TASMANIAN INDUSTRIAL COMMISSION
Industrial Relations Act 1984

T No. 5540 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, 19 June 1995

TRANSCRIPT OF PROCEEDINGS

Unedited

ACTING PRESIDENT: I'll take appearances please.

MR C. BROWN: Mr Deputy President, C. BROWN, appearing for the Health Services Union of Australia, Tasmania No. 1 Branch. And I have with me **MS F. GALLOWAY**.

ACTING PRESIDENT: Thank you, Mr Brown.

MRS H.J. 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.

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

ACTING PRESIDENT: Thanks, Mr Fitzgerald. What's the state of play, Mr Brown?

MR BROWN: Thank you, Mr Deputy President. Mr Deputy President, the HSUA seeks to vary the Welfare and Voluntary Agencies Award by amending clause 8 - Wage Rates, to include the second arbitrated safety net adjustment of $8. The State Wage Case decision, matter T.5214 of 1994, laid down the principles for obtaining the safety net adjustments.

The principle I'll be relying upon is principle 7.2.2, the second arbitrated safety net adjustment at the award level, and I'd like to hand up an exhibit.

ACTING PRESIDENT: HSUA.1.

MR BROWN: Mr Deputy President, principle 7.2.2. states that:

> *On application a second $8 per week arbitrated safety net adjustment will be -*

made -

> *- at an award level, from no earlier than 20 June 1995, subject to the following tests.*

Number 1 - and I'm not quoting here, I'm paraphrasing, but No. 1, that the award has been varied for the first $8 per week arbitrated safety net adjustment. Secondly, that at least six months has elapsed since the handing down of the first set of principles or the granting of a first award level arbitrated safety net adjustment provided for in these principles. Thirdly, that an employee who has received the second arbitrated safety net adjustment at the enterprise level will not be entitled to receive the second increase arising from the incorporation of the increase at the award level. And fourthly, the amount of the arbitrated safety net adjustment is to be reduced to the extent of any wage increase as a result of an agreement reached at the enterprise level since November 1 1991.

Mr Deputy President, my submission will address each of these tests that are laid down. Firstly, I'd like to tender an exhibit.

ACTING PRESIDENT: We'll label the Welfare and Voluntary Agencies Award, exhibit - on the front cover - as HSUA.2. And the other document concerning the words -

MR BROWN: Correction order.

ACTING PRESIDENT: Yes, as notified in the Tasmanian Government Gazette on the 13th July 1994, will be HSUA.3.

MR BROWN: Mr Deputy President, the documents I've tendered show that the award has been varied to include the first arbitrated safety net adjustment. The document also serves to satisfy the second principle, in that it's clear that the first arbitrated safety net adjustment was granted in January 1994, more than six months from today.

We also acknowledge that the second increase cannot be granted earlier than the 20th June, and I intend to address this when I seek an operative date for the second increase.

Mr Deputy President, principle 7.2.2.3 is satisfied in that employees covered by this award have not received any increases at the enterprise level through agreement or otherwise. The exception to this, of course, is the employees covered by Summit Industry who recently were granted the second arbitrated safety net adjustment at the enterprise level in matter T.5471, which I believe you heard.

ACTING PRESIDENT: Indeed, I believe I did.

MR BROWN: The principle 7.2.2.4 is satisfied in that there have no increases for the employees covered by this award. The HSUA acknowledges that any increases negotiated at the enterprise level can be absorbed against the safety net adjustment in the future.

Mr Deputy President, I have a draft order which I would like to tender.

ACTING PRESIDENT: HSUA.4.

MR BROWN: Mr Deputy President, the document I've just handed up has one amendment in it which varies from the draft order that lodged with the application. If I could just take you to it. It's on page 1 down the bottom under `Juniors'. In the draft orders that I handed up with the application, in the last sentence, it simply said `adjustment 10 cents'. And what it should have read, and I've corrected it in the HSUA.4 exhibit, in the last line `adjusted to the nearest 10 cents'.

ACTING PRESIDENT: Yes. And your original application contained a draft order which showed the percentages, the relativities ...., I believe.

