

**HEARING COMMENCED 10.36am**

COMMISSIONER: I'll take appearances.

5 **MS D. RALLINGS:** If the commission pleases, RALLINGS, D., from the Australian Mines and Metals Association, appearing on behalf of Pasminco Hobart Smelter. With me is **JURY, M.** If the commission pleases.

**MR K. BECKER:** BECKER, K., I appear on behalf of the CEPU in this matter.

COMMISSIONER: Thank you, Mr Becker.

10 **MR G. COOPER:** If the commission pleases, I appear on behalf of the Construction, Forestry, Mining and Energy Union, Tasmanian Branch, COOPER, G. Appearing with me is **MR MARSHALL REEVES.**

COMMISSIONER: Thanks, Mr Cooper.

15 **MR I. PATERSON:** IAN PATERSON, appearing on behalf of the Australian Municipal, Administrative, Clerical and Services Union in this matter.

COMMISSIONER: Thanks, Mr Paterson.

**MR T. HARDING:** Sir, HARDING, T., appearing on behalf of the AMWU.

20 COMMISSIONER: Thanks, Mr Harding. Well, who's talking?

MS RALLINGS: As it's AMMA's application, we'll probably go first. The application before you today is to vary the Electrolytic Zinc Award to reflect the principles of this commission. There was a new principle 16 issued earlier this year and the award has been rejigged in light of those principles.

30 What I am going to do today is briefly take you through the history of discussions between the parties, then I'll talk about the specifics of the variation, what we actually want from the variation and I'll touch on the tests which must be met before the award variation can be approved.

35 Once we had notice about the award review process and that it was beginning and we had our first conference with the commission scheduled, Australian Mines and Metals and Pasminco Hobart Smelter went through the Electrolytic Zinc Award and reformatted it in light of your new principle 16 and a copy of this was sent to all the unions on 10 June. Comments were asked for when it was sent out. A meeting was held on 22 June and this was just prior to the first report-back to the commission on the 23rd .

Unfortunately, at the meeting on 22 June only the CFMEU was able to attend, so we really didn't get a full input from all the unions. On the 23rd was a report-back before the commission and at the report-back there was actually a number of points discussed between the parties and the only variation to the award that was suggested at this stage was a variation by the AWU and they were suggesting that we vary the award interest and parties bound clause and also the supersession clause, in the light of the model clauses put out by this commission.

After that report-back there was a number of phone calls made by Jury, M., who is appearing with me today. He made the phone calls to the unions party to the award to find out how they felt about the review and whether there was anything that needed to be discussed. At this stage, it appeared that we had a consent position to put before the commission. At the report-back on 18 August, Australian Mines and Metals was ready to tell the commission that we had a consent position. However, at this report-back, there were further issues that were raised by the unions for discussion and these matters were, rolling in outstanding safety net adjustments, rolling in the supplementary payments column of the wage rates into the base wage rate and also there was discussion about the right of entry clause.

At this report-back meeting on the 18th, we scheduled a further meeting to discuss these outstanding issues and that meeting was held on 5 October, this year obviously. There was many outcomes to this meeting and what I'd like to do is table an exhibit. This is a letter that was sent to all the unions outlining the outcomes of this meeting on 5 October.

COMMISSIONER: **EXHIBIT R.1.**

MS RALLINGS: At the meeting all the unions attended except the CFMEU and the meeting was held with Bill Fitzgerald from Australian Mines and Metals, Mike Jury from Pasminco Hobart Smelter and the outcomes are the dot points that on this letter and I'll just take you through them. It was agreed at this meeting that:

*the current wage structure would be maintained (i.e. the supplementary payments continuing to be identified as a separate column).*

*AMMA will make application to vary the Electrolytic Zinc Award to incorporate the \$10 Safety Net Adjustment operative on and from the date of approval by the Tasmanian Industrial Commission.*

At this stage, that draft order has been drafted but not submitted. I actually have a copy here today, which I'll lodge. The next point was:

*in the event of the issue of the notional earnings base for superannuation not being 'sorted out' by 31 December, 1998 then Pasminco Hobart Smelter will agree to further Safety Net Adjustments to the Electrolytic Zinc Award -*

5 And there's the dates for the outstanding \$8 to be rolled in. I'd just like to make a point, commissioner, that I'm handing this up for information purposes only. I'm not seeking to give this any industrial status. Another point was:

10 *AMMA [agreed] to remove the proposed amendment to the "Weekly Employment" -*

We actually put up a proposal that a new clause be inserted, specifying that employment at Pasminco could be on a casual, temporary or full-time basis, or part-time as well, I should say. The last dot point on that page was:

15 *Pasminco Hobart Smelter's Rights of Entry Protocol was seen as workable and hence a change to the Electrolytic Zinc Award was not required. However, it was recognised by all that the CFMEU may have a different perspective on this matter.*

The outcome of the meeting was:

20 *AMMA to make required amendments to the draft Electrolytic Zinc Award and to lodge an application for a consent order with the Tasmanian Industrial Commission.*

25 We also made some agreement about including a Part 10 for waterside workers and attached the application to the draft order for information purposes.

