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TRANSCRIPT OF PROCEEDINGS

O/N 2728

TASMANIAN INDUSTRIAL COMMISSION

PRESIDENT P.L. LEARY
DEPUTY PRESIDENT P.C. SHELLEY
COMMISSIONER J.P. McALPINE

T No 12395 of 2005

ALL PRIVATE SECTOR AWARDS

Application pursuant to the provisions of section 23 of the Industrial Relations Act 1984 by the Trades and Labor Council to vary all private sector awards re: (i) increase all award rates and existing allowances relating to work or conditions, in private sector awards of the Tasmanian Industrial Commission, from a common operative date of, on and from the beginning of the first full pay period to commence on or after 1 August 2006 by an amount equivalent to 4 per cent; (ii) to increase the minimum wage that is payable to adults without regard to the work performed to $503.80 per week; (iii) obtain a special increase of rates of travelling allowances in all relevant awards, and (iv) to the extent necessary to effect these changes, amend the Principles of the Commission

HOBART

10.00 AM, WEDNESDAY, 29 MARCH 2006

HEARING COMMENCED **[10.05am]**

PN1

MR P. TULLGREN: I appear on behalf of the Tasmanian Trades and Labor Council, the applicant in these proceedings and I also enter an appearance on behalf of the Liquor, Hospitality and Miscellaneous Union. I appear with my friend MR S. COCKER.

PN2

MR T. KLEYN: I appear on behalf of the Health Services Union of Australia, Tasmanian Number 1 Branch.

PN3

MR M. WATSON: I appear on behalf of the Tasmanian Chamber of Commerce and Industry and Master Builders Association, The Tasmanian Sawmillers Industrial Association, the Australian Retailers Association (Tasmanian Branch), the Metal Industry Association of Tasmania. And with me is MR P. MAZENGARB.

PN4

MR W. FITZGERALD: I appear on behalf of the Australian Mines and Metals Association Incorporated.

PN5

MR K. RICE: I appear on behalf of the Tasmanian Farmers and Graziers Employers Association.

PN6

MR P. BAKER: In accordance with section 27 of the Act, the Minister intervenes in these proceedings and I do so on their behalf.

PN7

MR S. AMENDOLA: I seek leave to appear as agent pursuant to section 28(5)(b) of the Act on behalf of the Commonwealth Minister for Employment and Workplace Relations, who seeks to intervene pursuant to section 27(3) of that Act.

PN8

THE PRESIDENT: Any objection to Mr Amendola - - -

PN9

MR TULLGREN: Yes, we object to the application to intervene.

PN10

THE PRESIDENT: Would you like to address us - or Mr Amendola, perhaps can - before you do that have you - you have provided us with some written submissions, has that been provided to all of the parties?

PN11

MR AMENDOLA: I am not sure about all of the parties, your Honour. They have been provided to the Trades and Labor Council, to the TCCI. We are aware that the Minister, that is the State Minister, he indicated to us that he has a copy

of the submission. I am not sure whether they are circulated more widely than that and they were, in any event, filed with the Commission.

PN12

THE PRESIDENT: All right. Now, it was just in case I would give Mr Tullgren time to have a look at it, but I take it that he has got a copy. So if you want to address the intervention matter, thank you.

PN13

MR AMENDOLA: Your Honour, first of all I had sought leave to appear as agent. I am wondering whether that is opposed as well. I presume it isn't, but it is the fact of intervention as such that is opposed.

PN14

THE PRESIDENT: I think it is the intervention that is opposed.

PN15

MR TULLGREN: No, no objection to the agent.

PN16

THE PRESIDENT: So it is nothing personal, Mr Amendola.

PN17

MR AMENDOLA: I don't take it so, your Honour.

PN18

THE PRESIDENT: That will make you feel better, won't it?

PN19

MR AMENDOLA: Dealing - the matters that we would put forward, your Honour, in relation to why the Minister should be given leave to intervene, really in a sense are also the reason for the substantive application that the Minister would seek to make today, assuming that leave is given which is that the proceedings be adjourned. I will try to deal with briefly as I can on the issue of intervention without necessarily traversing all of those issues, but if intervention were to be granted then I would propose to make submissions at that point which I think would seem to be a better way of dealing with it so that they can be addressed.

PN20

The intervention that is sought is generally in respect of the proceedings, your Honour. The reason I mention that is because as the bench may be aware the Minister has sought to intervene in respect of proceedings in Western Australia, Queensland, New South Wales and South Australia. In each instance very specifically for the purpose of making an application for an adjournment. And in respect of each of those jurisdictions leave was granted to intervene, although on the substantive application it has been refused on each occasion. And in respect of any submissions that I might make I would seek to deal with those decisions and bring those decisions to the attention of the Commission.

