

**IN THE TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

**T. No 665 of 1987**

**IN THE MATTER OF** an application by  
the Tasmanian Public Service  
Association to vary nominated  
public sector awards to reflect  
movement in the Consumer Price  
Index for Hobart for the March,  
June, September and December  
quarters of 1986

**FULL BENCH**

PRESIDENT  
DEPUTY PRESIDENT  
COMMISSIONER KING

**HOBART, 27 February 1987**

**TRANSCRIPT OF PROCEEDINGS**

PRESIDENT: I will take appearances, thank you.

MR EVANS: If the Commission please, **A.H. EVANS**, along with **G. VINES** and **J. GEURSEN**, appearing for the Tasmanian Public Service Association.

PRESIDENT: Thank you, Mr Evans.

MR IMLACH: If the Commission please, **PETER IMLACH** for the Hospital Employees' Federation of Australia (Tasmanian No. 1 and No. 2 Branches) and for the Ambulance Employees' Association of Australia, Tasmanian Branch.

PRESIDENT: Thank you, Mr Imlach.

MS CROTTY: If the Commission please, **GAIL CROTTY**, appearing with **MAY BACKHOUSE** and **ROSS BUTLER**, for the Tasmanian Teachers' Federation.

PRESIDENT: Thank you, Ms Crotty.

DR SENATOR: If the Commission please, **GORDON SENATOR**, appearing for the Salaried Medical Practitioners' Society.

PRESIDENT: Thank you, Doctor.

MR WESTWOOD: If the Commission please, my name is **WESTWOOD, F.D.**, I appear for the Minister for Public Administration in this matter.

PRESIDENT: Thank you, Mr Westwood.

MR WILLINGHAM: If the Commission please, **CLIVE WILLINGHAM**. I appear for the Minister for Industrial Relations pursuant to section 27(1) of the Act.

PRESIDENT: Thank you, Mr Willingham.

MR FITZGERALD: If the Commission please, I seek leave to appear on behalf of the Tasmanian Chamber of Industries, **FITZGERALD, W.J.**

PRESIDENT: Any objection to that application for intervention? There being no objection, leave to intervene is granted.

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APPEARANCES

MR GARNHAM: If the Commission pleases, **JIM. GARNHAM** together with **MICHAEL WEITNAUER** on behalf of the Tasmanian Council of Advanced Education.

PRESIDENT: Thank you, Mr Garnham. Yes, Mr Evans.

MR EVANS: Thank you, Mr President.

PRESIDENT: Excuse me, Mr Evans, I think someone has beaten you to the punch.

MR WILLINGHAM: Mr President, if I could apologize to Mr Evans and seek leave of the Commission to raise a threshold matter for the Commission's consideration prior to Mr Evans commencing his submissions.

PRESIDENT: Yes, Mr Willingham.

MR WILLINGHAM: Mr President. If I may, Mr President, could I refer the Bench to section 25 of the Industrial Relations Act, specifically members of the Bench to section 25(3) which deals with award hearings before a Full Bench. If I may read section 25(3):

"The hearing of ... An application under subsection (2)(b) shall not be heard unless -

(a) the organization that made the application is the only organization that has members subject to the award to which the application relates; or

(b) notwithstanding that another organization has an interest in the award to which the application relates, the President, having regard to the subject-matter of the application and its likely effect on the members of any other employee organization, considers the hearing of the application

MR WILLINGHAM:

and the making of an award in relation to that subject-matter would not prejudice the orderly conduct of industrial relations in Tasmania."

Mr President, no application as far as I am aware has been received from any other organization of employees having an interest, or interests in the awards which are the subject of the Tasmanian Public Service Association's application.

Many of those organizations have significant and substantial interest in the awards which form part of matter T.665, and further, the T.P.S.A.'s application seeks to confine the increases sought to members of the T.P.S.A. only.

That is to say that in the event of the T.P.S.A.'s application being successful, no member of another union covered by these awards would be entitled to an increase; nor indeed would any other employee who is a member of no organization.

We can see a situation where disparate rates of pay are established solely by dint of membership of the Tasmanian Public Service Association.

Notwithstanding the ramifications of that within the public sector itself, the potential for flow-on of that concept, as well as for the actual increases sought, is very real in respect of the private sector.

In our submission, such a scenario is a recipe for prejudicing the orderly conduct of industrial relations in Tasmania.

In our submission, our respectful submission, it is clearly not in the public interest.

We respectfully submit, Mr President and members of the Bench, that the

MR WILLINGHAM: Commission, as constituted, should refrain from further hearing this matter, not only in accordance with section 25(3) but also in accordance with section 21(c)(ii). If the Commission pleases.

PRESIDENT: Mr Evans. Excuse me.

MR WESTWOOD: More clearly, if the Commission pleases, this is certainly the position that the Minister for Public Administration will adopt as the question of proceeding with this matter is clearly one which will prejudice the orderly conduct of industrial relations in this State.

PRESIDENT: Is that another way of saying, Mr Westwood, that no employee organization could ever seek an award for members only from this Commission because it might prejudice the conduct of orderly industrial relations?

MR WESTWOOD: It is not going just to the question of membership of an organization, if it pleases the Commission, it relates also to the question of a claim which we would submit is clearly not one which should be countenanced within the Principles.

PRESIDENT: Why not?

MR WESTWOOD: Because clearly the Principles have been established having regard to the events of National Wage Cases. A National Wage case is currently considering the very future of industrial relations in this country, and any application of this nature which seeks to go right outside that and create mayhem virtually in the industrial relations scene, ought to be rejected immediately by this Commission.

PRESIDENT: Yes, Mr Fitzgerald.