In light of the outcomes of that meeting, an application to include the \$10 safety net adjustment has been drafted and is about to be lodged and the application to vary the Electrolytic Zinc Award, in light of the award review principle - the application was lodged on 15 October.

30 So that's the history of the discussions and how we got here today.

35 What I'd actually like to get onto now is the application itself and what the variations are that we're seeking. The application is not seeking to make any changes of substance. It's not seeking to change any conditions of employment. The application before you today has been restricted to reformatting the award into parts removing any obsolete provisions and we mean by that, any ones that are not relied upon and we also inserted the model clauses as required by the principles.

In this respect, we are aware that the right of entry issue is a concern for the CFMEU. We're not seeking to change this clause because it's a

matter of substance. We believe that any issue about the rights of entry clause should be heard as a separate matter by this commission and it's more appropriate that the CFMEU lodge an application and a separate hearing date be set down to hear that.

5 The current draft award before you, that we've lodged, maintains the status quo as to rights of entry and we believe it's not appropriate to enter into arguments about a clause that we're not seeking to vary. I'd also point out that the current rights of entry clause has been seen as workable by all the unions here today. I suggest to this commission  
10 and also the CFMEU, that a more appropriate course to deal with the rights of entry issue would be for the CFMEU to make application to this commission to vary the rights of entry clause. This has been discussed with the CFMEU a number of times. I'm sure we'll hear a comment from Mr Cooper later on that today.

15 I've got another document I'd like to table. What this does, it shows how the current award has been redrafted in light of the principles and I'll talk you through it.

COMMISSIONER: **EXHIBIT R.2.**

MS RALLINGS: What the document does, it has headings in bold,  
20 and these show the new parts to the award. Underneath, for example, Part 1 Application and Operation of the Award, we have listed the new clauses under that Part 1. If you scroll across the page, you will see that the new clause has a new number and if you scroll further across the page to the right, you will see the old clause number. What that  
25 allows you to do is match up where the new clause came from under the old award. So that's fairly self-explanatory.

If you turn over the page, down the bottom, you will see that, the following clauses have been deleted. As I stated before, part of the review process was to remove obsolete clauses and we see obsolete  
30 clauses as those that aren't relied upon or aren't used and in that sense we got agreement from the unions to delete the following clauses. That was, clause 22 - Reference of Disputes. It was felt that this was adequately covered by the old settlement of disputes and grievances clause.

35 Clause 15 - Deductions, has also been deleted and it has reference to the Employees' Insurance Society, which no longer exists. Some of the allowances in the Electrolytic Zinc Award have been removed. Those are, the Brick Layers - Special Rate; Leadburners - Special Rate and Asbestos Eradication, again, because there is nobody doing this work  
40 and therefore it is an obsolete clause.

Obviously, there's been consequential changes to clause numbers and page numbers as a result of this reformatting and I would just like to point that out. If you note, on the second page, again, of this table of changes, we have a new Part X, called Waterside Workers. Under the

principles an enterprise award, and this is what the Electrolytic Zinc Award is, an enterprise award can depart from the standard formatted approach provided there is merit in the departure.

5 What I'd like to do is talk about why we've got a Part X for waterside  
workers and why we've moved away from the formatting outlined in  
principle 16. Waterside workers at Pasminco have different wages,  
different allowances, different hours of work, overtime conditions, et  
cetera, et cetera, than the rest of Pasminco Hobart Smelter's work  
10 force. For the ease of use of the award by waterside workers, it makes  
sense to put all their conditions into one document. This also makes  
the document easier to read for normal waterside workers as they  
don't have to go through a whole list of exemptions to find out what  
their conditions are.

15 We commend this variation from the standard formatting by the  
insertion of a Part X - Waterside Workers. We commend it as practical  
and meritorious and hope that the variation from the principles is  
approved by the commission.

20 There are a number of model clauses which are specifically referred to  
in the principles, in the letter sent from the president early this year  
and those were, award interest and parties bound and the  
supersession clauses. As outlined in the principle, those have been  
inserted into the award. As outlined in the principles, the classification  
definitions have been removed from the definitions clause and placed  
in the wages and related matters part.