PN21

But in this instance it would be intervention more generally in respect of the proceedings as well as for the purpose of making an application for an

adjournment. I thought it best to first start with perhaps any authorities that might be pertinent to the issue of establishing an interest sufficient to permit intervention. In that regard, your Honour, I thought it might be appropriate to refer the Commission to a decision of a Full Bench of the WA Commission in the CFMEU v Sandwell. I am afraid I don't have - I only have one other copy of that decision which I can hand up and I can certainly hand it around.

PN22

And the reason that I refer to it - if one looks at paragraph 9 of that decision which is on page 728, it has - it sets out the relevant provision in Western Australia, which is whilst not in identical terms to the provision in Tasmania, is in similar terms. I haven't found any decisions of the Tasmanian Commission dealing with this issue of sufficient interest, but subsection 2 of section 30 of the relevant Western Australian legislation says:

PN23

The Minister of the Commonwealth, administering the Department of the Commonwealth that has the administration of the Commonwealth Act ...(reads)... and by leave of the Commission intervene on behalf of the Commonwealth in any proceedings before the Commission in which the Commonwealth has an interest.

PN24

And in that particular case the Minister sought to intervene in respect of an application to the extent that it dealt with bargaining fees as a specific issue. The Full Bench in the decision at paragraph 14, said:

PN25

The Minister plainly does not have an interest of the type referred to in R v Ludeke and Others ...(reads)... upon the relevant Minister of the State and the relevant Minister of the Commonwealth.

PN26

Then it goes on to say - the Bench goes on to say:

PN27

The right to intervene in constitutional matters in the High Court is exercised ...(reads)... Such a right to intervene is akin to that conferred by section 30, subsection 2.

PN28

Paragraph 17 we say is the key paragraph of this in terms of the submission we want to make as to the establishment of a right.

PN29

Such a right plainly exists under the Act to enable the Commonwealth Minister ...(reads)... has a legitimate and sufficient interest in the conduct and outcome of particular proceedings in this Commission.

PN30

And we would say that in approaching the determination today as to whether or not the Commonwealth Minister ought to be given leave to intervene, that that is an appropriate statement of the principle that could be applied in determining the

issue. As the Commission is aware late last year the Australian Parliament passed amendments to the Workplace Relations Act 1996, which I can describe as the Work Choices Amendments perhaps for brevity. They were accented to on 14 December and the Act was proclaimed on Monday of this week and the effect of the legislation is, amongst other things, to create a body called the Australian Fair Pay Commission, which is to have the responsibility of determining rates of pay for employees within the federal system.

PN31

Now, one of the major changes of the Work Choices Amendments is made is that it has broadened the ambit of the federal system so that it is to apply to employees of not only but significantly constitutional corporations and that can be seen, for example, if one looks at the definition of employee in section 5 of the Work Choices Amendments, and the definition of employer in section 6. So that the AFPC as a body that has been given the responsibility of setting and adjusting wage rates is more across the board than it was under the Workplace Relations Act. And we would say that that is the effect of it.

PN32

And for that reason we say that the Minister has an interest as does the Government - the Commonwealth Government in relation to the national economies and of course the various State economies are important parts of the national economy. And in that sense it has an interest in the outcome in this proceeding as it has in the other State proceedings. It has a particular interest that it would seek to enumerate in relation to the application it would further make today and that is that in order to maintain the history of a national consistent approach that has occurred at least over the last decade, that the AFPC ought to be permitted to make its determination, which would then be a determination that could assist and inform this particular Commission as well as the other Commissions in terms of any decisions that it may make in relation to applications to increase rates of pay for those employees who would be covered by the jurisdiction of this Commission.

PN33

THE PRESIDENT: I don't want to get into a debate about Work Choices, but doesn't the enactment of Work Choices itself create inconsistencies that are not the doing of this Tribunal?

PN34

MR AMENDOLA: It is not the doing of this Tribunal - - -

PN35

THE PRESIDENT: No.

PN36

MR AMENDOLA: - - - that is so, your Honour, I would agree with that, but in a sense it is a sort of - it is a bit beside the point. What we would say, ultimately, is that - - -

PN37

THE PRESIDENT: Well, if you are arguing that we should adjourn it on the basis that it could create an inconsistency, isn't there an argument that the legislation itself does create other inconsistencies.

PN38

MR AMENDOLA: The legislation - there is legislation, it has come into place, it has changed the focus of the system, your Honour.

