

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29(1) application for hearing of an industrial dispute

**Communications, Electrical, Electronic, Energy, Information, Postal,
Plumbing and Allied Services Union of Australia and Ors
(T14268 of 2014)**

and

**Minister administering the State Service Act 2000/ Department of State
Growth**

PRESIDENT T J ABEY

HOBART, 3 SEPTEMBER 2015

**Industrial dispute – alleged breach of tasmanian state service award part
XI clause 1 consultation and change – outsourcing - meaning of service
program or function – found brooker highway project is not outsourcing–
proposed changes in work arrangements and practices - found consultative
process not followed – order issued**

DECISION

[1] On 12 November 2014 the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and others named in the Schedule attached to the application (CEPU)(the applicant) applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA)/Department of State Growth) (DSG)(the respondent).

[2] This application has been the subject of a number of conferences and hearings. On 4 August 2015 the applicant sought to have the matter re-listed in respect of the current dispute.

[3] In this matter the applicant alleges that the respondent has failed to comply with clause 1 Consultation and Change, Part XI of the Tasmanian State Service Award (the Award). The matter in dispute relates to a project known as the Brooker Highway Project and in particular the decision taken by the respondent not to undertake the work associated with traffic light installation and Intelligent Transport Systems (ITS) internally through the Transport Systems Group (TSG). The applicant seeks orders in unspecified terms but aimed at ensuring compliance with the award on the part of the respondent.

[4] The relevant clause reads as follows:

"1. CONSULTATION AND CHANGE

- (a) *Where an Agency proposes changes in work arrangements and practices that are likely to impact employees, the Agency is to consult with the employees who may be affected by the proposed changes and the relevant union/s prior to a final decision being made to implement that change.*
- (b) *Consultation is undertaken because all parties acknowledge that by discussing proposed changes with the employees who may be affected by the change and giving consideration to their views and feedback, a better informed decision occurs.*

Consultation is not joint decision making or a barrier to the prerogative of management to make decisions; nor is it simply advice on what is about to happen. It is a process that informs affected employees about proposed change and provides them with a genuine opportunity to influence the outcome before a final decision is made.

- (c) *While employees should be consulted on all change that is likely to affect them the extent of any consultation process should be based on the materiality or impact of the change and the number of employees likely to be impacted by the change.*

Employees and the relevant unions should be provided with access to relevant information about a change proposal, be given a reasonable opportunity to provide feedback and be provided with a response to any reasonable alternatives put forward.

- (d) *Consultation should involve four clear stages:*
 - (i) *Formulation of ideas or proposals;*
 - (ii) *Consultation on a proposal;*
 - (iii) *Considering responses and providing feedback; and*
 - (iv) *Making a final decision and implementing it.*
- (e) *Agencies are to maintain a register of changes subject to this process. The employer will maintain a register of major changes subject to this process. Employees and relevant unions may request access to these registers.*
- (f) *Subject to sub-clauses (g) & (h), in the event that outsourcing of a service or services supplied by an Agency is under consideration by that Agency, consultation is to occur in line with this clause. This will include identification of the actual service, program and functions to be outsourced, the services, programs and functions that are to remain, reasons and impact on employees.*
- (g) *Where the outsourcing of an in-house service is being considered by an Agency and that service will continue to be provided within the State Service, but by an external organisation, information will be provided on the following matters as a minimum:*

- (i) *The current cost of the service;*

- (ii) Impact on current employment arrangements, including salaries, job security and reasons for outsourcing;*
 - (iii) Future costs, where available, including contract management costs on an outsourced service, program or function;*
 - (iv) Description of the service, program or functions to be outsourced and those that are to remain;*
 - (v) Service quality requirements;*
 - (vi) Risk assessment should the outsourced provider cease to continue the service*
- (h) Prior to the implementation of a decision to tender Agencies will provide the opportunity for the employees and /or their union to submit a case to meet the requirements for undertaking the service, program or function."*

Nature of the Project

[5] The Brooker Highway Project is a federally funded project involving the realignment of the Goodwood, Elwick and Howard Road junctions. The total cost of the project is likely to be in the region of \$30m over an 18 month construction period. Much of the project involves civil construction work which, as a matter of course, is to be undertaken by a private sector contractor after a competitive tender process.

