles, to see whether some agreement can be reached. Now you've already seen, Mr Deputy President, two letters of offers. And I denote some surprise in the questions you put to Mr Kleyn, in terms of an offer of \$14, one of which had some conditions attached. The second one, the conditions removed.

40 Now in terms of bargaining in good faith, surely that represents a complete change from the company's point of view and that it does indicate that they are prepared to bargain in good faith. Now the union have indicated they rejected that second offer on the basis of some sort of mistrust. Now I find it almost farcical for Mr Kleyn to say that his members believe that there was some sort of shifty process going on - not his
45 words, but it's the words I use, about trying to slip out of the WAVA Award into a section 55 agreement. The point you made, very validly, in my submission is that that can only be by agreement. Surely with the protection of the union and they, in my submission, have been overly protective in this matter, there's no problems about ensuring that the conditions the employees currently enjoy are going to be maintained.
50 So that sort of argument, in my view, is almost farcical.

ACTING PRESIDENT: Yes, but again it's a question of choice. If people want a registered agreement, well they may seek to have it. If they don't want to, they don't have to.

5 MR FITZGERALD: Certainly. But to suggest that there is some ground for mistrust and suspicion in that paragraph, in HSUA.3 and 4, is, in my submission, absurd.

10 I believe that the whole picture painted by Mr Kleyn - and I don't blame him. I simply believe that he's the messenger in this exercise because of the number of his former colleagues that have been involved previously. And I'm certainly not having a go at Mr Kleyn at all. But I think the message which is being painted is, in fact, not something which is borne out in reality. The company have made an offer of \$14, well in excess of \$8. They have shifted their position. That's bargaining in good faith. And the union have accepted because there's some sort of perceived mistrust.

15 Now given that position, I just wonder whether I could stop at that point rather than going and responding to every point which Mr Kleyn has made, because there's many points which I disagree with simply because I've been involved on a continuous basis. And again I'm not having a go at Mr Kleyn because I think his message is only as good as the message given to him by his colleagues.

20 But clearly, the company have been prepared, and are still prepared, to continue to resurrect the process. They have by their conduct indicated they're bargaining in good faith. The union's conduct or the members of the union's conduct in rejecting that for some sort of emotive reason - it seems to be only that - is not bargaining in good faith. Now what Mr Kleyn has failed to do is clearly indicate the terms of the so-called draft which was sent to the company on the 16th March 1995, following these letters. And that, in my view, represented an incredible increase on the position which was
25 previously put.

30 What the union put to the company at that time was that, firstly, there be a retrospective payment of \$14 from the 1st December 1994, secondly, a second payment of 3 per cent or \$16, whichever is greater, from the 1st July 1995, and, thirdly, a third payment of 3 per cent or \$16, whichever is the higher, from the 1st January 1996. Not only - on the top of that there was no reference to productivity and efficiency, some sort of term which Mr Kleyn treats with some sort of sinister overtones. I thought, and it's my submission, that the whole notion of enterprise bargaining was about increasing productivity and efficiency. And at the same time rewarding employees by that process. It's not about rewarding employees for so-called
35 past gains. It's about future gains. And that's where Mr Kleyn has got it all wrong.

40 Now the tone of the letter; I'm so surprised by that submission. The tone is not threatening in any way. It's simply putting conditions which are business-like and within the terms of the wage fixing principles. Now there's nothing threatening about that tone. The company wanted to be involved in some meaningful offsets in terms of productivity and efficiency outcomes. Now in terms of the position which was put to the company on the 16th March, there are a number of other matters included in that, including occupational health and safety matters, including special leave of workers with family responsibilities - never before discussed, in terms of the translation process. Now that was nothing which in any way had any connection at all with the
45 enterprise bargaining process.

ACTING PRESIDENT: You can appreciate none of that's before me.

50 MR FITZGERALD: It's not, but I just wanted to summarise it. But what it did do, as I indicated in terms of, if you like, a claim, because that's the amounts which the union have put in the draft agreement. That represented a substantial increase in the position. Now given that document, the company then wrote to the union and

indicated that because of what's been put - and clearly, in terms of the federal legislation, it's either capriciously adding or deleting items, and that's what the union have done. They haven't been able to negotiate the \$14 amount which is unbelievable, in my view, so they just add a bit more on, quite a substantial bit more on. Now that, in terms of the federal process is capriciously adding items. And that, in my submission, is not bargaining in good faith.