25 Compassionate leave has replaced the term, bereavement leave, in the  
award. Other major changes include a change in the title and various  
changes in the scope and award interest and parties bound clauses.  
This has been done to reflect the name change of the organisation to  
Pasminco Hobart Smelter. Government department names have been  
30 updated and there has been one improvement to make the award  
easier to understand. If you've got the application before you, I'd like  
you to turn to page 18. In Clause 2 - Saturday Work, there's been a  
new paragraph two added. The new paragraph states:

35 *Payment for Saturday work for Day Workers is in accordance  
with Part V, Clause 5 - Overtime.*

This has been done for the ease of the use of the reader. A day worker  
reading through this award, as it currently stands would not know  
where to look automatically to find out what they're paid on Saturday,  
hence we've made that adjustment and that was consented to.

40 That, in substance, are the variations that we've sought in the  
application made before you today, commissioner. Have you got any  
specific questions before I get onto the various tests?

COMMISSIONER: Thanks, for that, Ms Rallings. We'll just go through a couple of points. As I understand it, supersession is said to be sufficient in itself, not supersession and savings?

5 MS RALLINGS: That was my understanding and it looks like that hasn't been inserted into the award. Can I seek leave to amend my application to remove the And Savings from the title of clause 6, Part I?

COMMISSIONER: Yes. What's it say on page 4 - and out from there as well?

10 MS RALLINGS: So, we've amended page 1 and page 4, to remove, And Savings.

COMMISSIONER: Are you seeking to do that?

MS RALLINGS: That's what I'm seeking to do.

15 COMMISSIONER: Any opposition? Carried. There's reference in the president note, Ms Rallings, about general definitions where, I think, all we have here is just, definitions. Is that right? I'm not saying you're wrong, I'm just raising it with you. Those definitions in clause 7 cover everything, do they?

20 MS RALLINGS: They are definitions that apply throughout the body of the award. They are not restricted to just Part I, so in that sense General Definitions may be the more appropriate title.

COMMISSIONER: Just off the cuff, it doesn't seem to worry me too much, although I suppose it would conform with the president's circular, wouldn't it?

25 MS RALLINGS: It certainly would. May I again seek leave to amend my application?

COMMISSIONER: Yes.

MS RALLINGS: To vary page 1 and page 4, to insert, general, prior to definitions in the award.

30 COMMISSIONER: Yes. Thank you. Any opposition? Carried. If we go to page 51, right of entry.

MS RALLINGS: Do you need to turn to the second page of that, or to the start?

35 COMMISSIONER: No, to the second page, page 51. Right of Entry of Union Officials, of the Electrolytic Zinc Award. It should be the Pasmaico Hobart Smelter Award.

MS RALLINGS: Again, I seek leave to vary my application.

COMMISSIONER: Yes. Any opposition?

MR COOPER: Commissioner, we do have some opposition to that because we have got a problem with that whole clause.

5 COMMISSIONER: Yes. All things being equal, you don't object to the name change though, do you?

MR COOPER: We object to the clause, sir.

COMMISSIONER: It's either the clause comes or goes, whichever way it is, that name will be there? If it goes it doesn't matter. If it stays, that'll be the name, will it not, Mr Cooper?

10 MR COOPER: That's correct, commissioner.

COMMISSIONER: Well I accept that amendment. Now, Ms Rallings, this is in truth, an enterprise award, isn't it?

MS RALLINGS: It is truly an enterprise award.

COMMISSIONER: Do you accept that?

15 MS RALLINGS: Yes, I accept that.

COMMISSIONER: I'm asking you, I'm not absolutely certain myself - does that mean that we call it the Pasminco Hobart Smelter Enterprise Award? Would you like to leave that with me?

MS RALLINGS: I would like to leave that with you.

20 COMMISSIONER: Yes, because I couldn't swear to it myself, but the Act allows for it and I think it does show everyone concerned that it is not a standard award, it's a special award.

25 MS RALLINGS: Yes. That has some merit in it. I suppose the current name, Electrolytic Zinc Award could have been Electrolytic Zinc Enterprise Award.

COMMISSIONER: It could have been although under the old system it meant, if someone else wanted to set up an electrolytic zinc process they would have been covered by the award.

MS RALLINGS: Yes.

30 COMMISSIONER: Any objection to that being called an enterprise award?

MR COOPER: It's very prudent, commissioner.

COMMISSIONER: Like the Rosebery one.

MR BECKER: We'll talk about this later.

COMMISSIONER: Yes.