MR FITZGERALD: Mr President, I would simply endorse those submissions made by Mr Willingham and Mr Westwood. We have

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PRESIDENT - WILLINGHAM - WESTWOOD - FITZGERALD

MR FITZGERALD:

real concerns on behalf of the private sector. We could foresee the same sort of problems that Mr Westwood just foreshadowed, and for that reason, sir, pursuant to section 21(c) we would request that the Commission refrain from further hearing of this matter, sir.

PRESIDENT:

Mr Evans.

MR EVANS:

I just want to check that no one else wants a ...

Well, Mr President, members of the Bench, quite clearly the application has been couched within the Principles which presently apply, as determined by this Commission as late as July 22 1986, inasmuch as it seeks to vary the rates of pay of our members in accordance with increases in the C.P.I.

This organization cannot, and indeed would not, make application in respect of movements in wages other than for its own members.

MR EVANS:

It would be improper for us to seek to prejudice the interests of other organizations who may seek to make application for increases greater, for example, than we have sought because of perceived disadvantages economic and otherwise which they feel have been occasioned to their members.

And as well, the fact that, as I am aware, there are no other applications, could indicate a whole range of proposals being contemplated by those other organizations. The application is on all fours with the application made by the A.C.T.U. to the Australian Conciliation and Arbitration Commission in November 1986, when it sought as point 1 of its application increases in the wages of those awards which were the subject of the applications based on the full compensation or full indexation for movements in the Consumer Price Index. Therefore, there has been nothing said from the other end of the table which would indicate that, at this stage, our proposal is any different to that which has been entertained and considered by the Australian Conciliation and Arbitration Commission.

The fact of the matter is that this organization is party to awards of this Commission. If the representatives for the Minister for Public Administration and the Minister for Industrial Relations are saying that this Commission has no role other than to endorse decisions of the Australian Conciliation and Arbitration Commission, then they should spell that out very, very clearly from the outset. But they have not done that. They have merely sought to in fact have 'two bob each way' by preventing this Commission fulfilling its statutory role and waiting until some other decision which they might think is more favourable to them, or less favourable to us, is upon them.

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EVANS

MR EVANS:

We believe that in accordance with the Principles presently operating in this Commission the onus is very much on this Commission and the Full Bench as presently constituted to hear our application. What this Commission does with that application and the decision that it may arrive at are a matter for it. But we believe that we have a fundamental right, given that we are committed at present to a system, and there is no submission from my friends at the other end of the table that that present system of wage fixation should change.

We have acted in accordance with Principle 1 of those Principles presently applying and believe that it would in fact prejudice the orderly conduct of industrial relations in this State if we were denied the opportunity and, indeed, were refused an appropriate increase in accordance with the provisions of those Principles.

PRESIDENT:

Mr Evans, I think it's a matter of public knowledge that a decision of the Federal Commission is imminent, and it is expected that that decision will set out a new package of Principles to apply for the immediate future. What would happen if that decision were to be announced next week, say, before you had concluded this case, or before we had made a decision on this matter?

Is it your organization's intention to, in effect, do its own thing or go its own way notwithstanding any decision of the Federal Commission regarding the Wage Fixing Principles?

MR EVANS:

I think that question really leads me into the area of being somewhat hypothetical. Yes, I am aware that there may be a decision from the Australian Conciliation and Arbitration Commission in respect of matters contained in its decision of 23 December 1986. However, I am not aware as yet as to what the likely basis or, the basics of that decision

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PRESIDENT - EVANS

MR EVANS:

are likely to be; nor am I aware yet as to whether the Australian Council of Trade Unions which intends to convene a special unions' conference will accept that decision. Indeed, one could, in entering the area of the hypothetical, suggest that if it was not greater than \$10 in the first tier and 3% in the second tier, then it is very likely, indeed, strongly likely that that special unions' conference will reject in toto the proposed system, and the system cannot exist unless organizations who are party to it give commitments to maintaining that sort of system.

It's not a question of us doing our own thing so much as operating within the Principles that apply now and I guess in part one has to admit that this Government has got to state very clearly where it sees the system of industrial relations in this State going in the future and the method by which wages will be adjusted for either economic increases or other factors which may come into play.

I am aware of the submissions they made to the Australian Conciliation and Arbitration Commission in respect of that recent decision and if that is still their position, then they have to spell it out to this Commission.

Until such times as someone puts to me that the Principles that we operate under at present are going to be set aside (and that hasn't been done) then we have to proceed on the basis that we must uphold and honour our commitment.

We are committed to the maintenance of a system which you, sir, would be well aware in your decision of July 22 - was intended to operate for some 2 years. We are only some 8 months past that date and I think the onus is not upon us, that is the party who has given the commitment to the

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EVANS

MR EVANS:

maintenance of that system to then seek to change it. The onus is on those who wish to change it to do so.

If it is the overwhelming view of all of those in the system that it should be changed, then we reserve our right to put a different view but equally, consistent with our past performance, if we believe that it is the only appropriate method to maintain an orderly system of wage fixation then we would give commitments.

What we are committed to is an orderly system of wage fixation. What others are committed to, I think, is a disorderly system of wage fixation and if they are committed to that sort of approach, they have to spell it out.

PRESIDENT:

Mr Evans, I'm sorry, but whilst you are still on your feet.

In the Commission's July 1986 decision, page 34 the heading 'Commitment'. I think we made reference to what had been said by the Australian Commission and we indicated there that we would require a similar commitment of no extra claims for 6 months and thereafter... We said on page 36:

"Each organisation of employees will be required, subject to the jurisdictional question, to unequivocally engage itself not to pursue any extra claims, award or overaward except in compliance with the principles, until the next National Wage Case. Thereafter we will expect to receive a renewal of the commitment to cover the period until the next National Wage Case."