PN39

THE PRESIDENT: To those of us that have got our heads around it, we would possibly agree.

PN40

MR AMENDOLA: Yes. It certainly has changed the focus of the system, but in terms of what we would say should be the approach, we would say the approach would not necessarily have changed. What we would say, your Honour, is that whereas what has occurred over the last at least decade is that the AIRC has had a practice of annually dealing with applications to increase the safety net wage, which has then been the subject of consideration by State Tribunals as to whether or not to apply it.

PN41

And there are different tests that have applied in different tribunals, for example, in this Tribunal I think the test is that if it is thought to be appropriate the Tribunal can apply it. I think in New South Wales and Queensland - New South Wales and Western Australia, I apologise, unless there is a good reason not to apply it, it should apply it. That has been the practice and what we would be saying is that whilst Work Choices certainly brings about a major difference in the legislative framework, what it does is it effectively replaces the AIRC with the AFPC as that point of the apex from which the practice that has been established and been followed should be continued to be followed, in my submission.

PN42

And so, yes, there is - because of the major legislative change it has brought about the necessity to have a serious look at what happens this year in terms of going forward as to how tribunals approach applications to increase minimum wages, but what we would say in reality is, it is merely a situation where one body has been replaced with another body which has certain parameters that it needs to apply in respect of the fixing of minimum wages and it would be our submission that the approach that has been applied by State tribunals across the board should be the way in which it should continue to be approached.

PN43

THE PRESIDENT: So we remove any reference to the AIRC, replace it with the AFPC and wait until they make a decision, is that sort of in general terms what you are saying?

PN44

MR AMENDOLA: In essence, your Honour, that is right. And we would say that - and I don't know how far - how much further I want to elaborate on the issue of intervention as to - we would say that that is an appropriate way of dealing with it and to deal with it otherwise gives rise to difficulties, except that

in a sense it might be said that they are difficulties of our own making though as I said, we would say that that is a bit beside the point. But we - the Commonwealth and the Minister does have an interest in terms of the way in which the Act is administered and in terms of the attempt to sort of reach that national approach and in that sense, your Honour, we would say that the Minister has an interest in terms of intervening in this proceedings.

PN45

THE PRESIDENT: Could I summarise the basis for the intervention as being two grounds?

PN46

MR AMENDOLA: Yes.

PN47

THE PRESIDENT: One is to avoid, as far as possible, any perhaps further inconsistency - - -

PN48

MR AMENDOLA: Yes.

PN49

THE PRESIDENT: - - - and that the Commonwealth has the responsible for the national economy, which of course takes into account the Tasmanian economy, would that be a fair summary of what you have put?

PN50

MR AMENDOLA: Yes, your Honour, but I am not sure that I need to take - well, I won't take the matter any further at this point.

PN51

THE PRESIDENT: No, that is fine, thank you. Mr Tullgren.

PN52

MR TULLGREN: Yes. Your Honour and members of the Bench, we oppose the application for intervention; we do say really for a number of reasons. The application to intervene is made under section 27(3) of the Industrial Relations Act and my friend, Mr Amendola, has put that in broad terms the position of the Minister and he has referred you to the decision in Sandwell in Western Australia. We wish to take the Commission to the decision of the Full Bench of the Western Australian Commission which dealt with that matter and specifically in relation to a similar application by the Commonwealth Minister to intervene in Western Australia.

PN53

I don't - I wasn't sure how - I didn't think we were going to have the cast of thousands that we have got today, but I have got a limited number of copies, one each for the Bench and there is one for the rest, really. The decision is a decision of the Full Bench of the Western Australian Commission and an application by the Trades and Labor Council to increase wages by 4 per cent to increase the minimum wage and to amend the extant State wage fixing principles. The right of appeal - the right of intervention in the Western Australian Act, which is section 32 and is reproduced in the decision, is in similar terms to section 27(3) of

the Tasmanian Act. Section 30(2) is set out at paragraph 11 of the decision of the Full Bench.

PN54

We say that - say for the contrary submission that we will put at the end of this in relation to intervention, the decision sets out why the Commission should not in fact grant intervention to the Minister and I will make the admission now that the decision tells against us in our argument in a sense that the Western Australian Commission allowed the Minister to intervene, but we will seek to convince this Commission that they shouldn't follow that part of the decision.

PN55

At paragraph 11, the Full Bench decision says, and I will quote:

PN56

It is necessary that the Commonwealth Minister demonstrate that the Commonwealth has an interest in the proceedings.

