

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 4146 of 1992

IN THE MATTER OF an application by
the Australian Social Welfare
Union pursuant to section 23 of
the act for hearing to vary the
Community Services Award

re making of a new award

COMMISSIONER GOZZI

HOBART, 9 March 1993
continued from 23/12/92

TRANSCRIPT OF PROCEEDINGS

Unedited

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COMM. GOZZI: Are there any changes in appearances this morning?

MR WARWICK: No Mr Commissioner.

COMM. GOZZI: I didn't think you appeared last time Mr Warwick.

MR WARWICK: I think from memory, sir, we sought an intervention and -

COMM. GOZZI: Did I give it to you, did I?

MR WARWICK: Indeed you did Mr Commissioner.

COMM. GOZZI: We'll live to regret that Mr Warwick. All right. I'm joking of course Mr Warwick.

Mr Paterson since this matter was last before there has been a few developments as you would be aware. I'm just wondering whether you have any comment about the matters I'm referring to. One, of course, is the issue of the decision by Senior Deputy President Hancock and the other, perhaps more fundamental at this stage than that even, is that the ASU, of course, hasn't any legal standing in the Commission at this time.

MR PATERSON: On the first matter, if the Commissioner pleases, whilst changing substantially, I suppose, the number and the - probably affecting some thirty to fifty employers, that decision in respect of proceedings before Commissioner Hancock doesn't substantially change the argument that I've put all along that there is still a significant workforce and industry out there that remains not covered. Since that time, of course, there are additional services funded under that programme that are not respondent and haven't been logged. So I don't see that that substantially changes the principal issue, although it may change the number and particular services that would be affected by this award.

In respect of the second matter, my understanding, of course, is that the ASWU is, in fact, still registered. There maybe some legal issue as to whether the parent body that it relied on for its original rules still exists as such. It certainly doesn't.

COMM. GOZZI: Well it certainly doesn't no.

MR PATERSON: But it's registration in the Federal Commission is now owned, if you like, by the ASU in terms of industry and eligibility of rules. Nothing changed except the body that now holds that capacity to cover people in the industry.

COMM. GOZZI: But don't you have a problem under the Act?

MR PATERSON: I don't believe so.

COMM. GOZZI: I think you do. You might be able to -

MR PATERSON: The matter is certainly in hand and the Branch Secretary of the ASU has had discussions with those unions that had issues raised with us that would have prevented the ASU's registration. And I understand the matter would have been dealt with by now if the Registrar hadn't been on leave. Certainly, on principle, unless there's something in the new Act nothing's changed since the last hearing or any hearing since 1st July last year in fact.

COMM. GOZZI: Yes. I'm concerned that the steps haven't been taken to get the new body registered in this Commission because prima facie what it does do, at the moment, is make these proceedings not formal.

MR PATERSON: Well the steps have been taken. They haven't been finalized. The ASU has sought registration and has sought an interest in this award and that certainly hasn't been brought to any finality but the steps have been taken. I suppose the question also still remains that in respect of at least one of the matters that we're dealing with, the application is, in fact, the application of the Confederation of Industry for the making of an award.

COMM. GOZZI: Yes it is. I'm just trying to - now just getting off the registration matter for the moment - I have got a copy of the decision of Senior Deputy President Hancock. And I note the comments he's made. But I note in particular the assertion of the ASWU in those particular proceedings. And the ASWU also asserted the National character of the dispute and pointed out that in respect of those parts of the dispute outside of Tasmania, clearly that the Tasmanian Industrial Commission is capable of dealing with it. This Commission is well able to give attention to the specific needs of Tasmanian employers including prompt service and had demonstrated that capacity in other industries. So clearly what the ASWU was saying there to Deputy President Hancock was that the Federal Commission was well able to give attention to the specific needs of Tasmanian employers and of course the Deputy President went along with that and it seems to me that the Federal award, notwithstanding what you're saying, when made will certainly override the State award anyway. I mean your primary concern is, I think, to pick up those areas that somehow might slip through the net. But if there's a Federal award in place I don't see

how they can slip through the net.

MR PATERSON: Well to the extent that the matter before Deputy President Hancock is concerned that only goes to supported accommodation. It doesn't in fact go to the industry.

COMM. GOZZI: But he's foreshadowed a structured approach to the other -

MR PATERSON: Foreshadowed a structured approach which would then see the further progression of our Social and Community Services Award.

COMM. GOZZI: Yes.

MR PATERSON: However, it's still there. The progressing of that award has certainly been slow and has been frustrated on a number of occasions and the principal position at the moment is that organisations that argue jurisdiction, under 111.1(G) are being excluded from those proceedings by agreement.

MR PATERSON: So to the extent that any Tasmanian organisation seeks to be exempted from those proceedings then they won't be covered, in the short term, by that Federal award. So there always will be a need for a safety net in a State award in my view.