MR BROWN: And for the disability service workers.

ACTING PRESIDENT: Oh, yes, I might be thinking of disability service workers only.

MR BROWN: Yes, it is.

ACTING PRESIDENT: Yes, sorry, you're right. I'm wrong.

MR BROWN: So with that amendment - Mr Fitzgerald is happy?

MR FITZGERALD: Sorry? With the amendment?

MR BROWN: Yes.

MR FITZGERALD: I've got no problem with the amendment, thank you.

ACTING PRESIDENT: Yes, okay, that's accepted then.

MR BROWN: Mr Deputy President, the draft order I've tendered combines the base wage rate and the supplementary payments in column A. Also the paragraphs referring to absorption have been deleted from the clause.

In the State Wage Case decision, in principle 8 - Form of Orders, it states, and I quote:

> *Where the minimum rates adjustment process has been completed in a minimum rates award or in a paid rates award the Commission may on application determine to combine the base rate and supplementary payment into an award rate. The arbitrated safety net shall continue to be expressed as a separate amount to protect the integrity of the relativities established in the structural efficiency process.*

End quote. Mr Deputy President, the draft orders provided reflect this principle as the base rate and the supplementary payments have been combined and the arbitrated safety net adjustment is expressed as a separate amount.

The draft order also removes the absorption clauses which were inserted in the award when the first arbitrated safety net adjustment was granted in February 1994. The HSUA seeks to remove these clauses consistent with comments made by the commission in their Reasons for Decision in the State Wage Case of December 1994.

In the Reasons for Decision, the full bench stated, and I quote:

We remind the parties however that when the awards are next varied the absorption clause will be adjusted to remove any direction relating to the ability of the employer to absorb the arbitrated safety net adjustment against any over award payments being made.

Mr Deputy President, I submit that the wage fixing principles cover the situation adequately. Paragraph 7.2.2.4 - principle 7.2.2., deals with the matter of absorption against increases gained through the enterprise level agreements. And I submit, that as far as over award payments are made, the commission does not have the jurisdiction over them. That is, it is not possible for the commission to rule on whether over award payments must be made or removed. This is a matter for the parties to negotiate at the enterprise level.

Mr Deputy President, I believe that the draft orders provided are consistent with the form of orders principle laid down in the Wage Fixation Principles, and also satisfy the requirements that awards be easy to read and be understood.

I believe that the tests laid down in the state wage fixing principles have been satisfied and that the commission should grant the second arbitrated safety net adjustment with an operative date from the first full pay period on or after the 20th June 1995. If the commission pleases.

ACTING PRESIDENT: Mr Brown, any amendment to the award granted as per your application would need to include, I think, a deletion of any reference to Summit Industries having an extra $8 because it would be overtaken by the granting of this application, if indeed it is granted, save for the fact that they would be entitled to that extra $8 for the period that they were in receipt of it before the award was varied for everybody.

MR BROWN: Up until the effective operational date. Yes.

ACTING PRESIDENT: That would be covered by either a savings clause or some reference in the decision that the proviso in relation to Summit Industries would be deleted as from a certain date. As long is it's clearly understood.

MR BROWN: Yes, thank you, Mr Deputy President.

ACTING PRESIDENT: Thank you. Mrs Dowd?

MRS DOWD: Thank you, Mr Deputy President. The Australian Services Union supports the application put forward by Mr Brown. And we believe that it does meet the wage fixing principles under 7.2.2, and also under the principle 8 - Form of Orders. And we agree with the date of the - operative from the 20th June 1995. If the commission pleases.

ACTING PRESIDENT: Thank you, Mrs Dowd. Mr Fitzgerald?

MR FITZGERALD: Thank you, Mr Deputy President. I can indicate to the commission that the application is opposed. We are of the view that this is the first matter before the commission in respect to the second arbitrated safety net adjustment at an award level. I could be wrong there, Mr Deputy President, but I understand from my colleagues at least that ....

ACTING PRESIDENT: It's hard to keep up with knowing whether this is the first or not, with all the activity going on in the commission.