I was wondering if you might see this as an extra claim because we haven't yet had a decision in the next National Wage Case.

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PRESIDENT - EVANS

MR EVANS:

No, I certainly don't see it as an extra claim, Mr President. We quite clearly see it as being consistent with the Principles adopted, particularly Principle 1, which is contained in the Appendix to that decision. It says in Principle 1:

"Subject to Principle 2, the Commission will adjust its award wages and salaries every six months in relation to the relevant quarterly movements of the eight-capitals CPI unless it is persuaded to the contrary by those seeking to oppose the adjustment on grounds related to the state of the Tasmanian economy and the likely effects of any adjustment on the economy, with special reference to the level of employment and inflation."

I will admit in our claim we have made one slight variation, and that is that the C.P.I. movement we refer to is not the six State capitals but the Hobart C.P.I. movement. And we are prepared to advance argument during the course of our submissions as to why this Commission, if it is disposed to grant our claim, should accept the proposition that the appropriate C.P.I. indicator that we should have regard to in determining the movement should be the Hobart C.P.I.

However I don't see that it is a fundamental point on which we would want our claim to stand or fall. And if that was going to be something which would cause some concern to this Commission then we are quite prepared to move our position so that that in itself doesn't cause any problems.

PRESIDENT:

Yes, thank you, Mr Evans.

DEPUTY PRESIDENT:

Mr Evans, isn't there one further manner in which your claim deviates from that before the Full Bench of

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PRESIDENT - DEPUTY PRESIDENT - EVANS

DEPUTY PRESIDENT:

the present National Wage Case, and that is that your claim relates to a wage movement reflecting C.P.I. movements for March/June, September/December quarters?

No, I beg your pardon. I thought you had included another quarter.

MR EVANS:

No, we have merely sought to have wages moved for the increase in the C.P.I. which has not yet flowed through in the system, and that is the four quarters of 1986.

We are not seeking to extend that any further. We believe that we have a fundamental obligation to our members to ensure that we put before the Commission the full arguments necessary to compensate them for the increase in the cost of living; because to do anything else would see us condoning a decrease in the standard of living of our members, which could possibly be in the order of 10%, and that is a sad substantial reduction in the standard of living.

As I said, I don't believe we have any other obligation but in fact to maintain our members' living standard, as for others who would seek to decrease their living standards to come out into the open, in a sense, and argue that position.

DEPUTY PRESIDENT:

But I did understand you at the beginning to say that your claim is not different to that of the A.C.T.U. in the present Federal case. But in fact isn't it different in quantum?

MR EVANS:

It is different in quantum inasmuch as the A.C.T.U. claim was lodged for the first three quarters of 1986, where ours seeks to compensate our members for increases in the cost of living for the four quarters of '86.

I think it is more a question of the time difference between when the application was made which the A.C.T.U. had carriage of and the application we have now made. There

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DEPUTY PRESIDENT - EVANS

MR EVANS: is some 3 months' difference in timing and we have merely sought to include the last quarter, given that the cost of living increases as known has been published by the Australian Bureau of Statistics.

DEPUTY PRESIDENT: So to that extent it is a different claim?

MR EVANS: It is a different claim in the quantum, but in the principle it is not. The A.C.T.U. sought that the movement be full indexation. We have done exactly the same, but recognizing that our claim is somewhat later than the A.C.T.U., included the last quarter.

DEPUTY PRESIDENT: Yes. But isn't the Tasmanian Public Service Association affiliated with the Tasmanian branch of the A.C.T.U?

MR EVANS: Yes.

DEPUTY PRESIDENT: And the A.C.T.U. has a claim before the Federal jurisdiction, so doesn't that potentially create a situation where two jurisdictions are hearing the same claim at the same time, albeit with the minor (as you call it, I think) differences in quantum?

MR EVANS: Well if I just take each of those as stated. Yes, the T.P.S.A. is an affiliate of the Tasmanian Trades and Labor Council. I am not aware of any decisions being made by the Tasmanian Trades and Labor Council in respect of applications for variation of wages due to the increases in the cost of living, either an application in the form we have presented it or any other form. As far as I am aware there is no decision being made.

In respect to the A.C.T.U., they had carriage of applications by unions which were party to awards of the Australian Conciliation and Arbitration Commission. The Tasmanian Public Service Association is not party to any awards of the Australian Conciliation and Arbitration Commission, but more

MR EVANS: important, as I said at the outset, that we are certainly well aware of the position that the Tasmanian Industrial Commission adopts and in fact holds in the industrial relations system. It is a commission independent of the Australian Conciliation and Arbitration Commission.

DEPUTY PRESIDENT: I am glad you used that word.

MR EVANS: I said I was well aware of its independence. Therefore given that role, whilst we may have disagreements as to the application of that independence, and I would not think you would want me to be anything other than frank ...

DEPUTY PRESIDENT: I would welcome your public comments.

MR EVANS: I am prone to make public comments. But as I said, sir, whilst you have that independent role, then those who are part of the system equally have the right to exercise their independence in terms of commenting on the activities of this Commission.

If I didn't think you had the independence, then I would not have made the application; so that the test is not on me, sir.

PRESIDENT: There are other employee organizations represented today who have entered appearances in the matters before us. Having regard for the fact that Mr Willingham has asserted that to proceed with this matter might bring about a situation that is against the orderly conduct of industrial relations, I would like to hear from those organizations to see if they are of the same opinion.