COMM. GOZZI: Well the point that I am really exploring with you is the desirability really to proceed to do something given that there is now a clear decision by virtue of the Federal decision to embark upon a course leading to the making of an award or awards to cover the entire area. I mean the argument has now come and gone. The situation is absolute and Deputy President Hancock has made his position quite clear that whilst he is proceeding with the SAP part of the award making process first, the other steps will follow. And you know, as a matter of course, the Commission per se is going to be really doing something that, in the longer term, will be irrelevant.

MR PATERSON: I don't know that we can be that definitive about the absoluteness of it. The decision on Section 111.1(G) claims by Anglicare and others as so titled in those proceedings certainly doesn't close off the option of further 111.1(G) proceedings. In one part of the decision the Deputy President refers to the constraints that the ASWU put on the pursuit of that claim and particularly to do with its occupational coverage in the industry. And basically it leaves at least one layer open in that decision for further 111.1(G) argument. The question of whether 111.1(G) arguments in that programme, which is a fairly consistent national programme, and the success of otherwise of 111.1(G) arguments in the rest of the industry where there is lot less national consistency are certainly not determined in any absolute sense by that decision I would think.

COMM. GOZZI: The other point that I'm wondering about it whether, indeed, it is appropriate in light of the decision for the Commission to continue to proceed the way we have been proceeding.

MR PATERSON: Well I expect that the point that eluded to before too remains a fundamental point, that the employers' position in this State, and certainly until such times as a Federal award is made, the employers' position as represented by the Tasmanian Confederation is for a State award. And as I mentioned it is their application so perhaps they are the ones, as much as us, who are caught in a cleft stick of preferring State jurisdiction, foreshadowing intention to argue against Federal coverage and on the basis

of those positions arguing for a State award. And we're looking at the position where they now -

COMM. GOZZI: But that argument's been run and won - well won and lost by the TCT and run and won by the Australian Social Welfare Unit.

MR PATERSON: Well if the undertaking on transcript here from the TCT is that they don't intend running 111.1(G) proceedings in respect of the Social and Community Services industry as covered by what was the ASWU and now is the Social and Community Services Division of the ASU I guess that we can conclude these proceedings but I wouldn't be optimistic about getting such an undertaking from them on transcript if they wouldn't be pursuing that.

COMM. GOZZI: Well they might want to pursue whatever they want to pursue but - I mean, to me, and I really don't want to see these proceedings bogged down or carry on unnecessarily on this particular point, but to me it seems fairly clear that Senior Deputy President Hancock has addressed the very issues that you are referring to. I mean he's opted for a structured approach to the award making process. I mean

MR PATERSON: And I suppose the other thought that entertains me is that if we do not have an award such as was sought here then the unions other course of action would be to apply for sequentially counterpart awards to those Federal award and we would end up then with perhaps three or four awards in this jurisdiction instead of one.

COMM. GOZZI: I am not aware that Federal award coverage or the application of Federal award coverage will be dependent upon, say, the Tasmanian Confederation of Industries being the respondent to that award and that as a consequence members of TCT are covered by the Federal award and those that are not members are not covered which is the circumstances in the case of some Federal awards. If the employer organisation is a respondent and various employers are not members of that employer organisation then the Federal award doesn't apply. That's not the case here.

MR PATERSON: No that's not the case.

COMM. GOZZI: That is not the case here, the way I read it. So therefore the Federal award would have application and there would be very little point in having a mirror Federal award or any other Federal award mirror made as a State award.

MR PATERSON: Well I suppose that again comes back down to how comprehensive the coverage is going to be and since that claim's -

COMM. GOZZI: Well look, you've read the decision. Let's just go to the part where Deputy President Hancock in fact talks about that. Have you got it there?

MR PATERSON: No I haven't got it with me.

MR FITZGERALD: I've got a spare copy if you want.

COMM. GOZZI: I thought I had marked it before. I think it's in Deputy President Hancock's conclusions. Have you got the decision there?

MR PATERSON: No I haven't. Could I borrow a copy? And what particular issue are you referring to?

MR FITZGERALD: I just wonder if we can go off record to find it Commissioner is a suggestion.

COMM. GOZZI: Yes we can go off record for a moment.

MR FITZGERALD: Before we could - could we just have a brief opportunity - if you're seeking a response from us and the record - I just wonder whether we could have a brief opportunity just to consider that.

COMM. GOZZI: Yes I would be. Yes you certainly will. I just want to get to the stage of hearing from Mr Warwick as well.

MR FITZGERALD: Okay, so you don't need anything from us at this stage then?

COMM. GOZZI: Well I certainly will afterwards.

MR FITZGERALD: Right. If we could have some opportunity at some stage just to confer.

COMM. GOZZI: I've got no -

MR FITZGERALD: Particularly to the fact that we have an application there as well. I understand that.

COMM. GOZZI: Yes.

MR FITZGERALD: What we want to do with that application given -

COMM. GOZZI: Yes, look, I understand that. Yes now let's just deal with it sequentially. Just getting back to the registration of the new organisation. I assume that under the Act notice has been given to the Registrar?

MR PATERSON: Yes.

COMM. GOZZI: The ultimate rules and constitution have been forwarded to the Registrar within the stipulated time period?