MR FITZGERALD: Certainly, I appreciate that. But I understand from my colleagues, at least in the private sector that this - and my own organisation, sorry, that at least in the private sector this is the first matter.

Now our organisation has taken an organisational position on these matters. And I can indicate that it is to oppose all awards where there hasn't been a proper and meaningful structural efficiency exercise completed. And I'll make further submissions in that respect later.

So if I can put it this way, Mr Deputy President, we would be taking the same position, whether it was this award or any other award. Given it's the first matter which has come before the commission, we take this position as an organisation.

ACTING PRESIDENT: Right. And can I be clear on how you expressed your opposition again?

MR FITZGERALD: I will be making further submissions - and I think it's probably - if you're happy to accept those rather than just me summarising again, I will go through the principles and also some parts of the decision in matter T.5214 of 1994.

Mr Brown has quite correctly stated the principles and has, in fact, indeed, produced those. And ...., Mr Deputy President, there is no precondition to the second arbitrated award adjustment, other than that relating to the six month period.

Now the federal bench in matter - I just refer to this by reference only, not by way of an authority. In the September 1994 Safety Net Adjustments and Review Wage Case in print L.5300 - took somewhat of a different view and, in fact, the requirement not only imposes that six month test, but also does impose a test relating to the need to impose facilitative and majority clauses.

So that was a further test which the Federal Commission imposed in its decision. The position taken by the TCCI in matter T.5214 of 1994 was in fact to mirror the federal decision and if I can quote - I haven't got a copy - but if I can quote from page 25 of the

decision of T525 - sorry - 5214 - and that's prior to the finding from page 22 onwards - and I would submit at this time, Mr Deputy President, that in examining the tests imposed by principles it's also a requirement in terms of ensuring the integrity of those principles that they be read in conjunctions with the finding of the commission. The findings can't be ignored in that regard, so I believe that's an important point.

But if I can quote from the second paragraph at page 25: The TCCI supported by the Tasmanian Farmers and Graziers Employers Association - the TFGEA - and the minister, sought the inclusion of this principle of a prerequisite that in order to received the second arbitrated safety net adjustment the parties should have developed a program for negotiating the effective implementation of facilitative provisions and the inclusion and effective use of majority clauses.

I continue to quote: We reject the first proposals on the grounds that the structural efficiency principle already provides that the insertion of facilitative clauses in awards is a measure to be considered in any review of awards which, as we have already said, is to be a continuing process. And I just emphasise that point, that structural efficiency is a not a stop-start process, it's - it's - as you'd be well aware - it is a continuing process.

My submissions in respect to this award, Mr Deputy President, is there have been very little, if any, meaningful structural efficiency measures applied to this award. So indeed, it's - not only is it not - not a continuing process but it's somewhat doubtful whether in fact it started it started in some sort of meaningful way.

As to the question of majority - and I just continue quoting if I could: As to the question of majority clauses we do not consider that in the state's common rule award system that it is practical or desirable to acquire such a broadbrush approach. We again note that the structural efficiency principle contains the signal that in reviewing awards regard should be had for the possibility of updating and/or rationalising the list of parties to the award. That option continues to be available to the parties.

Now in respect that approach it's quite clear that the bench did reject the TCCI's submissions to include further conditions as is imposed by the federal decision, however in - in - in rejecting it, it did also to ensure the integrity of the process - and that's the basis of our opposition - that there must be proper regard to the structural efficiency process.

Now my review of the award indicates little or - very little or any facilitative provisions within the award. The enterprise flexibility clause which is - and unfortunately I wasn't able to - to obtain at short notice given our position in this matter, a copy of the standard - the test case run by the Australian Industrial Relations Commission in respect to the enterprise flexibility clause and if it's a problem Mr Deputy President, I can undertake to forward that at the earliest opportunity, but in terms of the submissions in respect to that you'd be aware, I'm sure, Mr Deputy President, that the federal test case in respect to enterprise flexibility also provided the ability for non union work places to conclude agreements with employers. Regrettably this clause - and I turn to clause 54 - there are a couple of clauses I think within the award - it is somewhat the standard enterprise flexibility clause within state awards - and I quote: Clause 54(b) says: the agreement shall be subject to the following requirements and I just go to point 4 - the relevant union or unions must be a party to the agreement.