MR IMLACH: Mr President, if the Commission pleases, I am a little confused as to the exact direction of the T.P.S.A.'s application. We say that if the subject matter of the application is on all fours with the subject matter of the A.C.T.U.'s application before the Conciliation and

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PRESIDENT - DEPUTY PRESIDENT - EVANS  
- IMLACH

MR IMLACH:

Arbitration Commission this application would be better left to when that matter is heard.

If, however, it is not on all fours and there are separate matters that the association feels should be considered under the guidelines, then well we say that the Commission ought to proceed and hear them if they are under the guidelines, and at least hear the submissions. If the Commission pleases.

PRESIDENT:

Thank you, Mr Imlach. Ms Crotty.

MS CROTTY:

If the Commission pleases, we appear in these hearings as an interested party only under section 3 of the Industrial Relations Act. However, I am mindful of the case that Mr Evans has put on behalf of the T.P.S.A., and I can state categorically at this stage that we don't oppose the principle and the application that he is putting before this Bench because we are of the view that it is clearly within the Principles of the current guidelines. They still stand.

MS CROTTY:

Until such time as they are outlawed, if you like, by the National Wage Case I believe that the claim is well within the ambit of the Principles that currently apply.

The claim may not reflect wholeheartedly the application of the A.C.T.U.'s claim before the National Wage Case but I believe all it does is add the last quarter of the C.P.I. and in spirit it certainly does reflect that claim. And I can say that we would not see that if this claim was successful that indeed it would cause disorderly conduct amongst the union movement, certainly not with the Tasmanian Teachers' Federation - we welcome the opportunity of having a 9.7 increase flowed on to our members if this claim is successful.

PRESIDENT:

Notwithstanding claims that may prove to be successful before the Federal Commission, Ms Crotty?

MS CROTTY:

Sir, I support my colleague, Mr Evans, on his submission to you on that. I believe that we're currently operating within the system the Principles that now apply and that we can reconsider or reassess our position if the Conciliation and Arbitration decision is acceptable to us.

PRESIDENT:

Ms Crotty, while you're on your feet, a captive advocate as it were, have you had an opportunity to study the Commission's alleged National Wage Case decision of 23 December? I say alleged because in point of fact it doesn't decide a great deal except that it appears not to pursue, or continue, the notion of regular C.P.I. increases, on the one hand. On the other hand it does say that ... pending the outcome of its final decision the current Principles will remain in force.

Perhaps, put another way, is it not saying, 'Well, C.P.I. regular wage and salary adjustments based upon

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PRESIDENT - CROTTY

PRESIDENT:

C.P.I. will no longer be a part of the package. However, until we make a final decision on the matters before us, all the other Principles will apply.?

I'm simply paraphrasing; I may be quite wrong. I just wonder if you had read it that way.

MS CROTTY:

Well I've certainly read that decision. I didn't read it that way but I put it to the Bench that it be aware that that's an interim decision and we're all aware of what interim decisions are all about and there's no sort of firm conclusion by the Conciliation and Arbitration Commission and I would think that that decision has the status of an interim decision and no more and until such time as there is a final decision by the Bench, I don't propose that we should be caught by the references made by the commissions in that particular decision even if it relates directly to C.P.I. increases.

Sir, I also remind you of the fact that the Government in the recent National Wage Case did put a case before the Conciliation and Arbitration Commission for, if you like, the retention of C.P.I. within this State and I believe, as Mr Evans does, that the onus is on them to show that they have now either changed their mind or that they really didn't mean what they said before that Commission.

PRESIDENT:

Yes, thank you, Ms Crotty. Doctor Senator?

DR SENATOR:

If the Commission pleases, the Salaried Medical Practitioners' Society would have no objection to the submissions of the Public Service Association in this matter proceeding if it's felt by the Bench that the submission falls within the ambit of the current guidelines.

PRESIDENT:

Doctor, could you tell us please if

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PRESIDENT - CROTTY - SENATOR

PRESIDENT: the Salaried Medical Practitioners' Society is a member of the Tasmanian Trades and Labor Council?

DR SENATOR: No, it is not, sir; it is independent.

PRESIDENT: Thank you. There you are, Mr Willingham.

MR WILLINGHAM: Thank you, Mr President. I would respectfully suggest, Mr President, the Bench consider the initial question that I raised in isolation from some of the other matters that arose as a result of your questions to some of the other parties here.

My initial threshold submission to you relied upon sections 25 and 21 of the Act and since that time there has been a good deal of debate in relation to whether the T.P.S.A.'s claim is in conformity with the current Wage Fixation Principles or whether it is not.

So that there can be no misunderstanding about the Government's position in respect of the Wage Fixing Principles, there is no challenge whatsoever to the fact that the current Wage Fixing Principles, which we would submit must apply to the T.P.S.A.'s claim, as those handed down in the last State wage case. They continue to apply until they are varied by this Bench, or this Commission.

So it's not a question as both Mr Evans and Ms Crotty have suggested that we're about to change our mind on the Principles. It's as far from the truth as it's possible to be. There is no challenge. I do Mr Evans the courtesy of accepting that what he says is that his claim is within the current Wage Fixing Principles and I will await, as I am sure the Bench will, with interest to discover whether in fact that is the case. When he has concluded his submission if, should you not find in favour of my threshold argument, we'll have an

MR WILLINGHAM:

opportunity to put whether we believe his claim is within the Principles or it is not, as indeed so will this Commission. But I would ask initially, Mr President and members of the Bench, that you rule on our threshold submission specifically in relation to sections 25 and 21.