MR PATERSON: It's my understanding that that's happened, yes. As the ASWU we received notification of the ASU's application to seek registration.

COMM. GOZZI: Well - so 'til that is finalized I don't propose to continue this hearing but I'm not adverse to discussing with you, so that you and Mr Warwick and Mr Fitzgerald and Dr Rayner can take on board some of the comments we're making - the discussions that we're holding. Now dealing with the issue of Senior Deputy President Hancock's decision, the conclusion I think I'm coming to is that quite clearly it would be inappropriate in my opinion - subject to what other parties have got to say but in my opinion to carry

on with an award proceeding where the Federal Commission has clearly indicated they intend to make an award - and we all know a Federal award overrides a State award. And really the only concern that you have, Mr Paterson, is that there may be some respondents not party to proceedings at this stage and there might be a process you have to go through - or there would be a process you have to go through to get them roped into that award-making process. So that's point one.

Point Two is that there are other areas that you seek to cover where Deputy President Hancock doesn't propose to proceed at this point in time. However, he has indicated, I think, quite clearly that those other areas will be picked up by State award - by Federal award. So at the end of the day there's no doubt in my mind that the plan is to have the industry covered by a Federal award and that will apply to the extent of respondents nominated in the - specified in the schedule to the award.

Now where we go to from here - I think we've pretty well exhausted the discussion Mr Paterson, unless you've got anything further to add, I'll ask Mr Warwick to make a comment.

MR PATERSON: I'll just - I mean I think I've basically put on the record before the issues in respect of respondency. Clearly that is basically just a process for the union to identify and rope in employers in order to have the full effect of a Federal award. However, I have reservations about the extent to which the National award beyond the two - beyond the Community Employment Training Support Services Award and the Crisis Accommodation Supported Housing Award which the latter being the subject of Commissioner Hancock's deliberations. Once we move to the broader third or, you know, the catch-all for the rest of the industry if you like, I think that there's a lot left open to argument that Deputy Commissioner Hancock's decision doesn't cut off options that may well see a less than effective national industry approach for the balance of the industry. For the record, our historic membership has broadly been about twenty percent covered by that SETS award and Skillshare or CTS prior to that areas. About fifty percent of our membership in the Supported Accommodation Programmes Services leaving something like thirty percent of our membership subject to the third national claim. The issues really are not just ones of identifying and roping in employers but the way in which the industry has a remarkable turnover in new entrants into the industry and that there will always be ones falling through the Federal award. I'm more than

prepared to consider that our appropriate proceedings in this Commission may well be to get counterpart or mirror awards of those Federal awards as the safety net as opposed to an all-embracing industry award of the type we've sought.

I guess the other comment I would make though is that I don't think that the efforts that were put in by all parties into defining the scope have in the least been wasted because I believe that they will in fact, in terms of the regulation of the industry, help to provide and assist, provide a basis to all concerned to identifying concepts with the industry. And there's a document, the content of which has been relied on by the union nationally in other proceedings. So, you know, it's a positive and worthwhile effort even if it is not proceeded with in the current form.

COMM. GOZZI: Yes thank you Mr Paterson. Mr Warwick?

MR WARWICK: Thank you Mr Commissioner. I think it's reasonable for me to say at the outset that we find ourselves in a position where the industrial relation scenes are shifting beneath our feet to some extent. And we've certainly -

COMM. GOZZI: They certainly are.

MR WARWICK: Indeed Mr Commissioner. And logically enough I'm sure you can appreciate we've needed to give consideration to how we respond to that. We wrote to Mr Paterson last week in respect to the issue of the nature of our interest or involvement in the award which is, at this stage, of course as I mentioned this morning, simply the status of an intervenor, but I think it appropriate if I read some of the contents of the letter that was sent to Mr Paterson. I won't table it or read all of it because some of it contains matters which go to questions between the organisations I think and also comments which are somewhat political in nature.

MR WARWICK: However the letter refers to the Community Services award HSUA interest and says, "I write to indicate that Mr Richard Warwick of this office has made a study of the Full Bench decision in respect to the scope of the Community Services Award handed down last year. On the basis of this study and further advice I have received it seems that there is no question that this award will cover employees who are HSUA members and who have previously been agreed between ourselves to be employees who will fall to the HSUA by way of demarcation. I refer in particular to personal carers. On the basis of this advice I believe that it is imperative that the HSUA urgently make a Section 65(A) application to seek an interest in the Community Services Award."

The letter goes on to make a few further comments which I won't read onto the record and then concludes by saying "While I have not yet made the applications to which I refer I intend to do so in the next few days. Please contact Richard Warwick on the phone number specified if you wish to discuss this matters further. Yours sincerely, Mike Hall Assistant State Secretary."

Mr Commissioner there was, I must admit, some confusion in my mind in respect to the specific details of the Full Bench decision in relation to Scope. I think, if I recall, there was a correction order which was issued and I've asked the opinion of a number of people in respect to what the decision really meant and I think it is clear to say - or it is true to say and it is clear that personal carers are comprehended by the scope of the award.