Do you want me - do you want to take some time just to look at that, Mr Deputy President?

ACTING PRESIDENT: No, no, you're right.

MR FITZGERALD: It's a very brief reference anyway.

ACTING PRESIDENT: Yes, I'm interested in the last line if my memory's correct.

MR FITZGERALD: The one I just quoted?

ACTING PRESIDENT: The last line in -

MR FITZGERALD: The agreement shall be referred to the Tasmanian Industrial Commission?

ACTING PRESIDENT: Yes.

MR FITZGERALD: Right. Okay. Now it's our submission that that - that clause is a facilitative clause, if you like, to allow a grievance to be made but the - it is restrictive and in contradiction to the federal test case provision in respect to enterprise flexibility because it does provide - the only mechanism of actual approval of such an agreement is firstly with the union's consent - and they must be party to the agreement - and secondly, it must go to the Tasmanian Industrial Commission.

Now that is somewhat debateable whether that is in fact a section 55 or a section 61 agreement and it is possible, as you'd be aware, Mr Deputy President, that the - an agreement can be made pursuant to section 61 with the union, however, the - the actual requirements of this clause makes it clear that the only way an employer can negotiate and conclude a proper agreement with his or her employees is with the union, whether it be through a section 55 or section 61 is immaterial and our organisation has always taken that view anyway. We haven't - we haven't actively promoted one system against the other, we've just taken the view that organise - it's a horses for courses, if you like. If - if it's a non union worksite then may be section 61 is appropriate but there are other agreements which we have assisted employers with many agreements since the introduction of section 61 where we've actually assisted employers with section 55 agreements. And you'd be well aware that we're continuing to support those before the commission.

So in respect to that clause and in the context of structural efficiency, it doesn't assist and it's not an ongoing process to ensure that agreements can only be made with one party only - that being the union. I'm not - I'm not making these submissions necessarily to denigrate the role of the union at all.

That is not my purpose in making these submissions at all, Mr Deputy President. We, as an organisation, respect your role and - in a representative role, as we have a role in this commission. So it's not for us to denigrate it, but we do recognise that there are work places out there where there is little or no union representation. And in terms of structural efficiency those employers should have the ability to be able to conclude agreements with their employees without necessarily involving the union.

Now I'd submit at this stage, Mr Deputy President, this enterprise flexibility provision hasn't as yet been flowed through into the state jurisdiction. However I would submit, Mr Deputy President, that to maintain the integrity of the process as recognised by the full bench at page 25 of the State Wage Case, it's necessary - it will be necessary that such a provision be included and mirrored as a test case provision.

But at the moment we have one very significant bar to structural efficiency within this award and within many other awards, in fact, most other awards of the State Commission, in that employers can only conclude an agreement with a union, not with it's employees direct. And that, in my view, is in contradiction to the whole notion of structural efficiency, particularly in terms of the test case decision.

So it's my submission that even though the - and I would concede that the principles themselves quite clearly indicate only one principle test, and that's the six month test.

It must read in conjunction with the dicta, the finding in the State Wage Case decision and to ensure that there is a process of structural efficiency ongoing - and it's not a stop/start process. Our submission is, Mr Deputy President, that this award should not be varied for the second arbitrated safety net at the award level until such time as the commission is satisfied that the processes of structural efficiency are meaningfully implemented in this award.

And it's my submission, Mr Deputy President, that in the absence of any evidence from Mr Brown to the contrary, that this award has received - and we are, as you're probably aware going through a process of rationalisation at this moment, but that doesn't necessarily touch on these matters. But it's my submission that this award has received very little or just - a simply token structural efficiency measures. But in terms of meaningful facilitative provisions, which is what structural efficiency is all about, the award has simply not been subject to those processes. And in terms of the enterprise flexibility clause I'd submit, sir, that there is a major barrier there.

So for all those reasons, Mr Deputy President, we would oppose the application made by Mr Brown's union and supported by Mrs Dowd.