So in terms of the principles the union has not, in terms of principle 7.2.1.3 - has not genuinely sought - genuine in terms of bargaining in good faith - have not been genuine in their approach because they've simply rejected an offer which was quite - in our view quite reasonable. The - they rejected a further offer which the company had in fact shifted their position and removed that condition which was offensive but the union continue to reject it because it was some feeling of mistrust which, in my view, was perceived rather than real and then the union go ahead and say, well we can't get agreement on that, so they add substantial elements - further elements to the claim. Now who is bargaining good faith and who isn't? In my submission, quite clearly, the union is not. So in terms of the principle quite clearly they haven't satisfied the principle because there's no genuineness in what they've been seeking with the company before.

Now I just repeat my earlier undertaking, and it is on the instruction of the company is prepared and it firmly believes that with some proper guidance from the commission and through a conciliatory process which is available to it under the commission's role and under Principle 4, that is, the emphasis of the role of the commission in the enterprise bargaining, and we're happy for the commission to be involved in that process. We believe, Mr Deputy President, given the location of the company - and that's why the company officers aren't here today and they have given me explicit instructions in respect of the claim, that the - any further hearings or conciliation conferences should take place on site or at least in Burnie, and the company is prepared to take part in those processes.

Now in terms of the letter which the - which is HSUA.4, I understand that the translation process is almost complete there. Mr Kleyn has foreshadowed objections which - or possible objections - which I know nothing about but the company is sincere in that - in that once that translation process is over - because they were preoccupied with that process - and I think it's an important process - to ensure that it's completed, once that process is over and it's very near then it's quite happy to resume enterprise bargaining. But, with the overall - and I welcome Mr Kleyn's comment in respect to any increases absorbed - absorbed against any - sorry the safety net increases can be absorbed any increases through enterprise bargaining, that didn't seem to be the position previously. The position which we - the company perceived was that employees were seeking an up front payment of \$14 without any strings attached - now that's something which has not - that - in terms of - that is something which is not possible to achieve through wage fixing processes at the moment. The only way you are going to achieve an increase, in my submission, is by testing it against the productivity and efficiency and outcomes - productivity and efficiency outcomes.

Now the company - you can't simply ignore those outcomes, and that's what the unions - that's what the employees have sought to do. So what the company did was offer an up front payment which it's not obliged to do but it was a good - in good faith payment. Some organisations have done that in the past but there's no obligation to do so. The obligations under enterprise bargaining is in fact to secure - to have proper negotiations about a range of matters following which there may be some appropriate increase in wage rates.

Now in this case the company has in fact offered up front without conditions attached a sum of money which the unions rejected. Now I submit, Mr Deputy President, that

the company had been very genuine in their attempts to reach an agreement. It's been resisted for whatever reason by the - the union and the employees of the company and in my submission there is no attempt by the union, or there have been no attempts by the union to argue - to bargain in good faith, particularly in view of the - the agreement which was lodged with the company on the 16th March which represented a substantial lift in the previous position.

So in all of those respects, Mr Deputy President, we would seek that the claim be rejected at this point in time. We're happy to take part in those conciliation conferences to see whether agreements can be reached and we are confident that it can in fact occur but only under the auspices of the commission, because we're keen that the - that both the spirit and the intent of the enterprise bargaining principles are complied with.

ACTING PRESIDENT: I don't mind getting involved by invitation in some sort of exercise but I like the ground rules to be set at the beginning so that I am not wasting my time, because I've been down that track over the years before and I don't know how far apart or how close the parties are and therefore the extent of - of the - of the problem which the commission might be able to contribute to if - obviously if - if the parties are miles apart that the task is more difficult.

Now in the event that all of the parties - and I of course include Mrs Dowd's organisation - whatever it's called now - and she knows I'm just having a - a - a little joke with her - if - if the parties can see that there is a part to be played by the commission in a conciliatory way in resolving this particular issue, the commission as constituted is prepared to go along that path and put in the time and effort needed, but I want to know that if I'm to make some - if I fail in having the parties reach an agreement of their own at the end of that exercise, what then? Are the parties prepared to say, well as a last resort we'll accept your recommendation and implement it?

MR FITZGERALD: Well I understand, Mr Deputy President, that that process is available under the principles in any event. The union - if in fact conciliation does fail and unfortunately in entering conciliation conferences you can't make any guarantees -

ACTING PRESIDENT: No, no, no - some people may have everything to lose and nothing to gain.