COMM. GOZZI: Yes they sure are.

MR WARWICK: And indeed - the study I've undertaken also shows that indeed those - that application or those classes of employees were included by arbitration rather than by agreement.

COMM. GOZZI: Yes.

MR WARWICK: If my recollection serves me the Full Bench favoured Mr Fitzgerald's submission on that question.

COMM. GOZZI: Yes. We also foreshadow that there should be some interpretation with respect to the definition of domestic - didn't we?

MR WARWICK: That's correct, if I recall, yes.

MR WARWICK: Mr Commissioner, there have been discussions between the TCT and ourselves, not discussions which Mr Fitzgerald in fact has been involved but we had discussions with Mr Target from the TCT in relation to the possibility of establishing industrial agreements in respect to people generally referred to as personal carers. And those discussions, while not being entirely unfruitful, did not or have not led us to believe within the current climate we've assumed that the sands are shifting as we say that the pursuit of those agreements is the best course of action. I think - my letter indicates that we do see that there is a sense of urgency in relation to this issue and in particular to obtaining some sort of award coverage for these people.

If I may I'd seek to table a couple of letters emanating from the letter to which - to Mr Paterson to which I've referred. These simply are letters to the President of the Industrial Commission and also Commissioner Watling in turn. I think it's appropriate that I take you through them.

COMM. GOZZI: -- marked on the exhibit. Besides we won't get confused with the ones that were tendered in the earlier proceedings leading up to the making of the Community Services Award. We'll mark these ones "W". So W.1

MR WARWICK: Thank you Mr Commissioner. The first letter is a letter, as I say, to The President of the Commission regarding the recall and re-issue of the Health Services Union of Australia, Tasmania and number one branch certificate of registration and says, quote, "I write to apply under Section 65(A)" and that should in fact be 65 capital A, Mr Commissioner.

COMM. GOZZI: Yes.

MR WARWICK: "of the Industrial Relations Act 1984 for leave to recall the certificate of registration of my organisation and re-issue the said certificate in an amended form on the basis that the Health Services Union of Australia, Tasmanian number one branch has an interest in the Community Services Award and that such interest has not presently so specified."

And that letter was hand delivered to the Commission yesterday. The second letter, similarly was hand delivered yesterday and this is addressed to Commissioner Watling regarding application number 23517 of 1991 making it a

Community Health Award. I should say, Mr Commissioner, that that was an application we made prior to the handing down of the Full Bench decision on Scope in the Community Services Award. It was our intention that that award would be a catch-all award of a common law nature and that it would comprehend personal carers and this document says, "I write to request as the applicant in the above mentioned matter that said application be formally withdrawn. My organisation intends to pursue award coverage for the employees in the Community Health Award - for the employees of the Community Health Award was intended to cover by way of a Community Services Award. Applications to this effect have been made."

So I would simply say in relation to that letter, Mr Commissioner, that we feel if appropriate to withdraw that application on the basis that we can hardly seek an interest in the Community Services Award while at the same time we had an application to make another award which, in a nutshell would have served the same purpose.

I think it appropriate, after having declared my intentions or the intentions of my organisation in relation to this broad question, to make some comments about those issues you raised with Mr Paterson this morning. And quite specifically the question, I think, of the Federal Award handed down by Senior Deputy President Hancock or the decision I should say. And my submission in that regard is, I think, fairly straight forward. On the basis of the demarcation agreement between the ASWU as it was and now the ASU and I should say that that demarcation agreement has been carried over by agreement between the parties.

MR. WARWICK : It would be our expectation that the Federal Award Application made by the Australian Services Union would not comprehend the classes of employees or the classification of a personal carer and Mr. Patterson I'm sure, can respond to that question. I must admit that I have not been close to the Federal Award proceedings, but that's a matter our national office would have been dealing with. I think it's reasonable to say that our intention and our preferred position would be to press on with the making of the Award, at the very least in respect to the classification of personal carers within the State jurisdiction.

COMM. GOZZI : Yes, well that is interesting, isn't it? I have been reading between the lines what you have been saying Mr. Warwick. If the agreement between the HSUA and the ASU stands up, then really you may not need to have withdrawn the making of a health - Community Health Award, particularly if these award proceedings don't go anywhere.

MR. WARWICK : Well I appreciate your comments - -

COMM. GOZZI : The reason I'm making that observation is that it could be that all we could finish up with is an award for personal carers. If you have got other fish to fry in the Community Health area, then really the personal carer classification may be the tail of the dog.

MR. WARWICK : It may indeed sir serve that functional purpose Mr. Commissioner, but I think in the back of our minds, the primary consideration which motivates us is the fact that personal carers have been included in the scope of the Community Services Award on the basis of the full bench having favoured Mr. Fitzgerald's submissions in that regard.

COMM. GOZZI : Yes, well that's right and to that extent, they are currently within the province of the only organisation as an interest - employment organisation that has an interest of course, the ASU or ASWU. So you would be hopeful that your agreements stand up I would imagine.