ACTING PRESIDENT: What about the TCCI's own application to vary a number of conditions matters which, at your own request, is in a state of adjournment?

MR FITZGERALD: Yes, there's certainly - I would recognise that, Mr Deputy President. We have - and it goes back to my predecessor and prior to Mr Brown as well. I understand that those matters have - the reason why those matters came to the commission is that there have been attempts, prior attempts by my predecessor, Mr Sertori, to negotiate those matters, without success.

So the only option left was - and as you probably recall during the classification exercise, there were a number of matters which were hurriedly included and the only option was to include those. But we did concentrate on the major items, and that's the classification issue and relativities issue.

ACTING PRESIDENT: I don't know about being hurriedly included. The whole case went for a fair while.

MR FITZGERALD: It did but as you probably appreciate, Mr Deputy President, the parties were concerned with essentially the evidence relating to classifications and relativities. And we haven't - we didn't pursue those at that time. We intend to but the reason why they came to the commission is that there was simply no agreement through the negotiation process with, I understand, Mr Sertori representing our employers and Ms Harvey representing the employees.

ACTING PRESIDENT: And the other string to your argument is that current enterprise flexibility provision, being clause 24 of the award, falls short of expectations. Is that right?

MR FITZGERALD: Well the - I suppose, Mr Deputy President, that's where I apologise for not having the test case provision. I assume you're aware of the federal test case provision in respect to enterprise flexibility. It's a fairly recent decision.

ACTING PRESIDENT: Oh, I read some of their stuff.

MR FITZGERALD: Yes.

ACTING PRESIDENT: But I'm mainly concerned with what we do here in this jurisdiction.

MR FITZGERALD: I understand that. But there is - and I appreciate the independence of the state tribunal. However I think there is a common thread particularly in respect to structural efficiency measures.

ACTING PRESIDENT: I don't think they take too much notice of what we do.

MR FITZGERALD: Oh, I'm not certain, Mr Deputy President. I understand there is a requirement or an acknowledgment that state tribunals and hence the Heads of Tribunals Conference, there is some commonality of approach between the state and federal tribunals.

ACTING PRESIDENT: Well I'm in the privileged position of having been in attendance with those and, with great respect, you haven't.

MR FITZGERALD: I haven't but I would understand the purpose of those, to try to get some consistency. And I would have thought a clause such as this, which is fundamental to the process of structural efficiency, the enterprise flexibility clause, which allows agreements to be made at work places where there is no union representation would be one which would be simply transferred into this jurisdiction.

ACTING PRESIDENT: Yes. I think one of the first cases involving the establishment of a - what is known as an enterprise flexibility clause was concerned with the Marine Boards Award. And at that time it was within my portfolio. And I haven't got the date or the T number at my fingertips. I didn't realise that it would be needed. But it was one of the first ones and probably about three years ago now. And I did write quite a comprehensive decision on it and the argument there had been that there ought to be so much flexibility that the parties at an enterprise could, in effect, come to an agreement which varied the provisions of the award.

MR FITZGERALD: Yes.

ACTING PRESIDENT: And I wrote a decision which dealt with all of the arguments which were put up, and that's why I remember so starkly the final paragraph of 54 here that says that the agreement shall be referred to the Tasmanian Industrial Commission.

MR FITZGERALD: Yes.

ACTING PRESIDENT: So whether it's between a union or whether it's between employees or whatever, the decision of this commission, which was not appealed, in the Marine Boards matter, was that certainly there ought to be some proper flexibility on the job, but it would be within the parameters of flexibility which were provided by the award itself, and I think in particular a classic example would be where an hours of work clause says that people may work certain shifts and certain hours provided that they don't exceed the parameters, for instance, you know, the hours might be between 6.00 am and midnight.

MR FITZGERALD: Yes.

ACTING PRESIDENT: But they shall work, you know, perhaps not more than eight or 10 hours straight, excluding meal breaks, within those parameters. And whereas it might be normal for people to work from 8.00 to 5.00 at the establishment, they might by agreement at the enterprise level decide that they're going to work something else but within the parameters. And so long as it was within the parameters set by the award, then they could work to that. But these final words of this flexibility clause says that any agreement shall be referred to the Tasmanian Industrial Commission.