5 MS RALLINGS: Well, hopefully my submissions here today haven't altered the status of the award. What I'm simply doing is confirming my understanding of it being an enterprise award.

10 COMMISSIONER: Yes, me too. I don't think it has, Ms Rallings. Now, we have the two types of award and if we take another one that most parties here would be aware of, the Railton Cement matter, that is definitely an enterprise award and a lot of provisions in it are peculiar to that operation. It would be the same here.

All right, I think I've covered everything I wanted to raise.

MS RALLINGS: May I -

15 COMMISSIONER: Just one other thing, if you excuse me interrupting, R.2 - I appreciate that being put forward. I was going to raise it and I just make the point that it seems to me to be adequate for what's required but if I need to amend it one way or the other I'll contact you and the other parties. It will certainly still reflect the changes that are involved. All right?

MS RALLINGS: Thank you, commissioner.

20 COMMISSIONER: Now did you have anything else, Ms Rallings?

MS RALLINGS: I just wanted to briefly say that the application before you today meets all the legislative tests and wage fixing principles and we commend it for your approval with an operative date from 31 October 1998. If the commission pleases.

25 COMMISSIONER: Yes, is that the first full pay period or the date?

MS RALLINGS: Well there's actually no pay variation to this.

COMMISSIONER: So it will be the date.

MS RALLINGS: Yes. If the commission pleases.

COMMISSIONER: Thanks very much, Ms Rallings. Now anyone else?

30 MR COOPER: Commissioner, if I may with respect to the application, we're disappointed that it's not here before you as a consent matter and it would be incorrect for you to think that it was a consent matter because we do have a problem with the right of entry clause in particular and we do have some problem with some of the reporting  
35 that was provided to you. I don't say that Ms Rallings deliberately set out to mislead but there is some error in some of those things that have been said.

5 But notwithstanding that what we would like to say to you is that we seek the involvement of the commission to amend the right of entry clause which is Part IX - Award Compliance and Union Related Matters, and the company is fully aware of this as is AMMA as we have spoken to them at length about this provision and we seek to do that because we believe the suggestion we will make is consistent wholly with the wage fixing principles and in accordance with the Act.

10 Now the provision that we seek to put in is a standard clause that forms part of many awards of this commission and I'd like to provide the commission with a copy of that.

COMMISSIONER: We'll call that **EXHIBIT C.1**.

15 MR COOPER: Now this clause, commissioner, is the one that appears - and it's the one that you've already - you've picked up on. It appears at page 50 of the draft document that has been provided and the one that has been submitted to the commission and we'd seek to have that clause removed and that one inserted and we would do that as part of the award review process and I'll provide you reasons for that.

20 The first one is, commissioner, that as a result of the award review process the commission did circulate correspondence. I did have copies - I don't know if everyone has got copies of that correspondence - and I probably won't need to tender that as an exhibit then. Now that correspondence was from the president and it was dated 5 February 1998 - and I do have spare copies if people need it. And it sets out what happened in terms of the award review process. And the award review process obviously came about as a result of the introduction to the wage fixing principles of Clause 16 - Award Review Process. And clause 16(1) of the principles clearly talks about what's going to happen in terms of the award reviews. But particularly in this correspondence the president points out how it was agreed awards would be set out and how they would be divided, and at page three of his correspondence there is a dot point 3:

35 *That it is the intention of the award review process to remove obsolete, inaccurate or invalid provisions which would be pursued particularly union preference clauses.*

40 And obviously the reason why that was set out was because the Act was amended in 1993 to remove the provision of preference clauses in awards but up until this wage fixing decision that hadn't been pursued. So it was obviously clear in the minds of the parties during the wage fixing principle hearing and as a result of the conferences that followed that awards would be varied and they would be reviewed and they would be tidied up.

And I just particularly impress upon you, commissioner, that dot point 3 which clearly talks about the removal of obsolete, inaccurate or invalid provisions.

5 The other things though that are important is that the award itself must be made consistent with the Act. And in terms of the Act, I'd like to provide a copy to the commission of that section purely for the purpose of having it on the record here today as part of these proceedings.

COMMISSIONER: **EXHIBIT C.2.**

10 MR COOPER: I don't intend to labour that provision of the Act, commissioner, other than to say that it does provide clearly what the rights of officers of organisations of employees are - and they're not the names we'd use but they are the names that are provided for in the Act - and that clause goes on and deals with right of entry and it also  
15 deals with how you approach the issue of checking wages and records and the like.