MR. WARWICK : Well I have every reason to believe that they will Mr. Commissioner, and in fact they've served a very - served useful purpose in the appearance since those agreements were reached.

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COMM. GOZZI : Presumably the Community Health Award covered other areas apart from personal carers or did it overlap with this award, the Community Services Award?

MR. WARWICK : Its intention was to cast as broad a net as possible and I think that's a reasonable proposition from our point of view because we do, in our industry at the moment, face the ongoing process of privatisation which is a reality. It's talked about in relation to a lot of Government areas in the Tasmanian Public Service, but Health is the area where it has been happening and I think the intention of the award in the longer term, was that it could have application to people like physiotherapists, dieticians, paediatrists who previously would have worked in a public system and indeed - -

COMM. GOZZI : Are they privately employed paediatrists? I thought they worked under the public system, covered by the public award and had the right - the permission of the employer to go out and do some private work?

MR. WARWICK : They - they - that is the case at present, although we understand there are some public physiotherapists who are employees, not currently covered. There aren't, as I say - well as you say Mr. Commissioner, dieticians and paediatrists and so forth, but that's not to say there won't be and indeed once established, it would be a simple matter of inserting into the Community Health Award if it were made, those classifications. That was our intention and certainly, from our point of view, that would have been the most logical way to go with - in respect to the making of that award. However, our wishes are not always asceded to by the Commission simply because they suit us and the Full Bench decision may be a different decision, so in that regard, I guess we've had to think about it and weigh up what we really need to do more in the short term, rather than the long term in respect to - in particular, the classification of personal carers.

COMM. GOZZI : Well the situation is simply this Mr. Warwick. I would dearly love to make an award, carry on with the award making process, but we now have a decision from Senior Deputy President Hancock which contemplates making of an award for the SAP area and then picking up the other Social Welfare industry parts. Now whether personal carers fall into that

area Federally, I don't know and I don't know what the understandings are, but obviously you have in mind that you want to cover other private sector Community Health workers including personal carers. Now it may be, given this latest development, that this award making process - I'm just floating(?) this for the consideration of the parties as much as anything and Mr. Fitzgerald still has to get up, it may well be that these award making proceedings are currently - that I've got, go nowhere or have to change dramatic tact in the context of only picking up the thirty percent or so that Mr. Patterson foreshadowed as being not covered by anything at the moment. Now I don't know what all that means in the context of - or where the HSUA may be and where that leaves the TCI or anything. All I am really saying is, I think it's inappropriate - my personal feeling is it's inappropriate to continue with an award making process, certainly with respect to SAP, because a decision on that is clear and I am even perhaps going further and saying I'm very sensitive about going into an area now which has been foreshadowed to become a bi-Federal award and as a consequence, I'm really saying that that might really then mean that the HSUA and the TCI might have to take a different tack with the remaining Community Service Health workers that you seek to cover, which are of no interest to Mr. Patterson because of the arrangements that you may or may not have.

COMM GOZZI : I presume the arrangements that you have - I mean I don't see that Mr. Paterson's organisation would be interested in paediatrists, dieticians and so on. The only argument that - well the only argument that would arise if it does indeed arise, would - goes to personal carer.

MR. WARWICK : Yes, yes. I appreciate that it's a difficult set of circumstances Mr. Commissioner. One thing that - one thought that springs to mind is that it is always the case that it is open to a registered organisation to make an application for the making of an award for - it is - it would always be open for us to re-apply to make the Community Health Award. However, that would not resolve I guess, the obstacle which I think is in place and that is the current scope which has been determined includes those people, so - -

COMM. GOZZI : Yes, and in that context of course, what you have foreshadowed here is entirely appropriate, that you at least make application to seek interest in an award that is currently on foot. I mean, the award is made in respect of title and scope and parties and persons bound. So I am just really going beyond that and saying that I think everybody needs to have some thought about how the whole situation ought to be handled and how it can be handled in the best possible way to minimise unnecessary hearing times and submissions and all that sort of thing that goes with it. Mr. Fitzgerald?

MR. PATERSON : Can I just take an opportunity to quickly respond to the issues raised by Mr. Warwick or - -

COMM. GOZZI : Well you can have - you've got last go.

MR. FITZGERALD : Yes, thank you Commissioner. Mr. Warwick talks about the shifting Industrial Relations sand. I'm not sure whether it's going to help him in mentioning of the sea, I think we've got somewhat of a confused sea as well, with the direction chosen through all points of the compass. Commissioner if I could just make some comment in respect of particularly the technical deficiency which you bring firstly to the attention of the unions and the parties here. It is our position that I don't wish to - to - at this stage take advantage of that technical deficiency and if that's to be remedied in time, we wouldn't

want to see that circumstance prejudice any further negotiations, but in terms of the other issues and we are well aware of course of the SAP - for want of better title, the SAP 111(1)(g) decision by Senior Deputy President Hancock, and its implications and it's also I suppose, foreshadowing of an all embracing approach and we're also aware in a structured manner - we're also aware that the ASU have a current dispute finding for other than SAP areas at the moment. That obviously has some consequence, but I think it would be wrong for me to make any - and also I'll just acknowledge that one of the applications is indeed an application by TCI. However, I think it would be wrong for me to just state our position in response to those matters you raise without some form of consultation from those who instruct me and at this time, I am loathe to make any further comment without seeking some instructions about where we go after taking on your comments.