MR FITZGERALD: I acknowledge what you say.

ACTING PRESIDENT: Yes. To the extent that it tries to vary the award. And I do read some federal decisions and I think that there was a recent one headed up by the President, Deidre O'Connor, which dealt with - much with the same principle and said that parties could not, in fact, make their own rules if they were in contravention of an award.

MR FITZGERALD: I don't have any argument with you there, Mr Deputy President. That's not my point.

ACTING PRESIDENT: Right.

MR FITZGERALD: What my point is - and I acknowledge what you say in respect to the Marine Boards and your knowledge in respect to that matter. It has - that clause has withstood the test of time and if you examined most other federal awards - most other state awards you will probably find that it's pretty much identical.

However what I'm saying is, Mr Deputy President, that times have changed. We have a new act now which allows for agreements to be made with employees directly. That occurs also in the federal area under enterprise flexibility agreements. And I've got no doubt that if any agreement was to be made, that that provision could be interpreted that it could be before - in terms of section 61 as well, that matters be brought before the commission.

What my point is - and in respect to the test case decision, is that this clause is restricted to the extent that it must be with union. Under clause (b)(iv) the relevant union must be party to the agreement. Now that being the case, that prevents any non union work place making an agreement directly with its employees. And that's the extent of where I see there's a barrier to structural efficiency.

I'm not in the business nor submitting that the role of the union should be diminished. All I'm simply saying, Mr Deputy President, there are many work places out there with little or no union representation and their rights also should be respected. Now within the context of the current enterprise flexibility clause the only way they can conclude an agreement which changes hours or any other matters, is with the union. Now that could be registered under section 61 or section 55.

ACTING PRESIDENT: Well they couldn't be brought here under our awards.

MR FITZGERALD: I'm sorry?

ACTING PRESIDENT: Agreements with employees couldn't be brought -

MR FITZGERALD: No. But the only way that could be legally ratified is by section 55 with the union or section 61 with the union. There is no potential whatsoever for those particular employers to conclude an agreement with its employees direct and having it ratified under section 61. There's absolutely no potential because it must be with the union.

ACTING PRESIDENT: Well you're quite right when you say that Part 4A of the act enables agreements to be made between an employer and employees, and the act, of course, prevails over an award or anything else. So to that extent, the facility that you seek is available.

MR FITZGERALD: But I have some doubts about that in terms of the current enterprise flexibility clause. I can see your point.

ACTING PRESIDENT: You say the award would override the act.

MR FITZGERALD: No, I can see what you're saying. But if an employer - and I'll just approach it from a realistic point of view. If an employer wanted to make an agreement with its employees and there was genuine agreement at the work place, it would look firstly at the enterprise flexibility clause. Now the enterprise flexibility clause indicates quite clearly that the union must be party to it.

Now I would submit, Mr Deputy President, that employer would look no further and not realise that it could still proceed with a section 61 agreement with its employees which would override that award. But in terms of the manifestation in the award, the award quite clearly says the agreement must be made with the union, not with its employees. And that's where the restriction is. I concede your point that section 61 would be able to override that particular provision in the award.

ACTING PRESIDENT: You see, the award doesn't say that you can't have an agreement with employees in specific terms.

MR FITZGERALD: But it does prescribe that the union must be party to it. That's my point, Mr Deputy President.

ACTING PRESIDENT: Yes, but we can't in an award deal with anything in relation to Part 4A. Let's be clear about that. That's the intention -

MR FITZGERALD: No, I conceded that point. Yes.

ACTING PRESIDENT: - of the legislation. They've set up a different arm of the commission, if you like -

MR FITZGERALD: Yes.

ACTING PRESIDENT: - and split the jurisdiction.

MR FITZGERALD: Yes. I've conceded that point but I make it in particularly the terms of the test case at the federal level as this does quite clearly restrict structural efficiency measures because it clearly manifests that the only way an agreement can be made - and an employer first looks at its obligations under the award - is by agreement with the union. And that's where the restriction occurs, Mr Deputy President, in my submission.