PN57

In the same paragraph the Full Bench observed that the Minister sought to intervene based on the Workplace Relations Act 1996 as has been amended by Work Choices, and relevantly schedule 1A dealing with what we say is the all-willing entitled the Australian Fair Pay Commission. The schedule received royal assent and commenced to operate on 14 December last year and Mr Amendola has already referred to the operation of the Australian Fair Pay Commission.

PN58

The Full Bench said at paragraph 12 that the Minister argues that any decision of the State Commission, that is the West Australian State Commission, would make would undermine the Commonwealth's stated intention that minimum rates of pay applicable in the new federal system and to transitional employees should be determined by the Fair Pay Commission, again the same or a similar argument that has been put this morning. At paragraph 13 the Full Bench rejects this argument saying:

PN59

The decision of the Commission in this application can have no effect on employees ...(reads)... nor to the transitional employees so created.

PN60

The Bench goes on to say that any general order made by it arising from the proceedings does not apply to any employee whose conditions of employment cannot be determined by the Commission. I would stop here to say that in Western Australia their Commission has the power to make effectively general orders which can be characterised imperfectly as effectively a common ruling are particular decisions, they make them in relation to wage cases and they make them in relation to other matters.

PN61

So their reference of general order is their power to make a State wage case decision in this particular situation. We say that the same argument applies to this Commission because section 35(1) sets out the powers of a Full Bench of this

Commission in making an award in "respect to the following matters," which include at section 35(1)(b) the making or altering of a minimum wage and at section 35(1)(d) altering wages generally.

PN62

Sections 34(4) and (5) provide that decisions concerning minimum wages and wages generally apply to awards as specified in the Commission; an award is defined at section 3 it would mean an award made under this Act by the Commission and includes a variation of such an award. Any decision made in relation to the application by the Trades and Labor Council can only apply to employees whose conditions of employment are determined by this Commission.

PN63

The West Australian Full Bench goes on at paragraph 13 to reject any notion that a decision of the Commission, that Commission would undermine the stated intention of the Commonwealth in relation to wages because the Commonwealth can only deal with a restricted group of employees. At paragraph 14 the Full Bench says:

PN64

We are also relatively unmoved by the Commonwealth's submission ...(reads)... from the AIRC and to give it to a newly created body, the AFPC. This is significant because, given that section 51 of the Act -

PN65

And that is the West Australian Act.

PN66

specifically requires this Commission to have regard to any national wages decision ...(reads)... and to apply that decision in this State unless it is satisfied that there are good reasons not to do so, we do not think the Commonwealth have been unaware of this.

PN67

We say that the possibility of inconsistency or uncertainty or confusion that the Minister argues that he wants to address or to avoid lay squarely with the Commonwealth, because it is they in pursuit of the particular ideological objectives have decided to effectively destroy, we say, the system of fair wage setting of conditions and wages in Australia. We would submit that the Commonwealth has ignored the advice of the prophet Isaiah where he said, "Come now and let us reason together."

PN68

That the Commonwealth Minister sought not to do that and has pressed on and I am not sure whether he will suffer necessarily the fate that the prophet Isaiah foretold for those that didn't listen, but nevertheless. These actions by the Commonwealth, we say should not be allowed to impart ground any application for intervention. We urge this Commission to adopt the position of the West Australian Commission in disposing of this limb of the argument.

PN69

At this point we also submit that the discretion of the Commission to grant intervention must be exercised in light of settled law. The leading authority for

this is a decision of the High Court in The Queen v Ludeke and others, ex parte the Customs Officers' Association, and again to assist the Commission, seek to provide copies of that decision. The issue dealt with in this case go generally to the degree in quality of interest able to be demonstrated by a potential intervener. The assistance that will be provided to the Commission by hearing from them, balanced against the potential delay in prejudice to the principal parties that may arise if intervention was granted.

PN70

At page 522 of the judgment, his Honour, Mason J, said and I quote:

PN71

In this respect the applicant must be interested in the outcome of the result of the litigation ...(reads)... or a legal liability which will be directly enlarged or diminished by the judgment. The interest must be direct in immediate rather than merely consequential.

PN72

And later in dealing with the approach of his Honour, Dixon J, in relation to that related matter he had this to say and I quote:

PN73

Much the same approach was adopted by Dixon J when he expressed in the Australian Railways Union v the Victorian Railway Commissioners and Others, the principle according to which intervention is allowed in constitutional cases in these terms.

PN74

And he then goes on to quote from page 331 of the ARU case and says and I quote:

PN75

Normally parties and parties alone appear in litigation but by very special practice the intervention ...(reads)... without regard to the diminution or enlargement of the powers which the States or as the Commonwealth they may exercise.