MR FITZGERALD: Certainly. But I understand if those processes fail then it is open for the union to make application under - for the matter to be arbitrated. That can occur and we don't deny that.

ACTING PRESIDENT: How? How?

MR FITZGERALD: Well that's -

ACTING PRESIDENT: Okay, we have a little off record informal -

MR KLEYN: Yes please.

ACTING PRESIDENT: - or protracted type of conference and as I say, hopefully - hopefully that process would produce a - a better understanding by both parties as to what's a fair deal and they'll say, okay, thanks for your help - now we've got everything sorted out in relation to the company's position on any matters that they want to raise and the - and the union organisations' positions and they intend to - I don't know - make it a consent variation in respect to summit or use some other part of the act like section 55 or Part IVA of the act.

MR FITZGERALD: Well I'm not sure if I can assist in -

ACTING PRESIDENT: But as I say, if that - that's fine.

MR FITZGERALD: Yes.

ACTING PRESIDENT: Because that means the time will have been well spent.

5 MR FITZGERALD: Yes.

ACTING PRESIDENT: In the event that the parties at the end of the day say, look, you've twisted our arms, you've banged our heads together, you've done all sorts of things to try and persuade or frighten us or otherwise settle the issues, there's no agreement by the parties but there's a way out because do you give to me an arbitral
10 role that I wouldn't have otherwise and it would only be based upon - only be based upon the giving of word in good faith.

MR KLEYN: Well it could only be, Mr Deputy President, under section 61 couldn't it? I mean there is no capacity for the commission to arbitrate in an industrial agreement or an enterprise agreement so unless we both requested that you arbitrated, both
15 parties requested, or all parties requested -

ACTING PRESIDENT: Section 51?

MR KLEYN: Sixty one.

ACTING PRESIDENT: Sixty one.

MR KLEYN: Yes. But under -

20 ACTING PRESIDENT: Oh, right - private arbitration.

MR KLEYN: - yes - but under - there is nothing in the principles that indicate that the commission - that in this jurisdiction has the capacity to arbitrate.

ACTING PRESIDENT: Well all I'm saying that -

MR KLEYN: - other than they're private.

25 ACTING PRESIDENT: - as I said at the beginning, I want the ground rules to be set - I'm not going to waste my time -

MR KLEYN: Yes.

ACTING PRESIDENT: - going down into a long protracted sort of conciliatory process if at the end of the day people say -

30 MR KLEYN: Thank you very much but no thanks.

ACTING PRESIDENT: - if I like the - like your recommendation I'll accept it, if I don't, no, we're back where we started.

MR KLEYN: And as Mr Fitzgerald said, neither party could really give that guarantee I don't think.

35 ACTING PRESIDENT: Well fair enough.

MR FITZGERALD: Mr Deputy President, I just - just notice with interest Principle 4(3) which follows the section 61 provision and I quote: Failing agreement to private arbitration in accordance with section 61 or should a party wish to pursue an enterprise award or variation to an existing award the relevant provisions of the act
5 may be pursued.

ACTING PRESIDENT: Well that's stating the obvious.

MR KLEYN: Yes.

MR FITZGERALD: Well that - doesn't that mean that a party can make an application to vary the award?

10 ACTING PRESIDENT: Of course they can, so what was the good of - what was the good of my long protracted attempts to settle it?

MR FITZGERALD: Well the -

MR KLEYN: If I can respond, Mr Deputy President -

MR FITZGERALD: Well I think it's a question directed at me because I think I can
15 respond.

ACTING PRESIDENT: Well everybody - yes.

MR FITZGERALD: Okay.

MR KLEYN: Well, I mean if you want to go down that path, Mr Fitzgerald, I refer you to Principle 3 and 3(1) says: when approving enterprise bargaining agreements, the
20 commission will have regard for the primary consideration that such agreement should be formalised as a section 55 registered industrial agreement. Parties who wish to pursue a different approach will be required to satisfy the commission to that effect on the basis of the circumstances.

So not only do we have to go down a path of demonstrating to the commission that there is valid reason and justification for taking a different path other than section 55, then after we've satisfied the commission of that matter then we can go down the path of - that you're proposing of four. I mean what you're saying is that if we jump 16
25 hurdles then we can finally get to where we are. But I -

MR FITZGERALD: It's somewhat overstating, I suggest. Well it is a normal process of conciliation. It's quite clearly spelled out in the commission's principles. It's quite clear in terms of Principle 7 that before any second award level safety net - sorry - enterprise level safety net increases awarded, that the commission must be satisfied. I would submit, Mr Deputy President, that what's been put this afternoon is that the union have not satisfied you that there is no likelihood of - that further conciliation or
30 negotiation will result in an agreement, particularly given our undertaking to take part in that process and particularly given the history which I've put before you and in terms of what the unions' role would be in these negotiations.