[6] The traffic signals and ITS components of the project are estimated to cost approximately \$2.2m. Of this, work to the value of approximately \$1.1m will be undertaken by TSG in either a pre or post construction phase or in circumstances whereby there will be no interface with the head contractor. The balance of approximately \$1.1m is, on the decision of the respondent, to be undertaken by the head contractor. It is this component of the works which is the subject of this dispute.¹

Evidence

[7] Sworn evidence was taken from the following witnesses:

- Shaun Caris, Senior Technical Officer, employed in the TSG since 1995 and in a supervisory role since 2006
- Simon Darcey, Senior Electrical Technician, employed in TSG since 2001
- Shane Gregory, General Manager, State Roads.

[8] From the evidence, the following picture emerges.

[9] The TSG has a state-wide technical staff of eleven, seven of which are located in the Hobart region.

¹ Exhibit R5

[10] It is undisputed that the core business of TSG is the management and maintenance of traffic signals and ITS. In addition the TSG undertakes additional work of an external nature which involves installation of traffic lights and systems. The major client in this area is Local Government. The applicant contends that this work is also core business for the TSG. Mr Caris said:²

"Mr Caris, is it accurate to say that the Brooker Highway project work is external work?.....It is. If we use the definition of external to mean externally funded, that is funded by some source outside of Transport Systems Group, then yes it is.

Is it related to the core functions of the Traffic Signals Group?.....I believe so, yes, in that the core functions of the group have been, thus far, at least, to deliver essentially everything associated with traffic signals and ITS in Tasmania apart from major civil works, therefore the work would seem to be, in my opinion, it is our core function, yes."

[11] According to Mr Gregory, traffic light installation is not a major issue for State Roads. He said:³

"Is installation of new traffic signals a major part of the business?.....Not on the State road network. Most of the traffic signals in Tasmania are in fact not on the State road network, there are only a handful of State roads in southern Tasmania that have traffic signals on them and it's very unusual in fact that we would be installing new sets of traffic signals as part of major construction works. It's been done to my knowledge only a couple of times, only two times in the last ten or fifteen years."

[12] Mr Gregory acknowledged that Local Government is a significant external client.

[13] Mr Caris could only identify two external projects since 1995 which had been undertaken by other than TSG staff, and in each case, it was a component only of the work. Mr Gregory identified certain other work in this category. Notwithstanding, I am satisfied that in a historical sense, most of the external installation work has been undertaken by TSG.

[14] The evidence of Mr Caris is that the Brooker Highway Project is the equivalent of 31% of the known future works program for TSG. This was not contested by the respondent.

[15] Since January 2015 TSG staff have been involved in planning and design work for the project. Both Mr Caris and Mr Darcey state that there was an expectation that the work would be undertaken by the TSG.

[16] The evidence of Mr Caris is that on 27 July 2015 he was advised by the consulting engineering firm, that on the instructions of State Roads management, the work would be tendered as part of the major civil contract. That is, the work in question would be undertaken externally from TSG.

² Transcript p14

³ Transcript p30

[17] The events immediately following this advice are not entirely clear. It would seem that TSG staff were advised that the major difficulty with performing the work internally was the absence of a risk assessment. To this end a risk assessment was prepared and presented on 6 August 2015. A more comprehensive proposal was prepared by TSG staff and presented on 14 August 2015. This however was after the management imposed a deadline of 7 August 2015. For this and/or other unspecified reasons, the proposal was rejected.

[18] Both Mr Caris and Mr Darcey said the loss of the work would likely result in fewer staff and/or resources required within the TSG. Mr Gregory's evidence is that there will be no adverse impact on staff and no jobs are at risk.

[19] It seems likely that should the work be performed by TSG, some additional staff resources will be required, either directly on the project, or in backfilling arrangements to facilitate the release of key technical staff to the project.

[20] The evidence of Mr Gregory is that installation work in the nature of this project is not core business for TSG. Rather, the primary role of TSG is the management and maintenance of existing infrastructure.

[21] Mr Gregory said there are two key reasons why this work is to be a component of the larger civil works contract, namely:

- Commonwealth government funding requirements
- Performing the work internally would expose the agency to unnecessary and avoidable risk.