PN76

We submit that the Commonwealth does not and has not established a sufficient degree or quality of interest in this matter. It employs no one under the awards that are subject to this application. The Commonwealth in effect argues that its interest is related to the operation of federal industrial laws, which include so the Commonwealth claims, furthering its policy objectives regarding minimum rates of pay. Such policy objectives can only relate to the operation of the Workplace Relations Act. This at best is an abstract concern and any orders made by this Commission arising out of the application by the TLC will have no direct or indirect effect on the Commonwealth.

PN77

Any questions about possible concerns the Commonwealth may have regarding potential different outcomes are, as we have already argued, at the direct consequence of the introduction of Work Choices and therefore of their own making. At the best, we say the interest of the Commonwealth arises out of the

limited reach of the Commonwealth legislation. The Commonwealth seeks to intervene to ask the Commission not to exercise the jurisdiction that State Parliament has charged you with in circumstances where the Commonwealth must concede that there are employees of non-federal system employers who will not be addressed by Work Choices.

PN78

The application to intervene and the application to adjourn these proceedings is nothing more than an attempt, we say, to achieve an outcome that could not be achieved through the parliamentary process. The Commonwealth seeks to stop the Commission from proceeding to hear and determine this application. Issues related to a simplified national system are not a basis for seeking intervention because the Commonwealth has no direct interest in these proceedings per se nor does it employ any one under the awards that are regulated by this Commission.

PN79

We further say that, under sections 23 and 35 of the Tasmanian Act, Unions Tasmania has a prima facie right to have the application determined, the applicant seeks an operative date of 1 August 2006, which is 12 months from the date of the last State wage increase. If the Commonwealth is granted leave to intervene and then if the Commonwealth's argument is then for an adjournment of these proceedings and that that was granted, then a fundamental aspect of the Union's claim would be prejudiced. While it may be argued that the retrospectivity could be sought this would not be guaranteed and low paid Tasmanian workers would be disadvantaged. But turning to the West Australian Full Bench decision, at paragraph 16 the Full Bench found that:

PN80

For reasons we have given we are doubtful that thus far the Commonwealth has demonstrated an interest in these proceedings.

PN81

We respectfully adopt and support those submissions and urge - those findings and urge the Commission to make the same finding. The Full Bench went on to address the further submissions of the Commonwealth that it should be granted intervention because the Commonwealth has an interest in relation to arguments, having regard to the State and national economies. While it may be the case that this Commission in dealing with the substantive application by the TLC may have regard to matters touching on the national economy, then and only then, we say, would it be time to consider granting intervention to the Minister to argue about that matter.

PN82

We not that the West Australian Commission granted the Commonwealth limited intervention to only argue in relation to the adjournment question. If the Commission is against us in relation to not granting the Commonwealth leave to intervene, then we would urge the Commission to grant leave for them to intervene but limit that right for the purposes for arguing for the adjournment only.

PN83

THE PRESIDENT: Thank you. Is there any other objection to leave being granted to intervene? Mr Baker, - - -

PN84

MR BAKER: Thank you, President.

PN85

THE PRESIDENT: - - - did you want to add anything?

PN86

MR BAKER: I am sorry?

PN87

THE PRESIDENT: Did you wish to add anything else?

PN88

MR BAKER: Well, the argument that has been submitted by Mr Tullgren has been quite extensive and it certainly would cover any submission that we would place before you. The application for intervention, of course, as has been explained is really in two parts. There is the application for intervention and the second part of that application goes to the issue of the adjournment motion. It is very difficult to extrapolate one argument from the other and indeed one follows the other.

PN89

My comments would in fact go to - if intervention is granted would go to the issue of the possible adjournment of the proceedings, which the Government would vigorously oppose. Our opposition is that we oppose the intervention on the basis that the Commonwealth has no direct role in these proceedings, it has not in the past ever chosen to appear in a matter of this nature before this Commission in 21 years of State wage cases that have been convened.

PN90

It is a little ironic that with the advent of new legislation that these proceedings ought to be adjourned on the basis of inconsistency - I am sorry, intervention is sought on the grounds that any decision arising from these proceedings may give rise to some inconsistency of outcome, that is Australia wide as far as the decisions of the various State tribunals are concerned. As has been pointed out by Mr Tullgren that is not a decision that has been brought about by any action of this Commission nor of the State Government that oversights the legislation for industrial relations in the State.