COMM. GOZZI : When do you propose to do all this?

MR. FITZGERALD : Well I'd do that at the earliest opportunity. I s'pose the other thing which is a bit unclear is whether there is - are there any impending appeal proceedings against D.P. Hancock's decision and I am aware from a national viewpoint that there is certainly investigation as to whether that will occur, so that again could see the situation not resolved fully. But we'd certainly take instructions at an early opportunity. I'd like to, if possible, even just have a brief adjournment just to consider the position with Doctor Rayner who is with me today of course.

COMM. GOZZI : Yes, Mr. Fitzgerald leaving aside my comments, what impact did you think the decision would have on these proceedings today?

MR. FITZGERALD : Well clearly, as you indicated, the approach at this time anyway is for any Federal Award to prevail over any State Award to the extent of the inconsistency and in that respect, obviously those SAP funded agencies, depending on their - the award making process in the Federal sphere, any Federal Award ultimately made may well override any inconsistent provisions within the State Award. Our concern is also, I suppose, in respect to foreshadowed future

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awards for the remainder of the industry and we see that I suppose as you, if we continue to make an award, that could be simply overridden by the fact that the Federal Award prevails. To that extent, it - there may be a futile exercise in proceeding further with the award making process. However, I would like just to reserve my position on that and seek some instruction on that at that particular point Commissioner.

COMM. GOZZI : Yes. You see one of the points that you I think it was Mr. Fitzgerald, argued before a - Senior Deputy President Mr. Hancock and certainly supported by evidence of I think, Father Cooley, was that you preferred to have a State Award because that might more appropriately take into account the economic circumstances of the agencies operating within the State and of course, Deputy President Hancock countered that by indicating that he would apply the first awards principle. Now how that would be applied in a Federal jurisdiction, I don't know. The bottom line is however, that as far as rates and conditions go, whatever I did in the State Award would be superceded and irrelevant when the Federal Award is made and - so we could spend a lot of time and effort making an award that applies to SAP for no purpose at all. The only thing that would change that of course, was if there would be an appeal and the appeal is successful. Now - I mean, I'm not in any position to make any judgment on that whatsoever and people that are involved in the proceedings would know what chances that would have of success. Not that I'm saying there should be an appeal, far from it. I'm just simply saying that if this case is to proceed at all, logically it ought to really contemplate those areas that are not subject to SAP - that are not part of that program, and even then, we'd be proceeding on the full knowledge that there is an intention here to have a Federal Award to cover all of those areas and whether I or you or anybody else likes it or not, that looks like the way it's going to go.

COMM. GOZZI : So - -

MR. FITZGERALD : Yes. Well, that - -

COMM. GOZZI : It's like shutting the gate after the horse has bolted quite honestly.

MR. FITZGERALD : Well commenting on that, certainly it is obviously our intention to pursue - in fact we did pursue - the fact that we didn't pursue 111(G)(a) would indicate that we are very much in support of State regulation. Now, that argument is now lost with the - the Hancock decision. Now we need to reassess that and - and since that, the other event which has occurred of course, is the Federal process of serving a log in other areas other than SAP, which will obviously enable the union to pursue as foreshadowed by D.P. Hancock. Then I s'pose we really need to assess that as to whether we still favour that State Award approach. My - I think I'd be reticent to make any comment at this stage without seeking further instructions. It may assist even if I have some brief discussion with Dr. Rayner now on that point.

COMM. GOZZI : Well yes, I mean I don't intend to proceed with the application by the ASU, but your application is on foot of course and could be - and is joined, so there is no impediment to the proceedings going further, but until the situation is clarified, I think in the minds of even yourself and Mr. Paterson, there really seems to be little point and I really suggest that some discussions take place between you collectively as to try and determine a situation. I mean, from my point of view, I see my role as trying to facilitate the award making process, but by the same token I am not inclined to go down the path of making awards, particularly in areas that have been declared that a Federal (inaudible) will apply and regard that to be totally inappropriate and discourteous to the Federal Commission, to continue with the SAP part of it in any event. And as a further point, obviously then if we don't continue with SAP and I am saying we certainly shouldn't, then that will have impact on the State and I am not sure what that means say for the HSUA and indeed, for the TCI. It should probably be a fairly simple matter to reduce the scope if that's the way you would like me to go, but I think you need to have some discussions on it. Now Mr. Fitzgerald - Mr. Paterson, do you want to make your comments now? I don't propose to adjourn - I propose to adjourn the whole proceedings, so what do you want to say?