Not only do the unions fail in terms of that test but they fail in terms that they have not genuinely sought to reach an agreement because they have, in our submission quite clearly rejected an offer which was put in a bona fide manner then shifted their position to remove a particular condition, still reject it, and then the union came back with something which was quite extraordinary in my submission. So in that respect,
40 not only did they fail the test prescribed in 7.2.1.4 but also in respect to 7.2.1.3. So -

ACTING PRESIDENT: I'm not quite sure whether you're arguing that there is a likelihood or there is not of agreement being reached.

MR FITZGERALD: Well -

5 ACTING PRESIDENT: I mean because you're attributing blame as you're entitled to, I guess, as to why that things broke down.

MR FITZGERALD: Well, as the union did, in respect to the submissions they put as well, they were maintaining lack of good faith on the company's part, Mr Deputy President.

10 ACTING PRESIDENT: Well, I mean if either argument is true then it means that there's no likelihood of agreement being reached. If - if -

MR FITZGERALD: Well -

ACTING PRESIDENT: - if - if neither those submissions are true - that neither side is unreasonable then - then the answer must be that there is a likelihood within a reasonable time of this matter being sorted out.

15 I mean it's an odd sort of situation actually, where an organisation is seeking to have an arbitrated \$8 without - without any conditions attached - or any strings attached - and on the other hand there is a possibility of that amount being exceeded to negotiations provided - my words in general terms - there are productivity and efficiency offsets. It's a bit of a gamble isn't it to whether what's the most attractive and it comes down to, I suppose, to the substance of - of what might be - what might
20 be claimed, as to what might be sought in return for something in excess of \$8. So - now in the event that I had - if I took up, Mr Fitzgerald, your - your comments that the company is still quite prepared to continue negotiations in a - in a meaningful way, provided both sides are sensible about it, and there was a tight immediate timetable of
25 actual further negotiations with report backs to the commission, then I might be encouraged to say, okay, pursue that, but if it's just left up in the air, and I say, okay, well I hope that there will be negotiations, and I hope that within a reasonable time they manage to settle the things then that's not obviously a viable way of going.

Could a - could I be advised or given a response to -

30 MR FITZGERALD: Well I think -

ACTING PRESIDENT: - to that suggestion?

MR FITZGERALD: - I - you know - I'm just again drawing some analogies with federal processes and I think the Federal Commission's role is the same or if not similar where they are required to -

35 ACTING PRESIDENT: I don't know whether that's a good thing or a bad thing.

MR FITZGERALD: No, I think it's a good thing. I think there's consistency in approach where their role is to ensure that there's a type - time frame and time lines are complied with. So it's a facilitating role and I believe it's sensible to do so and we would be quite happy for the commission to take that approach. I don't think there's
40 any point in going to these processes in a willy-nilly fashion because - as you've alluded to - because I don't think there is any likelihood in those circumstances, but if the commission takes a facilitating role in setting negotiating time frames then in my submission there is a likelihood - there is a chance that agreement can be achieved.

The point we want to make, if I could just briefly, is ensuring that the commission's principles in respect to enterprise bargaining are complied with in terms of productivity and efficiency outcomes and we believe that that can be done through the conciliatory process.

5 ACTING PRESIDENT: I know what you're saying about the general thrust of the principles and I don't - don't disagree with you in broad terms but I must say that I, at the minimum, put a query over the extension of that general principle that the commission will encourage increased productivity and efficiency at the workplace over the minimum - the establishment of the minimum safety net amount.

10 Now I'm not putting it any higher than that, but I, in my understanding of the principles, don't see that the minimum - setting of the minimum as a safety net necessarily requires that there be productivity offsets.

Now if I'm wrong with that I invite invite comment and I'm not making a declaratory statement.

15 MR FITZGERALD: No, I understand what you're saying, Mr Deputy President. What I'm saying in respect to the productivity and efficiencies outcomes is that that should apply to the offers which previously applied -

ACTING PRESIDENT: Right. Right.