PN91

That is a decision that has been brought about by the structure of the Work Choices legislation and the effect that it has given in creating a separate entity that will determine wage rates for employees who are dragged in under what may be deemed a non-constitutional basis for the termination of wage entitlements. Something that I think we should bear in mind that the application by the various State Governments, including Tasmania to the High Court, will be heard in mid-May and so any application for intervention and subsequent argument insofar as the adjournment of these proceedings is concerned it should be borne in mind that

in fact such an application may in fact - the Act itself may in fact be determined to be unconstitutional.

PN92

The arguments that I could proceed with would in fact encompass the submissions of Mr Tullgren and I shall conclude my remarks there, but I just reiterate that in the opinion of the Government of Tasmania that intervention should not be granted for the basis that I have outlined and these proceedings should continue, consistent with the obligations of the Commission as per the various sections of the Act. One other section of the Act which I will address in further submissions is the issue of the provision of 35(10)(a) of the Act which is the new requirement first placed on the Commission to review the minimum wage in the State. And I think that as we move on in these proceedings that any consideration of adjournment motion should be considered in light of the new requirements in (b) imposed on the Commission.

PN93

THE PRESIDENT: That is in respect to the Fair Conditions Amendment.

PN94

MR BAKER: The setting of the minimum wage.

PN95

THE PRESIDENT: Does any other party wish to make any submission in respect to the intervention application before - yes, Mr Amendola?

PN96

MR AMENDOLA: If the Commission pleases, if I can just put the following briefly in reply. My learned friend, Mr Tullgren, took the - brought your attention to the decision of the High Court in the Ludeke case and if I can ask you to look at that. It set out the comments of Mason J in relation to the basis - comments of Mason J quoting Dixon J, as he then was, in relation to intervention in constitutional cases. However, unfortunately he didn't read on from there where Mason J said:

PN97

No doubt the Commission in exercising its discretion in accordance with section 36(2) ...(reads)... may be sufficient to support intervention in a matter of industrial arbitration before the Commission.

PN98

Which we say is relevant to the Commission's exercise of its discretion in this matter. Mr Tullgren also took you to the decision of the Full Bench in the West Australian Industrial Commission in relation to the application that was made by the Minister. Now, intervention was sought and granted for the purpose of making the adjournment application. So broader intervention wasn't sought, though I might just advise the Commission it has now been sought since the decision of that Commission. If one goes to paragraph 16 of the West Australian decision the Commission came to the view in the second sentence:

PN99

However, we considered that the Commonwealth is on stronger ground in its submission ...(reads)... and that they are matters in which the Commonwealth has an interest.

PN100

And on the basis of that, it concluded that intervention should be granted. Now, it certainly said what it said in terms of what my friend took you to in relation to paragraphs 13 and 14, though we would take issue with the comment that the decision of the Commission can have no effect on employees covered by the federal system. Decisions by a State tribunal may not have any direct effect but may well be something that would be put to and which the AFPC might take into account in coming to its own conclusions; but nevertheless, that is what it said there.

PN101

We say that we are not suggesting that the State or the Commission has brought about the circumstances that we all find ourselves in now, we are not suggesting that, but with all due respect we would say so what. The legislation has been changed, it has thought about a different sort of situation, it doesn't mean that it ought not be sought to be addressed in the meantime and the fact of there being a constitutional challenge to the validity of the legislation, that is the mere fact of it, it is completely irrelevant to the decision the Commission has to make on intervention - - -

PN102

THE PRESIDENT: We have to deal with the reality of the legislation as it applies today of course.

PN103

MR AMENDOLA: That is right, it is valid until it declared to be invalid, your Honour, that is correct. We persist with our application for intervention.

PN104

THE PRESIDENT: That is not an indication of your view, I presume.

PN105

MR AMENDOLA: No, it is not.

PN106

THE PRESIDENT: All right. Thank you. Okay, well, we will take a short adjournment.

SHORT ADJOURNMENT **[10.45am]**

RESUMED **[10.50am]**

PN107

THE PRESIDENT: Thank you. We propose to adopt a similar approach to that adopted by the West Australian Industrial Commission. We reject the application

to intervene on the basis of inconsistency. We express the general view that Work Choices is all about inconsistency. We grant leave to intervene as we recognise that the Commonwealth has the responsibility for the national economy, of which the Tasmanian economy is a part and that leave is limited to the argument to adjourn these proceedings. Mr Amendola.

PN108

MR AMENDOLA: If the Commission pleases. Apart from the submissions that were filed, if the Commission pleases, with respect of establishing an interest for the purpose of intervention we also file some further submissions setting out the basis upon which we would seek an adjournment which also had some attachments, if the Commission pleases. And those - - -

PN109

THE PRESIDENT: Yes. And I understand that most of the other parties have copies of that, yes.