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MR. PATERSON : Just on the last matter you raised, the wording of the scope was intentionally conceptual so that in fact there is no need to change any of the words in part (a) of the scope in respect of the Hancock decision. It's really a matter of a further exclusion or limitation on its effect. That was the intent and it clearly serves that purpose. In terms of what would remain in the event of the Federal proceedings going ahead on the second and third fronts, being the SAP program cash award and the National Social and Community Services Award, the areas that could well remain excluded on the basis of the agreement between the two unions here today are the health related services where there is a clinical component. It may well be that we choose not to - and of course this is in no way anything that we can put a direction on the table at this point in time, but it may well be where there is a mixture of social support and clinical services, that we choose not to pursue a Federal Award and leave those. So - I mean, I can identify a number of areas that could well be covered by this award as a Community Services (Health) Award. For instance, Family Planning Associations where there is a clear mixture of education and training and clinical services, Aboriginal Health Services where again, there is a clear mixture of health and social support. In terms of the pediatry type professions, there are some of those funded under the Home and Community Care Program, although I believe at this point in time they are State employees. Pediatry funding goes to the hospitals or the Community Health services, but there is no impediment to that being in something like the Migrant Resource Centre in the future, and then there is Drug and Alcohol Services, so it could well be that there is a much broader area than personal care there.

COMM. GOZZI : Yes, but one of the problems - that certainly addresses Mr. Warwick's concern, but one of the problems I think you are going to run into and particularly Mr. Fitzgerald is going to run into is that a lot of the employers that he will - that he represents will have a mixture of programs - a mixture of funding and what you could conceivably have is a real fruit salad in terms of award coverage and regulation and so on and so forth, and I think that as much as anything, is going to be the difficulty in trying to sort that out because on the one hand you could have an organisation that has got that variety of funding - variety of

programs, so all of a sudden part of the workforce is covered by a particular award, but the person performing the duties is the same person under the different programs and therefore, notwithstanding that the award applies to say, SAP programs in terms of impact on the employer, you are not going to have, I think in the real life situation, a SAP employee, a home care employee. It's going to be the one person and - -

MR. PATERSON : It tends not to happen that way and there are a minority of circumstances where for instance Centacare might employ a Social Worker who works across programs, but - -

COMM. GOZZI : Well in - I'm just saying that I think from my knowledge of it I think Mr. Paterson, that is going to be a real problem because you are not going to start employing part time people I wouldn't think, under say the Federal Award for half a day because they work in the SAP program for another half a day or another couple of hours somewhere else.

MR. PATERSON : I only know of one service that employs - and I think it's - well it's their choice, but I only know of one service that does that. I mean, essentially SAP services are service arms of agencies and those service arms employees tend to remain within that service arm. In my experience to cross over out of program areas is certainly not a common characteristic of the industry.

COMM. GOZZI : Well I thought on our inspections, that that was a point. I mean, I might be recollecting it -

MR. PATERSON : I don't recall it, but - -

COMM. GOZZI : But I thought a lot of them got different funding under different headings.

MR. PATERSON : Yeah, but the employment - certainly in the SAP area, it is not a feature of that program. It's not a feature of that - -

COMM. GOZZI : Well not a feature of the program, but the agency - -

MR. PATERSON : The source - the source of funds is almost immaterial in one sense. I mean, the question

is, is the service arm which is the work and the way the award would apply, is that discreet. Now I am acknowledging that there can be a problem, but I don't believe it's in the form you're suggesting.

COMM. GOZZI : Yes, well hang on. Hang on Mr. Paterson. The agencies provide a variety of programs - -

COMM. GOZZI : - - under different funding categories, and if you have a SAP award apply, then presumably the employment will be under that Federal Award. Now that - how does that in reality then work in the agency that might be funded under the other categories? How are you going to pay that employee?

MR. PATERSON : Well in my experience there are very few, if any, that I'm aware of apart from very isolated examples where, under a particular program that is as tightly regulated by State Federal agreements, that there is a cross over of staff out of that area, that those SAP employees remain within the SAP program by and large.

COMM. GOZZI : So you are simply saying that if an organisation - -

MR. PATERSON : It's not a manifold problem in that program. It becomes a bigger problem in the national Social and Community Services Award area where - -

COMM. GOZZI : So you are saying that employees of SAP designated employees?

MR. PATERSON : SAP service designated, not SAP funded designated.

COMM. GOZZI : Even though if they are in the one agency, providing different services?

MR. PATERSON : I know of one or two examples where that's not the case by and large. I mean, the people who work at Bethlehem House for St. Vincent de Paul under the SAP program, work at Bethlehem House. Now you've got a problem when you get up to the manager who may be a house manager, but those night supervisors, those day supervisors don't work in their other establishments. If you look at the women's shelters, the youth shelters - -

COMM. GOZZI : Well I'm thinking of places like youth shelters.

MR. PATERSON : They don't - I mean, they work under - the shelters don't - I'm aware they operate - let me think of an example. The C Tech(?) that we went to for instance, they all - -

COMM. GOZZI : What is the situation with Anglicare?