PRESIDENT:

Thank you, Mr Willingham. I thought that the responses that that threshold argument drew were in fact directed toward section 25. I thought there were 2 questions that needed to be addressed and they were addressed, namely that the applicant organization not being in all cases the only respondent or party to the awards in question raised a point, that is addressed in section 25, and the other question was that notwithstanding that fact, were we to proceed, the question of the orderly conduct of industrial relations (whatever that means) could be put at risk. Well now, we've heard from other employee organizations that they don't appear to be unduly concerned one way or the other and I presume they are the organizations who are joint claimant parties to some of the awards in question.

We are also aware - or I'm aware - that a number of the awards that are sought to be varied by this application are awards to which only the T.P.S.A. is party.

Now the only other question that I think you did address was the question of 'members only' and I would agree that that's something that is a departure from the normal run of applications, but this Commission otherwise constituted already has an application of that kind before it that has been debated and is shortly to be ruled upon, so I don't think we need concern ourselves too much with that.

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PRESIDENT - WILLINGHAM

PRESIDENT:

Now, what I'm saying to you is - well, you've heard the responses to your section 25 objection?

MR WILLINGHAM:

Yes, I've heard responses, Mr President from the Tasmanian Teachers' Federation which says that going by its appearance in this matter under section 3 of the Act, I think Ms Crotty said that she didn't oppose the T.P.S.A.'s application.

We've heard from Mr Senator who said that he didn't oppose it; we've heard from the Hospital Employees' Federation of the one sector, in Mr Imlach, also representing other organizations, saying that in essence he did - that he thought it was more properly dealt with at another time, more specifically during the forthcoming State wage case.

I really would suggest that the two responses in support of the T.P.S.A. don't seriously undermine the thrust of what I put to you.

Not only that, Mr President, you'll recall that a further part of our threshold submission was the capacity for both the flow of the principle of exclusivity to T.P.S.A. members as well as the actual increases sought flowing to the private sector and we still maintain and we submit most strongly to the Bench, that that does have the capacity to prejudice the orderly conduct of industrial relations in Tasmania.

So, Mr President, notwithstanding the remarks you've made and the considerable discussions on whether the T.P.S.A.'s claims are in conformity with the current Wage Fixing Principles, we rely upon our earlier submission. We would ask you to consider and determine them.

PRESIDENT:

Yes, thank you.

MR FITZGERALD:

Mr President, if I could just add one point, sir, in respect to a submission made by Mr Evans in

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PRESIDENT - WILLINGHAM - FITZGERALD

MR FITZGERALD:

respect of the independence of this Commission, which the T.C.I. as an organization also respects.

However, I think it's fair to point out, in respect to the consistency between the Australian Commission and this Commission there is a need for consistency and indeed that view is expressed by the National Wage Bench when the current Wage Fixing Principles were initially formulated and they were formulated in the decision reported in print F.2900 and at page 21 of that decision and I quote from that page - the Bench said:

"The Principles must be applied consistently and rigorously by all members of this Commission. Further, it was at the heart of many of the submissions put to us that a centralized system of wage fixation could not really work unless there was consistency between the State tribunals and this Commission."

Now, I would submit, sir, that at this point in time, whilst the Australian Commission's decision hasn't been handed down there is very much an inconsistent approach being taken in respect to the claim made by the applicant union and I'd simply like to submit that in response to the comment made by Mr Evans.

PRESIDENT:

Yes, thank you.

MR EVANS:

Mr President, could I just touch on a matter that I don't think I fully canvassed in my response to Mr Willingham's submission, but it may assist the Bench.

I think I outlined that the application was made by us on behalf of our members. That is because we cannot act for any other organization, but it would not be our intention to argue during the course

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PRESIDENT - FITZGERALD - EVANS

MR EVANS: of our submissions that the Bench has no other option but to grant an increase only to our members.

The question of preference or application of awards to only members of an organization, I think, is being dealt with in another matter and we would see it appropriate that it continue in that matter. We would not be leading any argument to the notion that, if the Commission was disposed to grant our claim, in essence, it would only apply to members of the T.P.S.A., who are parties to those awards.

PRESIDENT: That isn't what your application says though, Mr Evans.

MR EVANS: Well, I think it does, in essence, sir.

PRESIDENT: Don't you seek two columns?

MR EVANS: Well, I'll go back to the original position I advanced, sir, that we as an organization can only seek to apply for increases for our members. I would not dare to act for any other organization because, as I said, it would not be an argument we would maintain or persist with in our submissions as the final outcome.

If the Commission sought to raise that as a matter I think we would very briefly submit that it was in the powers of the Commission to make a determination as to who the increases apply to in respect of the award.

PRESIDENT: Yes. Thank you, Mr Evans.

We'll adjourn to consider what has been put before us.

...

PRESIDENT: We have considered the question raised by Mr Willingham and supported by the Minister for Public Administration and the Tasmanian

PRESIDENT: Chamber of Industries, that pursuant to section 25 (3), or section 21 (2)(c)(ii) of the Act, we refrain from hearing this application. We have decided that -

1. We are not prepared to hear the application in relation to those awards to which the T.P.S.A. is not the sole employee organization respondent thereto.

2. That insofar as those awards forming part of this application before the Commission are awards to which the T.P.S.A. is the sole respondent organization, we are prepared to allow the case to proceed.

Mr Evans we would require you to identify those awards which fall into the latter category. You may do that now, or perhaps you may wish some sort of an adjournment.

MR EVANS: In that case I was going to ask for a short adjournment, sir.

PRESIDENT: Yes. What do you call 'short' - after lunch?

MR EVANS: Well, if that's more appropriate, I'm quite happy to do that. It will only take us, I think, a relatively short space of time but it might be more appropriate for the convenience of the Commission and all parties if we adjourn to 2.00 p.m. or 2.15.