ACTING PRESIDENT: I'm sure the full bench recognised what you're saying, Mr Fitzgerald.

MR FITZGERALD: The federal full bench or -

ACTING PRESIDENT: No, the state.

MR FITZGERALD: The state, yes.

ACTING PRESIDENT: The state, yes. I don't know what was in the minds of our national counterparts.

MR FITZGERALD: I'd say in respect to that there was some sort of compromise resolution to the TCCI submission stating, in fact, the principles should actively reflect or exactly reflect the federal decision. And the full bench, in my submission, said: Well no, we're not going to do that. However there must be ongoing recognition of structural efficiency and the appropriate words are continuing process.

ACTING PRESIDENT: Yes. If you look at principle 4, which is headed `Role of the Commission in Enterprise Bargaining', you'll see in paragraph 4.4, without reading all the procedures:

> *When approving an enterprise bargaining agreement which is to be reflected in a Section 55 agreement or enterprise award, the Commission will ensure that the Section 55 agreement or enterprise award, taken as a whole, will not disadvantage the employees concerned.*

Now if we accept your argument that the commission ought to be acknowledging there the agreements generally, that is agreements which also can be made with employees, the full bench, if it intended to, would have said there. In relation to section 55 agreements or agreements under Part 4A of the act et cetera. But the full bench confined itself to 55 agreements.

MR FITZGERALD: Well I concede that as well but I'm not sure whether that is necessarily fatal to the submission which we made, because it goes back to the discussion we just had a moment ago in respect to the enterprise flexibility provision. And I would submit - I still hold to our submission, Mr Deputy President, that it's a manifestation the award where the union must be party to it, that that on the face of it prevents employers concluding agreements with its employees.

Now quite clearly, behind that there is a viable facility under section 61 - pursuant to section 61. If an employer simply looks at how it does it, how it makes agreements with the employees, then it looks no further than the enterprise flexibility provision in the award. And that prevents agreements with its employees. Now that is in contravention to the federal test case decision in respect to enterprise flexibility.

ACTING PRESIDENT: If you look at some awards it will contain a provision that says that preference of employment will be given to people who are members of a union. That's now contrary to the act.

MR FITZGERALD: Certainly.

ACTING PRESIDENT: But they're in the award.

MR FITZGERALD: Yes.

ACTING PRESIDENT: And employers need to have a knowledge of the act as well as the award.

MR FITZGERALD: I can understand that and -

ACTING PRESIDENT: And you know that those matters went in awards mostly by consent, I would suggest.

MR FITZGERALD: Yes, I would suggest so.

ACTING PRESIDENT: And that there hasn't been the opportunity for them to be re-examined because the commission only has jurisdiction when it's got an application.

MR FITZGERALD: I understand that and that properly puts us on notice that those provisions should all be excised from awards.

ACTING PRESIDENT: I'm not suggesting that people should make such applications. I don't want to take that responsibility.

MR FITZGERALD: Well that's something which we could do and I'd suggest that it's something which we should do - our organisation I'm talking about. Another example would be superannuation provisions in awards which clearly state a minimum of 3 per cent. Under Superannuation Guarantee legislation that, of course, has been increased.

ACTING PRESIDENT: Yes, well that goes beyond our act too, doesn't it?

MR FITZGERALD: Well it does, yes.

ACTING PRESIDENT: It goes to federal legislation.

MR FITZGERALD: It does, it does.

ACTING PRESIDENT: One needs to have a fairly wide knowledge.

MR FITZGERALD: I can understand that but that matter which you raise is an important issue. In my submission in terms of structural efficiency, the matter which I raise - and I'm sure you can raise other examples, I acknowledge that. But in terms of structural efficiency this is a significant point, in my submission, which is a barrier to proper structural efficiency measures.

Other than that though, Mr Deputy President, there are other - if you examine the award as a whole there's been very little done in respect to making the award more facilitative in nature. And the federal full bench took the view that facilitative clauses should be in awards before the second safety net adjustment is approved. This jurisdiction didn't take the same view but it did make reference to an ongoing need to recognise structural efficiency measures.