MR FITZGERALD: - not in respect to the \$8 safety net.

20 ACTING PRESIDENT: Right.

MR FITZGERALD: So - I'm sorry, I did - I didn't intend to mislead. I could have been somewhat misleading, but no, it's in respect to the earlier process rather than -

ACTING PRESIDENT: Oh, well it's just that something flashed in my mind -

MR FITZGERALD: Yes. No, I understand.

25 ACTING PRESIDENT: - that needed a further comment.

MR FITZGERALD: So in fact, you know, it could be, if I just illustrate it further, that - now if you are involved in conferences - in fact it may not be the \$8 we're talking about, it may be some other sum - it - we can't necessarily indicate that there's a reinstatement of the \$14 claim because that offer has been rejected and by implication it's been withdrawn.

30

ACTING PRESIDENT: Mm.

MR FITZGERALD: But, you know, it may be if - if the company, with the assistance of the commission, is involved in conferences which in - which see a different approach by the union it could be that that offer could be reinstated.

35 ACTING PRESIDENT: Mm.

MR FITZGERALD: So it's not the \$8 necessarily, it's the enterprise bargaining claim - enterprise bargaining - that - which we're talking about.

ACTING PRESIDENT: Right. Okay. Now I'm going to be bold here. Since the gap is closing between what is achievable and the enterprise - the minimum - the second
40 arbitrated safety net adjustment under - at the enterprise level, and the second

arbitrated safety net adjustment at the award level - and everybody knows what I mean by that -

MR KLEYN: Yes.

MR FITZGERALD:

5 ACTING PRESIDENT: - the dates are narrowing. The closeness of those two events are narrowing of course with - provided the necessary conditions are fulfilled. And to make sure that no-one is to have an advantage or disadvantage because of that narrowing gap, I'm going to be bold and ask whether or not it would be possible for the parties to have some understanding about that very vexed question of operative date of
10 anything which is negotiated and agreed upon in excess of the minimum \$8.

I would - if that was possible - and you may need to get instructions, Mr Fitzgerald -

MR FITZGERALD: Yes.

15 ACTING PRESIDENT: - then I would naturally see that as something which would preserve the situation where - where people would be inclined to throw up their hands and say, well - well why are we still talking when the award could move on application anyway.

MR KLEYN: I'm not quite sure, Mr Deputy President -

ACTING PRESIDENT: I'm sorry.

MR KLEYN: - what you're referring to - what you're saying.

20 ACTING PRESIDENT: What I'm asking is, whether or not - whether or not in - in - if - if the parties are encouraged by me to continue to negotiate, notwithstanding what has been said about the possibility of reaching agreement, I'm then asking the parties as to whether or not to facilitate that process there might be an understanding at the beginning that if it's possible to negotiate something in excess of what the minimum is
25 - the \$8 - what would be the operative date?

MR KLEYN: Well that's a very good question. I mean, Mr Deputy President, we have a letter saying that - that Summit Industries do not want to discuss enterprise bargaining any further until translation is over. So -

30 ACTING PRESIDENT: But if there was an operative date set of anything which was agreed -

MR KLEYN: Mm.

ACTING PRESIDENT: - in excess of \$8 -

MR KLEYN: And it was agreed, say, that it would be today, for example -

ACTING PRESIDENT: For example.

35 MR KLEYN: Mm.

ACTING PRESIDENT: The party might say, well, okay, nothing has been lost by - by the delays and no-one could be - it could never be suggested that there were delays which were going to advantage somebody.

MR KLEYN: But if we didn't reach agreement on an operative date of an amount in excess of the minimum \$8 then something would be lost because if we, through the negotiations decided that in a month's time we can't reach agreement on an operative date, we would then put in an application for an award level variation. It would be - it would be at least another five to six weeks before that was heard, granted, et cetera. So in - from our member's point of view it is - there is an element of risk. I mean my view would be, I suppose, that we would prefer that - that you make a decision one way or the other on this matter and then that still gives us the capacity to say, well look, if - if the employer is sincere in wanting to pursue enterprise bargaining, we've got the \$8 - it's accepted as part of the principles but it has to be absorbed against any further increases. If the - it would provide our members with an incentive, something in their pockets, we would be able to go the employers. If the employers are honestly saying, yes, we want to continue this process then we could still do what you're suggesting and set an operative date for anything in excess.

15 ACTING PRESIDENT: Yes. But you see, I'm responding to the submission by Mr Fitzgerald -

MR KLEYN: Yes.