Now clearly what we say in terms of this provision, that when you do an award review you must do it consistent within the first instance of the Act and we say that is the appropriate benchmark that must be  
20 used. The only other reference to the Act is a reference to the regulations and I've provided a copy of regulation 26 that accompanies that provision.

COMMISSIONER: **EXHIBIT C.3.**

25 MR COOPER: Now that regulation just simply states that an officer of an organisation must identify themselves. So we have two pieces of legislation that are what we must operate in and part of the award review process was designed to make awards consistent with that legislation.

Now in terms of the award review process, we do have wage fixing  
30 principles and clause 16 of those wage fixing principles which I have organised a copy of, also talks about the removal of obsolete or amendment of inaccurate award provisions. So I provide a copy of that for the record as part of these proceedings.

COMMISSIONER: **EXHIBIT C.4.**

35 MR COOPER: And clause 16 of the wage fixing principles - 16(1)(iii) - talks about the *removal of obsolete or amendment of inaccurate award provisions*.

Now what we say, commissioner, given the information that I've provided to you, is that the clause that is attached to the application -  
40 the clause that we're arguing about is not consistent with the Act nor is it consistent with the wage fixing principles, nor is it then allowable

for this commission to proceed to vary the award in the manner sought by Australian Mines and Metals because it would be inappropriate and would not be in the public interest to have the clauses contained in awards that first of all don't line up with the wage fixing principles and secondly don't line up with the relevant legislation which is the principle legislation and that is the *Tasmanian Industrial Relations Act*.

And I take the commission to those parts of the clauses that aren't, in my view, consistent and that is that the clause is more onerous in the manner its set out than is the Act in that in the very first paragraph it talks about union officials on legitimate union business entering a premises during midday whereas the Act clearly sets out that *an officer of an organisation, subject to any conditions prescribed in the regulations, may* - and the regulation simply says that you must produce identification - during working hours enter any premises.

So first up, the Act at 77(1)(a) provides that you can enter premises during working hours where the members of that organisation are employed for the purposes of talking with or interviewing those employees.

So this clause straightaway puts an onus greater than that is required by the Act by saying it must be on legitimate union business - the Act doesn't talk about that - and it talks about a midday meal or crib time for the employees on each day of the week and doesn't allow you to visit in the first instance on Saturdays and Sundays subject to the following conditions: 1) is consistent with the regulations. 2) says that you must interview them at a recognised place - that doesn't talk about that in the Act - so that's inconsistent. 3) Not more than one representative of each of more than three unions be present at any one time - that's inconsistent with the Act. 4) That a representative may visit the premises on two occasions in any week - that's inconsistent with the Act. 5) That the employer alleges that a representative is unduly interfering and so on - that again isn't mentioned in the Act. And then it goes on to a proviso that by mutual agreement you can make other arrangements. Again that is a right that we have under the Act and we don't need mutual agreement to have that right restated in an award.

It then goes over the page and talks about that the holder must have a certificate. The only requirement in the Act for a certificate is one that must be lodged for the purposes of investigating any alleged breaches of the award and it doesn't say then that that certificate must be shown - it talks about what happens.

Now as an official of the CFMEU I filled out one of those forms and made the appropriate declaration. That is on file and available but it is not required. And then it says here in the amendment that you mentioned that we didn't agree about the award and sets out how that should be done.

Now we say, commissioner, that it's not appropriate to continue to pursue clauses like this. If it was a preference clause it simply would be deleted. It is a right of entry clause and we say that it is appropriate and incumbent upon the commission to have in awards appropriate clauses. And exhibit C.1 represents a very standard clause that has  
5 been developed by the unions and the commission and the TCCI in accordance with making awards relevant with the legislation and it appears in a number of awards. When I was with a former employer we inserted that clause at numerous times.

10 It simply says, right of entry to a duly accredited representative of a union party to this award shall be in accordance with the provisions of section 77 of the Act. Now I think that's very straightforward and it sets it out.

Now in terms of those submissions, commissioner, it's disappointing that we can't be here on a consent matter to deal with that because we have raised that and we have raised it from day one. So in terms of the information provided, we provided that information early in the piece because the commission would remember the CFMEU actually had a dispute with Pasminco over this very issue and it was agreed by the parties that that could be dealt with during the award review process and that's where we left it. That's why we haven't made separate applications because we thought it's appropriate and sensible to have an application like this dealt with as part of a review. If you're going to review an award you do it in accordance with the guidelines that have  
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25 been set down.