PN110

MR AMENDOLA: And those attachments constituted the decision of a Full Bench of the AIRC of 21 December.

PN111

THE PRESIDENT: Yes.

PN112

MR AMENDOLA: An explanation about the operation in terms of wage fixing under Work Choices in respect of the AFPC and the AIRC, which is an attachment that we prepared, attachment 2 and an example of the decision that was made by a Full Bench of the Commission - of the Federal Commission in a safety net wage decision to adjourn pending the outcome of - just bear with me for a moment. Yes, pending the release of the May budget, it is something that they could then take into account before ultimately making their decision.

PN113

As I indicated in terms of - in submissions and support of the application for intervention, if the Commission pleases, the basis upon which we seek that the proceedings be adjourned and perhaps if I could just say at this stage, it was suggested by my learned friend that what we are suggesting is that the Commission should not exercise its jurisdiction and in effect an application to refuse to hear the matter and that is not the basis of the application.

PN114

THE PRESIDENT: No, it is an application for adjournment as I understand it, yes.

PN115

MR AMENDOLA: Indeed, it is to postpone making a decision. We are not asking that the Commission not exercise the powers that are available to it under the legislation, it is just a matter of when, in our submission, we say the Commission ought to do so.

PN116

THE PRESIDENT: It is all about timing.

PN117

MR AMENDOLA: Yes.

PN118

THE PRESIDENT: Is that what you are putting?

PN119

MR AMENDOLA: Absolutely. And the position we are advocating is one for the - that seeks to maintain a uniform approach in relation to wage fixing and which advocates the maintenance of the sort of co-operative scheme that has applied over a long period of time. There is no legislative mandate, if the Commission pleases, that has the Federal AIRC determine wage cases every year, but that is the way in which it has worked out. And other Commissions have taken the view that they should in a sense wait, see, look at and draw its own conclusions as to whether or not to follow such decisions and it is a sensible approach that has been applied throughout the country in relation to that.

PN120

And all that we are advocating is that rather than that body being the AIRC, upon which a State Wage Commission has regard to in terms of making its own decisions, that it should be the Australian Fair Pay Commission because as the Federal AIRC concluded when it adjourned its proceedings on 21 December at paragraph 10 of its decision it said:

PN121

In light of these provisions we accept the Commonwealth submission ...(reads)... for the fixation of minimum wages for employees covered by the federal system.

PN122

We would say that that is consistent that to sort of substitute one body for the other doesn't decry from approaching matters in a manner that tries to maintain a form of national consistency. And if one looks at, for example, the application that has been made by the Tasmanian Trades and Labor Council that is before the Commission today, it is entirely consistent with an approach - in terms of an approach that is advocated by the Trades and Labor Council itself when one looks at paragraph 2 of its statement of particulars, and that is for the Commission to consider this matter as one desirable to be dealt with by way of joint proceedings with the industrial authorities in accordance with section 19(f) of the Industrial Relations Act 1984.

PN123

Now, just to put that into some sort of recent historical context, applications were made by the ACTU to the Federal Commission - Federal Unions for a safety net wage case which were also then shortly followed by applications that were made in various State commissions by State bodies which sought - and those applications sought a consistent outcome across the board. So the outcome that was sought before the AIRC is the same as is being sought throughout the various State wage cases and in each of those - well, I think in each of those applications or near enough to in each of those applications, the unions making those applications were advocating for the possibility of joint sittings.

PN124

In other words, they were still seeking a national approach, an approach that brought about a consistent outcome. And that approach, and I am not sure whether or not it is abandoned for the purpose of this application now - vigorous nodding from my friend, Mr Tullgren - - -

PN125

MR TULLGREN: Just for the purpose of the record, in the further amended draft directions, which I am instructed the Labor Council sent to the Commission, that particular direction was abandoned.

PN126

THE PRESIDENT: So are you deleting that part of the application?

PN127

MR TULLGREN: Yes.

PN128

MR AMENDOLA: Yes, well, your Honour, there it is. Consistency was sought, if I may say so, until the AIRC decided that it would adjourn the proceedings and then consistency wasn't sought. And what we say is that consistency ought to be sought and there are reasons, there are good public interest reasons for trying to maintain a form of consistency in terms of approach. What has taken place over the last decade has taken place for good reason and it is sought to bring about an approach that has regard to that over-arching national interest and for State industrial bodies to have to have regard to the decision of a body looking at that over-arching interest in terms of its decisions that it makes in terms of fixing wages.