PRESIDENT: Yes. I think perhaps 2.15, Mr Evans. You are aware, Mr Evans, of course that we at this stage have only reserved today for this matter?

MR EVANS: Yes, sir. I would hope that our submissions would be completed today.

PRESIDENT: Yes.

MR EVANS: I cannot speak for the other parties.

PRESIDENT: Very well, we'll adjourn until 2.15.

...

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PRESIDENT - EVANS

PRESIDENT:

Yes, Mr Evans.

MR EVANS:

Thank you, Mr President.

Before I respond precisely to the statement made by the people before the luncheon adjournment, I think I should put forward a position that we believe that the intent and the purport of the statement made by you on behalf of the Bench seemed to indicate that this Bench was undertaking an Act which we believe is ultra vires the Industrial Relations Act. And I take some little time to explain as to why we believe what the Bench did is beyond its powers to do.

As I understand it, (of course not having the benefit of the transcript) Mr Willingham made a threshold submission which went to two principal areas. Firstly he sought to draw your attention to section 25(3) of the Act and asked you to carry out certain actions in respect of the provisions of that section of the Act.

Now, section 25(3) of the Act says:

"An application under subsection 2(b) shall not be heard unless -

(a) the organization that made the application is the only organization that has members subject to the award to which the application relates; or

(b) notwithstanding that another organization has an interest in the award to which the application relates, the President, having regard to the subject-matter of the application and its likely effect on the members of any other employee organization, considers the hearing of the application and the making of an award in

MR EVANS:

relation to that subject-matter would not prejudice the orderly conduct of industrial relations in Tasmania."

It's my very strong submission, sir, indeed it's a submission made on advice we were able to obtain ... legal advice we were able to obtain during the lunch hour, that the exercise of that discretion vested in you is an exercise only capable of being carried out prior to the commencement of hearings in this Commission. And it's our strong submission, sir, that the hearing has actually commenced before this Bench at 10.36 this morning and that there was not open to you an option to exercise your discretion after that event occurred.

It would have been quite appropriate and, indeed, competent for you, sir, to have exercised that discretion prior to the commencement of hearing, that you would not proceed to hear this matter. However, having passed the 'witching hour', one might say, that discretion does not repose in you any longer and, indeed, it's a discretion only exerciseable by the President. And we would believe, sir, that that argument is strengthened by the fact that it would be quite possible, indeed it is quite normal, for a Bench to be constituted which does not have you as a member. And, therefore, there is no opportunity for any Bench other than one of which you are a member to even have that raised with it.

But we would argue, most strongly sir, in fact, that you have that sole and absolute discretion and must exercise it prior to the commencement of hearing.

Our application was made in the full knowledge that many of those, indeed, all of the awards which were listed in the application, all of them, have other persons named as parties to

MR EVANS:

them, and I'll come to that in a little while.

Therefore, having not exercised your discretion, it was not open to Mr Willingham to seek to have you exercise the discretion at a later time.

He then went further and, I think, raised section 21 of the Act, specifically, 21(2)(c)(ii), 'that further proceedings are not necessary or desirable in the public interest'. But he did not put any substantive argument other than to make the very broad and sweeping statement that it was not in the public interest for you to hear the matters.

It would be our submission, sir, that it would need quite substantive argument from someone raising that matter to persuade the Bench not to proceed with the hearing or any part of it on the grounds of public interest.

But as we understand the statement made by the Bench before the luncheon adjournment, it went to two parts. You would not hear any application in respect of those awards to which other organizations were party.

PRESIDENT:

Other employee organizations.

MR EVANS:

Other employee organizations were party, but would proceed insofar as those awards to which we are the sole respondent.

Well, sir, unfortunately for all of us, by that decision you have effectively prevented this organization from pursuing its claim, because there is not one of those awards to which this organization (this employee organization) is a sole respondent because this Commission, of its own motion, (in spite of substantive argument I think from both ourselves and indeed other interested parties) has made the

MR EVANS:

Tasmanian Trades and Labor Council a party to the awards listed there - the public sector awards - and therefore, we cannot proceed, because the Act deems the Tasmanian Trades and Labor Council to be an employee organization.

So, we are in a cleft stick. But in fact, if we set those two substantive arguments aside (and I'm not asking you to. In fact, I think they have to be answered very clearly, otherwise you're going to have a fundamental breakdown in the proceedings and operations of this Commission), the implications and the import of the statement made by the Bench prior to the luncheon adjournment have grave consequences for the orderly conduct of industrial relations in this State, because if we went through those awards, sir, we'd find probably of some 58 awards, there are, approximately, 16 or so to which other organizations, apart from the Tasmanian Public Service Association and the Tasmanian Trades and Labor Council, are party, even though in the majority of those we are the principal party one might say inasmuch as we have the substantive interest as the majority of persons, as members of our organization, would be affected by those awards.

Yet what you have effectively said by your decision is that unless every organization (and remember the T.T.L.C. has been made an employee organization and respondent to those awards) acquiesces in the application, then this Commission or this Bench as presently constituted will not proceed to hear the matter.

Now, sir, that leaves every organization but particularly organizations of our size and dimension and areas of interest, in somewhat of a dilemma. In order to promote orderly industrial relations in this State, we have over time come to official and unofficial and formal and informal arrangements with

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MR EVANS:

organizations which might have an interest in those awards so as to ensure that the bulk of persons affected by that award have their interests protected. But your decision, sir, would leave the situation such that any organization, no matter how small or how large if it so decided, could frustrate and prevent the settling of industrial disputes which may be arrived at by the granting of claims made in application to this Commission to variation of awards, because they choose merely to be capricious or may have some other devious motive.