MR. FITZGERALD : Dr. Rayner can - -

DR. RAYNER : Well basically what Ian is saying is so, as of right now, but out staff would largely be employed in that area, but that doesn't mean that - my dilemma has always been just what you're describing. That in fact as an agency, I employ a hundred and fifty workers to work across a whole range of programs and one of our dilemmas has always been the business of actually how we employ people with some sort of equity within the organisation, when there is a SAP award as there now clearly will be, regardless of the way in which the State and Commonwealth have sought to maintain funding of salary levels. They've clearly said to us we can do what we like with those, and that has given us the leeway to make service in a salary somewhat equitable. I believe however that the latest SAP review, which is in process at the moment, is moving far more towards the establishment of support workers in that SAP program which will bring other professionals like, I would expect psychologists, counsellors into those services in a way which the SAP classification at the moment, doesn't in fact cover. So I think there are moves afoot - there have been moves afoot for a considerable time. It seems to us that there is more support for those moves in Federal Government at this stage in terms of adding those support type people into what is now the SAP program and so I believe that there will be some changes in that sort of area.

COMM. GOZZI : Well Mr. Paterson, you know the issue of equity arises doesn't it? I mean, it becomes a real issue, even if they are - even if they were to be kept distinct.

MR. PATERSON : Well I suppose we can only answer that at the end of the day when we see what awards we're really looking at. I mean, there's not much point hypothesising. I mean, the fact it re-opens the 111(g) argument, the observation that G.P. Hancock made was in fact that because the Union had narrowed its claim in those proceedings which, in essence, was at his instruction, we could well leave ourselves open to new 111(i)(g) arguments if we sought as the ASU, to broaden it beyond the narrowness that we put, so that

qualifies the absoluteness of it. But, you know, it's a fact of life, it always has been, that St. Vincent de Paul operate under waver and Red Cross already operate or have, until this change - the Blood Bank service came under the Hospitals Award. A lot of services - a lot of agencies will run different services and the questions is, is the service discreet. The C Tech(?) we went to, they run education services that are tied to State, but are award free. They've got a SAP project, they've got a skill share project. They've now got drug and alcohol services. You know, I suppose the question is that which D.P. Hancock answered by saying this is the best of rational ways of approaching it, is to deal with and it's the unions position all along, to deal with what is discreet and manageable first, which may at the end of day, be the less discreet and the less manageable are not covered by a Federal Award because of limitations there.

COMM. GOZZI : I can see that that's reasonable where thne employee is a SAP employee, but if you want to have flexibility and efficiency across the board where an agency operates a multiplicity of programs under different funding categories, then it's - it really means that that employee would be paid presumably, under the applicable award which would be the Federal Award, and that would for all purposes, surely? So the orderly approach in that context, doesn't really solve that problem because once you have made the SAP award, I would imagine it would be applied by employers.

MR. PATERSON : Well let's hope so. I suppose the answer - -

COMM. GOZZI : Well it would be a nightmare if they didn't.

MR. PATERSON : That's right, and I suppose the answer at the end of the day is that a third national award that has - that is compatible and consistent, both in terms of wages, conditions, classifications and entitlements with other Federal awards to the extent that there is consistency between awards, there'd be no problem in applying one or the other. The only difference would be the name and particularly, if we moved to generic classifications, they should be the same from one award to another. But basically, there is no further point here today, I've nothing further to add to those matters. Run principle arguments

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for months and months, but I guess we're now looking at the practicality of what should we do with this. Again, I suppose the final comment should be that I wouldn't like to see these proceedings terminated today. Maybe we can look at that question after the next Saturday and a coalition victory in the Federal election makes this award probably our only course of action.

COMM. GOZZI : Well quite frankly, I don't worry about who is in Government about whether I am going to make an award or not.

MR. PATERSON : But to the extent that a coalition victory would basically mean the end of the realistic possibility of making the Federal awards with the effect - efficacy that we've had the opportunity or prospect of in the past would basically be an end to the unions Federal award strategy and - -

COMM. GOZZI : Well they would all - not all of them come to Tasmania. It could be a new growth industry Mr. Paterson, if that was to be the case.

MR. PATERSON : Obviously that question will be revisited after Saturday.

COMM. GOZZI : Yes, well look, I would certainly want to be guided by the parties after you have had some opportunity to hold discussions to canvass the issues we've addressed this morning. I think that's necessary. If, at the end of the day, an award is to be made to cover other than SAP funded programs, I'd certainly look at that, but there again, it appears to me that the Federal award making process will overtake the situation I reckon sooner rather than later, and I suppose I am not saying that, having allowance for your comments Mr. Paterson. The only other observation I make is of course, that agreements are also capable of being registered in the state jurisdiction under Section 55 of the Industrial Relations Act, and that might be another mechanism that - to look at. But I want to reassure the parties, if you need reassuring, that I would certainly very seriously look the award making process if you are able to satisfy me that that exercise wasn't going to be a waste of time, having regard to course of action outlined by Senior Deputy President Hancock, which at this stage contemplates

the making of the SAP award, followed by other awards, as is outlined in his decision. Go off the record for a moment. (Tape switched off).

Taping Resumes :

COMM. GOZZI : These proceedings are adjourned to 10.30 on the 31st of March, thank you.