So to say that at a report back there were no issues discussed other than the AWU ones we would disagree with because we did attend the meeting on site and there was only Mr Jury and myself that turned up to that meeting and we talked about a whole range of things and what was going to happen next and another meeting was to be convened.  
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When the report-back on further issues was raised, we do agree that those issues that were outlined were outlined and mainly they were raised by the CFMEU - that's the meeting on 18 August and we did talk about the right of entry and supplementary payments.

35 Now we don't necessarily agree with that supplementary payments clause or safety net adjustment clause but we believe that's something we can deal with because it in itself isn't outside the wage fixing principles nor is it an offence to the Act. But the right of entry clause clearly in our view remains inconsistent with both the wage fixing  
40 principles and the Act.

So to say - and Ms Rallings said there was a consent matter on all issues when she was reading from the correspondence that was information only and had no industrial status; we say clearly that is not the case and that was known by the company and it was known by  
45 Australian Mines and Metals. And they even acknowledge in their

correspondence that attended that draft that was sent to the unions that was going to be lodged that the CFMEU had a problem with right of entry. So they knew that but yet they say in the letter it was a consent matter and clearly that is misleading.

5     Obsolete was a view that was given by the company, was not relied on. Obsolete is something that the commission is aware of. Obsolete clauses are those that no longer comply with the Act and that's why you've seen preference clauses disappear from a number of state awards because the Act does not allow for preference to be an  
10    industrial matter nor does it allow for, say, pay roll deductions of union dues. It's not an industrial matter so therefore it can't continue to appear in awards.

Now you can't have that principle applying to remove obsolete provisions and yet overlook the other wage fixing principles; it says  
15    you must have accurate provisions contained in awards. And it's our submission that you cannot have a provision in an award that is inconsistent with the Act nor is it appropriate when it's inconsistent with the wage fixing principles.

In terms of the other provisions in terms of the waterside workers, we  
20    support that provision because we believe it is the appropriate way to go. Waterside workers are a discrete group and they do require separate conditions and it is the practical solution to that. So we would support submissions in respect to that provision.

In terms of this issue with the supersessions and savings, we've  
25    supported that; the general definitions - we support that. And we say that those things can be done because they are consistent with the guidelines that were set out by the commission and the commission has quite rightly highlighted those in respect to the draft that's before the commission to be varied.

30    I say then it is appropriate that the commission must also highlight the fact that a right of entry clause must also be consistent with the guidelines that were set out and consistent with the Act. To do otherwise is to apply arbitrarily a principle that is quite sound.

The legislative test - the award does not, in our submission, meet the  
35    legislative test because it provides a provision that is outside the Act and the award must be consistent with the Act - that is the idea of the award review process.

In terms of the wage fixing principles, it was submitted that it complies  
40    with the wage fixing principles. It is our submission that it does not because principle 16 clearly says you must remove those obsolete provisions or inaccurate provisions and we say that the right of entry clause in that regard is because it places a greater onus on the unions than does the Act so therefore the award can't continue to present a position as inconsistent with those two tests.

Commissioner, we say that this is a simple matter and one that is very straightforward. We say also it is not appropriate to suggest that we must - our arguments must be dismissed and subject to a further application. They already have been subject to an application where we  
5 tried to sort it out. We have agreed protocols on site that we are observing and those protocols are consistent with the Act and they do work. They are not consistent with the provision that's in the award and therefore we think it's inappropriate and not in the public interest that we now have a provision in the award that is outside what we as a  
10 union have agreed with the company and what is contained in the Act and what is contained in the wage fixing principles.

So I don't think I have much more to say other than those comments, commissioner. It is disappointing though to be arguing that and I would suggest that in accordance with the Act, the commissioner has  
15 the capacity to deal with this matter on light of the submissions that I've made. Under section 21(1), the commission may regulate its own procedure and under section 21(2)(l), the commission has the capacity to *correct, amend or waive any error, defect or irregularity.*

Now what we suggest to you is that this provision is one that is an  
20 error in that it is a provision that provides more onerous rights or more onerous obligations on a union official than is required under the Act and therefore it's inappropriate to do that and I suggest the parties simply have the Act as a guide and continue to develop as they have done in the past - appropriate protocols - to allow for the orderly  
25 access on site of union officials from time to time. Those are my submissions. If the commission pleases.

COMMISSIONER: Thanks, Mr Cooper. Mr Becker.

MR BECKER: Thanks, commissioner. I support the submission of Mr Cooper. It is unfortunate that we're here at this point in time without  
30 being able to reach an agreement on this particular clause. I support the proposed variations but as was consistent with our original hearing on this matter I suspect it was more of an informal meeting where we canvassed with your good self about a number of awards about what we could do and what we couldn't do and basically I think  
35 what came out of that was so long as it meets the principles and you reach an agreement then by all means modernise to the very best you can and that's it.