And we think, sir, that the implications of that statement, made by the Bench before the luncheon adjournment, are so serious in their consequences for the industrial relations framework which has applied to this State, that it would need, I think, substantive reasons in writing as to why the decision was made and the intent and the thought of its application because, sir, I think the decision in fact would give rise to disorderly conduct in industrial relations.

For example, my own organization, having this decision prima facie before it says, 'How do we ensure that the interests of our members are protected in the future and we are not frustrated in pursuing our legitimate aims and goals by making applications to vary awards and having those granted by this Commission, if it is open to an organization which might have five or ten or fifteen members covered by that award to choose not to join the application or choose, in the case of most of the organizations here today, not to even appear?'

And the choice is very simple in fact, that we would have to go out on the ground and promote disputes with the employer in order to ensure that every person who was affected by those awards to which we think we are

MR EVANS:

the party principal is a member of my organization and not a member of any other organization which could frustrate our legitimate aim.

And I think, sir, those matters I have raised really need a detailed response from the Bench because, whilst I can well imagine what might have been the desire of the Bench in terms of these proceedings. the reality is that a great number of significant issues have been raised by that statement made by the Bench before the luncheon adjournment, which need to be answered in order that this organization who made the application (the T.P.S.A.) can proceed to represent its members properly; because, sir, as I see it the choices are fairly simple.

I could name all the awards to which ourselves and the T.T.L.C. are parties and indicate to you, as we understand it, you would not be making any decision in respect of those awards but that would be contrary to the constitution and, indeed, the express decisions of my organization which is that I am to pursue, in the interests of all the members, claims for increases in wages and salaries due to the increases in the cost of living; in short, sir, continue with indexation. And therefore, I would not be in a position to proceed other than on the basis that my arguments encompass all the awards which were covered in the application.

It may well be that in the final analysis and its final decision, the Bench chooses to exclude certain awards, but I would have to proceed on the basis that the application and the arguments and submission we would make address all the awards.

I think, sir, those are briefly some of the matters which need to be contemplated, not least of which I think is the threshold argument I raised that your statement did not, I

MR EVANS:

think ... you are not enabled by the Act to do what you did in that statement. However, there are other avenues that Mr Willingham could pursue if he so desires in frustrating this claim, but it's up to him to make substantive submissions, not to rely on provisions in the Act which do not really exist.

PRESIDENT:

But, Mr Evans, if you would just clarify a point for me insofar as the exercise of the President's discretion is concerned. Do you not feel that the Act leaves it open to the President to exercise his discretion at any time (that is under 3(b))? After all how can he make a decision of the kind contemplated until he is made aware of the subject matter?

MR EVANS:

Well, sir, we have had advice on that, and I must say it is a clear defect in the Act if one wants to have a situation where the parties who may be affected by the exercise of discretion wish to be heard.

But the Act says:

"An application under subsection 2(b) shall not be heard unless ..."

Now it does give you an enormous amount of power, sir, that you can sit there in, I suppose one could say, 'splendid isolation' having no regard to anything other than the orderly conduct of industrial relations in Tasmania, in your opinion.

Our views and the views of Mr Willingham do not need to be taken into account, but indeed cannot be taken into account, we would argue, once the hearing commences.

It may be open to you, sir, to use whatever means are at your disposal to come to that decision prior to the hearing commencing, and you may choose to consult with the parties, you may choose to ask the parties to make some informal submissions either in writing or verbally to you, but once the hearing commences, unfortunately for all of us, that discretion ceases.

PRESIDENT:

Well doesn't the Act authorize the President to conduct his own hearing if he is minded to do so - he is not

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PRESIDENT - EVANS

PRESIDENT: obliged to - in order to decide for himself whether or not a matter should be heard by a Full Bench?

You see we have a combination of circumstances. On the one hand the Act says that where more than one award is involved the matter must go to a Full Bench.

MR EVANS: Yes.

PRESIDENT: The Act also says that in such circumstances, because 25 deals with award hearings before a Full Bench, the President has certain discretionary powers that he may exercise. It doesn't say when he shall exercise them though, Mr ...

MR EVANS: Well I think it does, sir, and that is the advice we have received; and in fact Mr Willingham has raised this rather difficult situation for us - had he chosen not to we might not be any the wiser.

But having raised it, it then I think is incumbent upon us to examine the provisions of the Act, and unfortunately, as I said sir, it is quite explicit. Once the hearing commences then that discretion that you have is no longer exerciseable.

PRESIDENT: If the Bench was otherwise constituted, how would the President deal with such a matter, if he's not a member of that Bench?

MR EVANS: Well it in part goes to strengthen my argument, that it is clear it was contemplated in the legislation and then put into more precise terms, that you as the President may not be a member of the Bench so that discretion is given to you before the hearing commences - before a Bench is constituted - before they start to hear the application.

And as I said we would contend very strongly the hearing had commenced, so in fact, sir, you do have, as I said, an enormous amount of power in

MR EVANS: terms of deciding whether a matter which is the subject of an application can be heard by any Bench - whether you are a part of it or not.

But as I said, it strengthens my argument because that discretion rests with you and you alone, so if you are not part of the Bench there is no way any other Bench could even contemplate the matter.

PRESIDENT: But the application hasn't been heard, has it?

MR EVANS: Well that's the advice we received, sir, that the moment proceedings commence that constituted the commencement of the hearing.

PRESIDENT: It may only be a hearing to ascertain whether or not the President should exercise his discretion in the way that is contemplated.