ACTING PRESIDENT: - that notwithstanding anything else which has occurred, there is a preparedness to continue - to negotiate and he's drawn attention to the fact that I need to be satisfied that within a reasonable period in the context of 7.2.1.4 further conciliation or negotiation will or will not result in an agreement. And he's saying it will.

MR KLEYN: But what is a reasonable period? It's been six or seven months now. I mean is a reasonable period 12 months, 18 months, six months?

25 ACTING PRESIDENT: Well that's why I raised the question of operative date.

MR KLEYN: Yes. Mm. Yes - which is very good.

MR FITZGERALD: I'm happy to take instructions on that but I suppose given the history of the matter I - it would perceive it somewhat difficult for the company to commit to an operative date prior to knowing what the view of the union is. I don't wish to sound pessimistic in that regard but the company is adamant if we're going to enter into these negotiations that there be a preparedness to look at meaningful productivity and efficiency measures and that would be something which we'd raise as a - as our first issue within the negotiations.

ACTING PRESIDENT: Well what do you think the response would be?

35 MR FITZGERALD: I have - I don't know. I'm heartened by the response from the union in respect to their acknowledgment today that they see any increase come out of enterprise bargaining to be absorbed against the safety net increase. I hope - I would hope that the union have changed their view in respect to the purposes of enterprise bargaining negotiations and that's to include productivity and efficiency outcomes.

40 MR KLEYN: And we've said it's a two-way street.

MR FITZGERALD: Well certainly that's the case, but regrettably in terms of the document which was - and I know it's not before you, but regrettably in terms of the document produced on the 16th March it's very much a one-way street.

MR KLEYN: Well, Mr Deputy President -

45 MR FITZGERALD: No - no, could I - if I could just finish please.

MR KLEYN: Well that document is a draft 'without prejudice' document that's why it's not been submitted - that's not why I didn't raise it - it's a 'without prejudice' document purely and simply to try and put to the company our views on let's start negotiating.

5 ACTING PRESIDENT: Okay, well -

MR KLEYN: It's - it's simply that.

ACTING PRESIDENT: Well I'm sure Mr Fitzgerald has seen those sort of documents before

10 MR KLEYN: It's 'without prejudice'. I mean Mr Fitzgerald is representing it as - as a document - as a demand and saying this is what we want as an outcome. It's a document that is in the normal course of industrial relations parties submit to each other in terms of

MR FITZGERALD: Well I'd -

ACTING PRESIDENT: Well there's -

15 MR FITZGERALD: - submit that you've got to look at it in terms of good faith, Mr Deputy President, you can't ignore that in my view, and with respect the fact is that prior to the putting of this document the union would - the union and the company were negotiating a \$14 increase with virtually no strings attached and then the company - then the union now puts in terms of its document three increases over a
20 period of time plus additional matters. Now that's not good faith and that's the context I put it in.

ACTING PRESIDENT: Well I don't know your experience goes back as far as mine, but, you know, those sorts of tactics are not - weren't uncommon in the old days -

MR FITZGERALD: That's true, but -

25 MR KLEYN: Well -

MR FITZGERALD: - but in terms - in terms of -

ACTING PRESIDENT: - but that's - bargaining -

MR FITZGERALD: - yes - in terms of the new days - the current days -

ACTING PRESIDENT: I've probably done it myself.

30 MR FITZGERALD: - well I have too, but in terms of the current days there are quite clear processes about what bargaining in good faith means and that's not meaning just capriciously or withdrawing or including new items and that's what the union have done.

MR KLEYN: Oh. Can I -

35 MR FITZGERALD: And that's why -

ACTING PRESIDENT: Oh, well - hang on, I think we're probably losing our - our objectivity.

MR KLEYN: Can I respond though, Mr Deputy President. Mr Fitzgerald keeps mentioning talking about terms of bargaining in good faith, and terms about that we

have to - that the idea of putting up a claim is no longer the way things go. We've recently received a document from the Chamber of Commerce and Industry with regard to another ward -

MR FITZGERALD: This is not relevant.

5 MR KLEYN: Hang on - please - please let me go on.

MR FITZGERALD: This is not relevant, Mr Deputy President. I suggest it's not relevant to these proceedings.

MR KLEYN: And the practice still occurs. The practice still occurs.

MR FITZGERALD: I - I - Mr Deputy President, this is not relevant.