So really that's what basically was set out to be done. From the CEPU's point of view there is no problem at this stage with right of  
40 entry for my organisation. But like lots of other things things can change and there is a situation here where sometime in the future something other - or some other people may be running the show so I suspect that we ought to try and fix this up now so as there's no arguments into the future. And I believe that as consistent with Mr  
45 Cooper that the Act provides for that to happen under this award review. If the commission pleases.

COMMISSIONER: Thanks, Mr Becker. Mr Paterson.

MR PATERSON: Apart from the matter of this right of entry, my union will consent to the variation of the award. I would only say on this matter that having been involved in both the wage fixing  
5 determinations before the full bench and the conference before the president, I'd support the arguments that the terms that I find various expressions of obsolete in the wage fixing principles invalid in the president's decision and looking at the Act those matters that go to the capacity of the commission effectively to vary on its own initiative  
10 errors and defects, that it would appear that the logic that runs from the Act through the principles to the president's letter would say that the commission cannot make an award that has a provision that is inconsistent with the Act and that the standard clause as proposed by Mr Cooper ought be the one included in the Act when it is consolidated  
15 in this form as a result of these proceedings. If the commission pleases.

COMMISSIONER: Thanks, Mr Paterson.

MR HARDING: Thanks, Mr Commissioner. I don't want to get into the technicalities of the arguments around this but I do want to get  
20 into one clause that my comrades have oversighted I would imagine - the duties to obey commands. The last time I obeyed commands was when I was in the army and I didn't do that too well, either. I would suggest to the parties that maybe that word should be changed to obey orders or directions. Command is today a word of the leftovers over the  
25 army and churches and the prisoners and I think it should be well and truly wiped out of something that's going into the twenty first century so it's remiss of me not to have attended any of these meetings and pick my fellow trade union officials up on this and I must chastise them at this stage. To let words like that go through is an utter  
30 disgrace and should not be settled upon, and I'd request the employers would accept a change to that word, Mr Commissioner.

COMMISSIONER: Yes, Mr Thanks, Mr Harding. Now Ms Rallings.

MS RALLINGS: If the commission pleases, I'll start on the last matter first in terms of a new title for Part I, Clause 3 - Duty To Obey  
35 Commands. I'm suggesting amending my application to read duty to obey lawful directions or instructions. Have we got any comments from other parties here today?

MR PATERSON: Duty to obey -

MR HARDING: Instructions.

40 MS RAWLINGS: Duty to obey lawful instructions.

COMMISSIONER: Are you happy with that Ms Rallings?

MS RALLINGS: I'm happy with that seeing how it's my suggestion.

COMMISSIONER: All right. Well is there any other objection to that? All right, we'll amend it accordingly, thank you.

5 MS RALLINGS: From my understanding of where we are today, we've got a consent position on a variation to the award except for the rights of entry clause. Hopefully I'm correct in my understanding then.

COMMISSIONER: Well, that's my understanding too, yes.

10 MS RALLINGS: We have, I suppose, a number of issues that have been touched on today and unfortunately I'm ill-prepared for this argument and I was hoping that you would heed my suggestion and suggest to the CFMEU that this be dealt with by a separate application. Am I to take it that that's not to occur?

15 COMMISSIONER: No, I accept that the matter is one to be decided in relation to is it obsolete or is it consistent with the Act. Certainly, I think it's appropriate for me to look at that now. If you're not ready I would suggest, if it's not - well, I'd suggest that if you're not ready that we either adjourn it which is not the best option, or that you put it in writing and the other parties be permitted to do the same if they want to object to what you've written.

20 MS RALLINGS: I just seek a brief adjournment to speak to my client?

COMMISSIONER: Yes, we'll go off the record for a minute, please.

**OFF RECORD 11.20am**

**HEARING RESUMED 11.25am**

25 COMMISSIONER: We'll resume thank you, gentlemen. Yes, Ms Rallings.

30 MS RALLINGS: If the commission pleases, thank you for that brief adjournment. A couple of comments I'd like to make on transcript and then I'll seek the opportunity to go away and make some written submissions to be forwarded to the commission and to the other parties. I think that's the only way I'm going to have adequate time to prepare. I'd also like if possible a copy of this transcript prior to the date of providing you with written responses.

35 I suppose there's a couple of comments we've had from the parties here today that what's in the award is an error or its an oversight. It was actually part of an enterprise bargaining process when the first Electrolytic Zinc Enterprise Award was created, so it has some status as that and I think the comments that it was in error are quite misleading.