And I would submit that even though it's not as prescriptive as the federal test case, there is an obligation for this commission, prior to making - approving the applications sought, to examine the award to ensure that there have been structural efficiency measures incorporated. And my submission is that there's been very little, if any, facilitative clauses included in the award.

ACTING PRESIDENT: But the principle itself now being called into use, principle 7.2, makes no mention of the arguments that you're raising, does it?

MR FITZGERALD: No, I think I've covered that by submission earlier. I will concede that the conditions are set out clearly in the principles. However it must be read in conjunction with the findings of the full bench. It can't be read in isolation, in my view, Mr Deputy President.

ACTING PRESIDENT: Are you saying that the full bench erred in the principles that it established in them being incomplete -

MR FITZGERALD: No, I'm not -

ACTING PRESIDENT: - and inconsistent with its findings?

MR FITZGERALD: No, I'm not saying that at all. But it must be - those principles must, in my submission, be read in conjunction with those findings. The findings are completely superfluous otherwise. The findings must have some meaning and they must be or they must be considered in light of the principles, in my submission.

I have no further submissions, unless you have further questions, Mr Deputy President.

ACTING PRESIDENT: Not at this stage, Mr Fitzgerald. Does that make a difference to your application, Mr Brown?

MR BROWN: No, it doesn't, Mr Deputy President. Not at all. The fact that Mr Fitzgerald's members aren't aware of Part 4A of the act and their rights under that, I think is a problem for the TCCI, not a problem for this commission.

MR FITZGERALD: We didn't concede that.

MR BROWN: Mr Deputy President, I was only aware that this wasn't going to be a consent matter only about 20 minutes before the hearing was due to commence. And I note that Mr Fitzgerald hasn't handed up any exhibits with regards to the federal test case provisions regarding this matter. We also are aware of some decisions of the federal bench that would have a bearing on that, but we obviously haven't had time to be able to explore those and therefore tender up our exhibits.

But in any case, Mr Deputy President, the basis on which we're making our application is the principle 7.2, and I think we've demonstrated clearly that we meet all of the tests that are outlined in that particular principle. I won't go any further.

ACTING PRESIDENT: Mr Brown, do you want any further time to answer the arguments put by Mr Fitzgerald today, given that you didn't have as much time to prepare yourself as you might have needed if you'd known that there would be this argument, or do you rely upon submissions put and for me to arbitrate the matter from this point onwards?

MR BROWN: Could I have just one minute off the record, Mr Deputy President?

ACTING PRESIDENT: Yes.

MR FITZGERALD: Before you go off the record, could I just firstly apologise to Mr Brown for the lack of notice in terms of our position. I did previously indicate - I have indicated this off record to Mr Brown but I think it's better that the commission also know.

I did previously indicate to Mr Brown that this matter would probably proceed by consent. However as an organisation it was only late Friday that this matter was taken - the decision was taken in respect - given it was the realisation that it was the first matter before the commission, that our organisation took this position. And I rang the first opportunity this morning, I think it was about 8.30. And I apologise for the late notice but out of courtesy I was attempting to ring him just to let him know that our position changed.

ACTING PRESIDENT: I make no criticism, Mr Fitzgerald. It's just that that's the reality of the situation.

MR FITZGERALD: It is, yes. But I just wanted to make it clear that I apologise to Mr Brown for that late notice but I suppose some notice is better than no notice.

ACTING PRESIDENT: Yes, thank you. Is it the wish we go off record? Any objection, Mr Fitzgerald?

MR FITZGERALD: No.

OFF THE RECORD

ACTING PRESIDENT: We're now back on record. Mr Brown.

MR BROWN: Mr Deputy President, thanks for that brief adjournment. We don't wish to make any further submissions so we'll let our case rest.

ACTING PRESIDENT: All right. Anything to add, Mrs Dowd?

MRS DOWD: No, Mr Deputy President.

ACTING PRESIDENT: Okay. Well I thank you all profusely for your submissions and I'll reserve my decision and hand it down as soon as possible. Thank you.

HEARING CONCLUDED