10 ACTING PRESIDENT: Well I hear you, Mr Fitzgerald. I'll allow it to continue for the moment.

MR KLEYN: The practice still occurs. And the fact is, that the Federal Commission - the role of the Federal Commission is significantly different to the role of the State Commission in that they do have the capacity to arbitrate.

15 In the federal jurisdiction employees have what's called a bargaining period and a right to take industrial action within that bargaining period, which does not exist in the state jurisdiction.

So comparisons -

MR FITZGERALD: What's that got to do with it?

20 MR KLEYN: - between the Federal Commission's role and the State Commission's role are not accurate in what Mr Fitzgerald is saying.

MR FITZGERALD: I don't know if you can say that.

ACTING PRESIDENT: Well, I don't know where this leads us.

MR FITZGERALD: That's rubbish.

25 ACTING PRESIDENT: Look, what we are dealing with here is whether or not I can be convinced that there is a reasonable possibility of the matter being resolved by allowing the parties to continue negotiations and that there could be a settlement within a reasonable period of time.

30 And I think a reasonable period of time is important, and whether negotiations should be with or without the commission's role, and in an endeavour to conciliate.

I must admit I don't - my impression is - I don't see that the parties are terribly close together, from what's been said here today, and I can't be more candid than that.

MR FITZGERALD: Could I say that that doesn't mean to say that could not be with your assistance, Mr Deputy President.

35 ACTING PRESIDENT: Well, we're going around in circles a little bit because I said a while back that if we could set some ground rules at the beginning I would be more likely to participate than just saying, just going in blind, no ground rules, and at the end of the exercise everybody having red faces, including myself, or redder in my case,

and thinking , well, what a waste of time that was, where are we now. Why did I ever agree to getting involved in an exercise where we are back where we started.

And that's why I raise things like could the parties give me a program for negotiation, and could the question of operative date be considered.

5 MR FITZGERALD: We have considered both of those. I have taken instructions on both of those

MR KLEYN: Mr Deputy President, we wrote to Summit Industries on - I can't remember the date - but it was to indicate that we were prepared to continue the discussions and that we - well, here it is, yes - we wrote to them on 27 March and indicated 1,2,3,4,5,6,7,8,9 days at which we would be prepared to meeting with them to progress this matter.

The response we got was that any further enterprise bargaining negotiations at Summit are being put on hold until translation to the new classifications of the award has been completed. And they go on to say: 'Has now made the need to confirm meeting dates in April as per your letter irrelevant', and that letter is dated 31 March.

So on at least two occasions we have received letters from Summit Industries saying we do not wish to meet with you on enterprise bargaining.

Mr Fitzgerald states today that the company is still willing to discuss this, but certainly all the correspondence we have received in recent months indicates to the contrary.

ACTING PRESIDENT: Well, I don't know - well, certainly history is useful is influence the present and the future - as we all know, but, Mr Fitzgerald, you would need to get instructions on the question of an offer of an operative date, and the question of a setting of an acceptance of dates for negotiations.

25 MR FITZGERALD: I am happy to do that, Mr Deputy President.

ACTING PRESIDENT: What, does it take a phone call, or -

MR FITZGERALD: Not at this stage, they are not going to be there at this time. Unfortunately, Mr - I mean, Mr Snadden would normally be at this sort of hearing - but he is unavailable. He has also been down to Hobart on three occasions in respect to the earlier hearings.

My submission is that any conciliation conferences should, in fact, take place on the north west coast. But I am happy to get those instructions when I can, but certainly I won't be able to get them right at this moment.

ACTING PRESIDENT: Well, would you get advice to me and to the other parties here today by tomorrow, and I will respond accordingly.

MR FITZGERALD: I'd be happy to certainly attempt to get those instructions as quickly as I can tomorrow morning.

ACTING PRESIDENT: And I would like to have details. You know, not just, oh yes, we will sit down in the not too distant future.

40 MR FITZGERALD: Yes. Are you anticipating -

ACTING PRESIDENT: I would like to see a program.

MR FITZGERALD: Are you anticipating your own involvement in those discussions, or are you suggesting that you just oversee a program of discussions?

ACTING PRESIDENT: Well, I am not quite sure that I can contribute. There are no firm ground rules.

5 MR FITZGERALD: Well, my submission is, Mr Deputy President, you can contribute in terms of your role as described in Principle 4, which is encourage and facilitate in parties through conciliation, and in our submission, in my submission, you can assist by reinforcing the principles of enterprise bargaining, and that may or may not be successful in persuading one or other of the parties, or both of the parties.