DEPUTY PRESIDENT: Isn't it similar, Mr Evans, to other sorts of challenges such as jurisdiction for the Commission to deal with a matter? And the Commission doesn't stop dead and make up its mind. It says, 'Well, that matter will be heard and after it is heard a decision will be made as to whether or not jurisdiction does exist.' And isn't that consistent with natural justice with the Commission, or the President, as the case may be, not making up its mind or his mind until appropriate people have had the right to be heard?

MR EVANS: Well, whilst one might like to pursue the argument of natural justice and we certainly had that canvassed, unfortunately there is a power within an Act to in fact make provisions which might seem to be a denial of natural justice. But in fact we would say, sir (and as I said, it is our advice) that by commencing the hearing, then in effect, the President has exercised his discretion and made a decision that the matter should be heard.

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MR EVANS:

Because of the way the Act is framed, and the onus it places upon the President, once the hearing commences then that is a clear indication to all that he has exercised his discretion; whether the President actually sat down and did it, does not matter; whether he has some statement to the effect that he did it, does not matter.

The mere fact that the power is vested in the President to do a certain thing prior to the hearing commencing, and he does not inform the parties under the provisions of section 25(b) that the matter shall not be heard because of the provision of section 25, then on the face of it you have exercised your discretion and considered that for the orderly conduct of industrial relations in Tasmania the application should proceed and be heard in respect of all the matters contained in the application - all those awards that were part of the annexure to our application.

Now as I said, there are other avenues open to Mr Willingham if he wants to stop these proceedings, but unfortunately for him, and fortunately for us, he cannot use that one.

PRESIDENT:

There are also other avenues open to you, I imagine, Mr Evans. If you are genuinely concerned that somehow or other we have stymied you, couldn't you lodge individual applications?

MR EVANS:

Well I could - but I have.

PRESIDENT:

But you have put them all in one.

MR EVANS:

Yes, I put them on one.

PRESIDENT:

But if you lodge separate applications and I referred them to individual Commissioners, section 25 wouldn't apply, would it?

MR EVANS:

No, if I had lodged separate applications, but we chose not to.

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MR EVANS: What I am saying, sir, having chosen to follow the path we have, then there was at a certain point in time the capacity for you to exercise your discretion not to hear them. You have chosen to commence the hearing, therefore we would argue that that discretion has been exercised, therefore unless there are some other arguments advanced as to why the hearing shouldn't proceed, then we believe it is appropriate that the subject of our application should continue in its hearing.

PRESIDENT: Well the Commission hasn't said that it won't hear you on any of your applications.

MR EVANS: No.

PRESIDENT: And it left it to you to tell us ...

MR EVANS: Well the words I got, sir, were 'not hear the application in respect ...'

PRESIDENT: '...of...'

MR EVANS: '...of...'

PRESIDENT: '...those awards to which ...'

MR EVANS: '... those awards to which other employee organizations ...'

PRESIDENT: Yes.

MR EVANS: Well that's effectively stopped me, sir.

PRESIDENT: Well then you are arguing (well I don't know that you are arguing), you are suggesting that the T.T.L.C. has constitutional coverage for employees covered ...

MR EVANS: No, sir, no. But the Act deems it to be an employee organization. This Commission has made them a party to the awards, as I said, in spite of substantive argument from our organization. And the problem gets compounded quite frankly, sir, because the T.T.L.C. has a resolution on its books which precludes it from

MR EVANS: making any applications in respect of any award unless it has the consent of all the parties or the affiliates who are party to that award, or unless the council determines.

So we have now created, quite frankly sir, a rather difficult situation for all of us.

PRESIDENT: Well have you taken advice on the purpose of the 'deeming' provisions contained in a statute?

MR EVANS: No, I haven't.

PRESIDENT: You might find the answer interesting.

MR EVANS: The 'deeming' provision in the statute? No.

PRESIDENT: Yes.

MR EVANS: Which ones ...?

PRESIDENT: Well let me give you an example to whet your appetite for further consultation with your council.

For example, the Act says that your organization, if you wish, is deemed to be registered for all purposes of the Act. Elsewhere in the Act it says that you now have to run the gauntlet of, for example, the 'conveniently belong' provision.

One might say there is a conflict because having said that you are registered for all purposes, why should you have to run the gauntlet of the 'conveniently belong'? You might find that that is because the 'deeming' provisions mean something else.

MR EVANS: No, I haven't canvassed that one expressly, sir, but I certainly will.

PRESIDENT: I suggest you do. Well now the T.T.L.C. is deemed to be an employee organization - it doesn't necessarily make it one. And that doesn't answer

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PRESIDENT - EVANS

PRESIDENT: the question raised in another matter either, but ...

MR EVANS: No, it doesn't, and that is an area which we have been exploring, is the actions of the Commission in making the T.T.L.C. a person or party bound.

PRESIDENT: I think the Commission in ruling the way that it did, intended that you could proceed if you were minded to do so, with something like 30 ... Your application as it affected, on my count anyway, 32 awards.

MR EVANS: But it then comes back to the other implications I raised, sir, that inherent in your decision is the fact that if all organizations who are party to the award do not make the application or seek to appear and make submissions in support - and I think there is a question about that latitude as well in the way the statement has been framed - then the situation can arise in the future that this Commission can refrain from hearing the matter.

And as I said, I am quite serious about it, sir, that it really does give rise to a concern about the orderly conduct of industrial relations, because it may well set organizations at each other's throat; it gives power way beyond that envisaged by the size of an organization.

And you take some of those awards, sir - we are almost without exception, except in the areas of teaching and nursing, the principal organization. And I am sure my friends in the T.T.F. would feel extremely concerned that if we decided to be capricious in respect of teaching service awards that they may well be frustrated.

It is not our intent to do that, but the capacity is now there, sir, by the import of your statement before the luncheon adjournment.

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