5 The issue about whether the provision of right of entry is inconsistent with the Act is a highly legalistic issue. In terms of legislative construction, the intention and meaning of that provision and a close legal analysis of how the award varies or moves away from that legal provision, I suggest that it would acquire more input and foresight than what I'm able to do on my feet here today, and thank you again for that opportunity to put a written submission.

10 I suppose there's been a couple of comments particularly from the CEPU here today that there's a functional protocol on site about rights of entry and that's not causing any problems at present. So I'm just seeking a bit of leave in terms of time before which the written submission would have to be made by this - before this commission.

15 I suppose one point that I keep coming back to personally in relation to the right of entry clause was there's been a couple of statements that the commission cannot register an award that is inconsistent with the Act. The first time the Electrolytic Zinc Enterprise Award was made, that question must have been foremost in the mind of the commissioner at the time, and the commissioner who approved the Electrolytic Zinc Award with that right of entry clause in made the  
20 decision that it was consistent with the Act. So that's something I think that we need to bear in mind.

I'd also like to make a couple of comments about Mr Cooper's application or submission here today. He suggested that I had misled the commission; I'd just like to touch on that briefly.

25 The first point was in relation to a meeting held on 22 June which stated that only the CFMEU was able to attend and after that meeting only the AWU made any - or expressed any interest in varying the document we'd sent out. If that's not correct, I do apologise to the CFMEU. I'm unaware of any issue that they raised with Pasminco  
30 Hobart Smelter about the proposed award and if that's incorrect I do apologise.

35 In relation to the letter that was sent out to all the unions - that was exhibit R.1. Quite clearly the intention there was not to mislead. We basically said quite clearly that we were aware the CFMEU had an issue about rights of entry. There was no intention there to mislead the commission by putting that as an exhibit.

If the commission pleases, I'd just like to suggest a timetable for written submissions.

40 COMMISSIONER: Yes, that's quite in order, Ms Rallings. Of course the transcript might give you quite a bit of leeway anyway. But anyway, tell me what you think.

MS RALLINGS: I was suggesting two weeks after the receipt of the transcript.

COMMISSIONER: Yes, that sounds fair enough to me. Is there any objection to that?

MR COOPER: No objections, commissioner.

MR BECKER: No objection.

5 COMMISSIONER: All right, well I'll grant that. Is there anything else?

MS RALLINGS: No, there's nothing else I'd like to touch on, but thank you for that opportunity. If the commission pleases.

10 COMMISSIONER: Right. I think it's only fair in the circumstances, Ms Rallings.

Now I'd like to congratulate the parties as far as I can in reaching the settlement that has been reached. I think that it covered a wide area and in the spirit of the original - the principles and the request from the president.

15 I note there that the parental leave clause is there. Is that - it's not the ultimate upgraded one so as I understand it we'll proceed with what's there now and that will be sought to be amended in due course. Is that correct?

MS RALLINGS: That's correct, commissioner.

20 COMMISSIONER: And I notice that carer's leave is not there, what's the story with that?

25 MS RALLINGS: There's been no application at this stage to insert carer's leave into the award but it is part of the enterprise agreement which sits over and above this award. So that condition is actually granted on site.

COMMISSIONER: Yes. The commission is ultimately bound, I believe, to put that in, so again I just raise it and consult with the president and if it ought to go in it will go in. I trust there will be no appeals perhaps.

30 Yes. And then the final matter outstanding which is obviously the bone of contention, the right of entry of union officials; I think it is a matter that ought to be properly considered by the commission and that is why we're proceeding the way we are and I'll await your submission on the matter Ms Rallings plus any further written submissions from the other parties. There's nothing else?  
35

MR PATERSON: If the commission pleases, that the two week time frame, is that the time frame for the association to get its written submission or are we not expecting the ability to effectively reply to their submission and therefore have some time to apply?

COMMISSIONER: Yes.

MR PATERSON: I'm just a bit unclear on that. I mean our -  
individually or collectively our responses presumably it shouldn't be to  
the same time frame and we should have the opportunity to put  
5 something in writing that is in response to any submissions made.

COMMISSIONER: Yes, I take your point, Mr Paterson. After you  
receive the copy of the association's submission on the matter of right  
of entry, you will be given time to respond - I would say two weeks  
from that time. However, if they are all received within that time we'll  
10 proceed, or if it's someone delaying we'll contact them. We'll certainly  
follow it up and complete it as soon as we can. But that's a good point  
and that's two weeks from the date of receiving it.

Nothing else? Thank you all, the matter is closed.

**HEARING ADJOURNED 11.30am**