[22] Mr Gregory said the project had been discussed with TSG staff on a number of occasions. However his evidence did not specifically address the relationship between these discussions and the requirements of the Consultation and Change clause. Indeed it is the respondent's submission that the clause does not apply because there is no material impact on employees.⁴

Findings

[23] It is not for the Commission to determine whether or not the Agency was justified in choosing to have this work undertaken externally. The only consideration for the Commission is to determine whether the Consultation and Change clause has been complied with, and if not, what is the appropriate remedy? In approaching this question, I reiterate that this clause is not a creation of the Commission but rather a consent variation to the Award following negotiations between the parties. Whilst this distinction is not relevant so far as the law is concerned, it does add an extra dimension in that parties have a reasonable expectation that agreements freely entered into should be honoured.

[24] Sub clauses (f), (g) and (h) relate to "*outsourcing of a service*" and, as a matter of award construction, stand alone.

[25] In this context the first question to be determined is whether an "*in house service*" is to continue to be provided within the State Service, but by an external organisation.

⁴ Transcript p 75 line 15

[26] The nature of the language in subsections (i) to (vi) of sub clause (g) suggests that the 'service' must be an existing service, and by implication, a service which has a continuing life.

[27] From the evidence I am satisfied that the employees within TSG had a reasonable expectation that this work would be performed 'in house'. However this expectation falls short of a guarantee, in that the evidence indicates that, in limited circumstances in the past, similar projects have been contracted out.

[28] More relevantly, can the demonstrated capacity of the TSG to perform external work be construed as a 'service,' within the meaning of the clause?

[29] I think not. The Brooker Highway work is by definition a 'project' rather than a service and is futuristic rather than existing. Subsection (i) refers to "*the current cost of the service*" which clearly cannot be answered.

[30] Sub section (iv) and sub clause (h) refers to a "*service, program or function,*" none of which comfortably fit with the Brooker Highway Project.

[31] I conclude that sub clauses (f), (g) and (h) do not have application to the circumstances before the Commission. That leaves for consideration whether sub clauses (a) to (e) apply.

[32] The evidence of Mr Caris and Mr Darcey is that failure to undertake the work 'in house' would, in all likelihood, have a negative impact on the resourcing and/or employment levels within TSG. Given the unchallenged evidence that this project represents 31% of the known future work program, coupled with decline in employment levels over recent times, this is not an unreasonable position to hold.

[33] Further, I am satisfied, given past practice; the employees within TSG had a reasonable expectation that this work would have been performed in house.

[34] During the hearing Mr Gregory gave an undertaking that there would be no negative impact on employment levels. However this undertaking was given after the decision to put the entire project to tender had been made. Further, the undertaking was given in the context of a Commission hearing, rather than to the employees affected, as envisaged by the clause.

[35] I am satisfied on the evidence that the proposal to have the Brooker Highway Project tendered externally does amount to a situation whereby the "*Agency proposes changes in work arrangements and practices that are likely to impact employees.*" This in itself invokes the consultative process which clearly refers to a process which is to occur prior to making a final decision and implementing it.

[36] I acknowledge that there is a debate as to the extent of any impact on employees. However this is contemplated in sub clause (c) which refers to the "*materiality or impact of the change.*"

[37] I have formed the view that the consultative procedure as prescribed in the relevant clause has not been observed and to that extent I find that the employer is in breach of the Award requirements. Even at this relatively late stage the breach should be remedied and accordingly I order as follows:

Order

Pursuant to section 31 of the Act, I hereby order that, in relation to the project known as the Brooker Highway Project, the employer implement as soon as possible a consultative process which complies with sub clauses (a) to (e) of Clause 1 Consultation and Change Part XI of the Tasmanian State Service Award.

The applicant is to advise within 21 days the status of this file. In the event that the applicant fails to advise in accordance with this direction, the file will be closed.


THE STAMP OF THE TASMANIAN INDUSTRIAL COMMISSION
Tim Abeysinghe
PRESIDENT

Appearances:

Mr W Ash with Mr S Caris and Mr S Darcey for the applicant
Mr K Grey with Ms Jacqui Cooke and Ms Mel Parker for the respondent

Date and place of hearing:

2015
19 August
28 August
Hobart