10 But, in my view, I believe there is a reasonable likelihood of that occurring with your assistance. We have got confidence in the commission in facilitating that agreement. To be left to the parties alone, I think we will have some difficulty. But the commission's role is certainly clear under Principle 4 that it has a role in trying to facilitate agreement, and we would be happy for you to be involved in that role.

15 MR KLEYN: Mr Deputy President, I think it needs to go further than that. I don't disagree with anything that Mr Fitzgerald has just said, but there needs to be some discussions and some agreement reached on the actual conduct of the negotiations - the actual terms of reference of the consultative committee.

20 I mean, it is all right for us to stand around here talking about the principle of enterprise bargaining. It's not something that everybody in the workplace is familiar with. We have attempted to discuss with the company to set up a consultative committee. Now the terms of reference couldn't even be determined in a couple of meetings, you know. So I think -

MR FITZGERALD: Well, that's -

25 MR KLEYN: With all due respect, I didn't interrupt you, Mr Fitzgerald.

MR FITZGERALD: Hah.

30 MR KLEYN: With all due respect, I didn't. But I think that if you were to participate in this, and I certainly would see that as being of benefit, but it needs to be at a much more local level than that. I think there needs to be some work done on actually getting the parties to develop a terms of reference on even starting how to conduct the negotiations. So, thank you.

MR FITZGERALD: There is a point there which I have to answer, and that's in respect to the consultative committee.

35 Unfortunately, Mr Kleyn's instructions aren't correct. There were some terms discussed about the terms of reference of the consultative committee, but never agreed, but there was never any attempt to either. They were just forgotten, along with all the other issues. Now that's that point I am making, Mr Deputy President. The number of people involved from the HSUA you lose a lot of the translation.

MR KLEYN: That's irrelevant.

40 MR FITZGERALD: And, unfortunately what Mr Kleyn has put to you this afternoon is not accurate because it has been passed down the line by eight people in his own organisation.

MR KLEYN: That's irrelevant.

ACTING PRESIDENT: Look, all this is in the context of an application as to whether or not I should grant \$8.00.

MR KLEYN: Yes.

5 ACTING PRESIDENT: And that needs to be borne in mind. And, you know they are basically interrelated matters, arguably two matters - whether or not there should be the granting of the application for \$8.00 at Summit at this time, or from the date of decision, and/or should there be a means of negotiating matters which would have to be over and above that.

10 I mean, that would have to be the basis of further negotiation, otherwise, I mean, if it is granted the argument is won and lost at this time, and if it is overcome by other events like the award moving, anyway, it's not got the same impact.

15 Well, however, look, I've asked Mr Fitzgerald to respond and to give me the sorts of things which would support his case, that there is a genuine and real likelihood - that's the word, likelihood - of further negotiations resulting in an agreement. It is as simple as that.

MR KLEYN: Within a reasonable time, Mr Deputy President.

ACTING PRESIDENT: Within a reasonable time, yes.

MR KLEYN: Yes.

20 ACTING PRESIDENT: And, as I say, I've asked that that be communicated at the same time to the other parties - you, Mr Kleyn, and Mrs Dowd - and, indeed, any other parties to the award who are interested. And I will respond to that in the terms that it is conveyed to me.

25 MR KLEYN: Can we have that in writing, Mr Deputy President? I mean, if what you are asking is a commitment from the employer that there will be a schedule or a program of meetings and negotiations to discuss this, can we have that in writing. because we obviously will have to -

ACTING PRESIDENT: My request is on tape.

MR KLEYN: No, no, not your request, the response from the employer.

30 ACTING PRESIDENT: Oh, right. I see, I am sorry. Yes. Well, I would think we would get a telephone response and then a confirmation, and with faxes these days, it is not difficult.

35 MR FITZGERALD: I will endeavour to. My difficulty is going to be tomorrow morning Unfortunately with other matters on, one of which is before you, but others before Commissioner Watling, it is going to be difficult to get hold of Mr Snadden at that time to discuss it with him.

ACTING PRESIDENT: Yes.

MR FITZGERALD: But I will endeavour to. If it involves setting a schedule in writing, then we'll give a commitment we are happy to confirm that in writing, if necessary.

40 ACTING PRESIDENT: All right, we'll see how we go, and this matter is formally adjourned to a date to be fixed.

HEARING ADJOURNED