PN129

And the fact that it is the Australian Fair Pay Commission as opposed to the AIRC should make the - that is, that over-arching body now should make no difference whatsoever to try and maintain that consistent approach. It has been suggested in other jurisdictions that - at least put in argument, that because it is an adversarial proceeding that is going to be advocated by the AFPC, because it is effectively an administrative body and that no applications are made to it, that somehow that detrimentally effects the possibility of having a nationally consistent approach.

PN130

But one might ask the question rhetorically why should that be. There are wage setting parameters set out in section 16 of the legislation and interestingly enough, for example, when one looks at, I think it is section 36 of the Tasmanian legislation as to the public interest factors that are specifically enumerated, they are not dissimilar to the matters that the Australian Fair Pay Commission has to have regard to pursuant to section 16 of Work Choices.

PN131

The fact that there is not an application that is necessarily made is neither here not there. There are a number of nations throughout the world in the OECD that don't have wages set by virtue of an adversarial proceeding that has been brought before an industrial tribunal. The fact that an application isn't made but it is the

AFPC itself that regulates its own proceedings, is really neither here nor there if one looks at the task that it is bound by statute to carry out. It is bound by statute to do the sort of things that the AIRC has traditionally done in terms of wage fixation, it has got a set for wage setting parameters, it has to make a decision, it has to publish the reasons for its decision.

PN132

In one sense it might be said that it has an advantage that the Commission, unfortunately because of the nature of the Commission being the Commission did not have. The Commission certainly in wage cases in the past has sought the agreement of parties to carry out economic research. In other words, not merely be presented just with economic research but to carry out some economic research in terms of specific issues. And that has never been able to take place because the parties have never been able to agree as to the terms of reference in respect of that economic research. Now, insofar as the AFPC is concerned the statute sets up a secretaire to allow research to be carried out which will inform the AFPC in terms of the decisions that it might make.

PN133

THE PRESIDENT: It doesn't necessarily mean everyone is going to agree with the outcome, does it?

PN134

MR AMENDOLA: But in terms of the out - - -

PN135

THE PRESIDENT: Of that research, yes.

PN136

MR AMENDOLA: Of that research?

PN137

THE PRESIDENT: No.

PN138

MR AMENDOLA: That is so.

PN139

THE PRESIDENT: It is the same old argument.

PN140

MR AMENDOLA: That is so, of course, your Honour. And of course in any submissions that are made to the AFPC that can be addressed. But at least it can be carried out, it can be something that sort of approximates conclusions that are put forward. And as I said, the AFPC is tasked with that, it will be carrying out those functions and the Government has indicated that it would expect the AFPC to make a decision by spring '06.

PN141

In terms of this tribunal, and we would say in respect of all the State tribunals, whilst they may not be obliged by virtue of the statute to take such a decision into account of the AFPC, it would nevertheless, given the statutory context of Work Choices and the position of the AFPC in respect of wage fixing, be a sensible

thing to do. And one would think that the State Wage Tribunal would see it as being beneficial to be informed by the determinations made by the AFPC, whether or not it chooses to ultimately follow them, whether or not it chooses to agree with them, because of the work that it will necessarily do and have to do in terms of the tasks that the statute sets up for it. And in that sense - sorry, your Honour, you - - -

PN142

THE PRESIDENT: Is spring '06 still the target date, because I think I read that there have now been some appointments made to the AFPC.

PN143

MR AMENDOLA: There were - - -

PN144

THE PRESIDENT: And that they were meeting soon or some such thing?

PN145

MR AMENDOLA: Yes. The other Commissioners were appointed this week, your Honour.

PN146

THE PRESIDENT: Yes.

PN147

MR AMENDOLA: And my understanding - my instructions are that - I believe they are meeting very shortly and my instructions are that the target date is still spring '06.

PN148

THE PRESIDENT: Is it, fine, thank you.

PN149

MR AMENDOLA: And in that regard, if I can maybe just comment on that, Mr Tullgren's indicated that in relation to the application the Trades and Labor Council make they ask for an outcome which relates to August '06, which unless there was some sort of retrospective application or retrospective - a determination which was retrospectively applied, that could not possible be met and I am sure that that will be put as a matter of prejudice in respect of the application that is put by the Trades and Labor Council.

PN150

And there are two things to which one can put in response to that and the first is that in a sense that whilst they brought an application and they have a statutory right to bring an application, the issue of prejudice in terms of a proceeding is not just that of the applicant but it is that of the parties and that in considering the issue of prejudice, in my submission, one needs to look beyond just merely the applicant wants, the applicant gets, the applicant seeks and there are other people who put up submissions in relation to that and when one balances prejudice one balances it within that context and the second is, that while we don't advocate it, there is the possibility that a decision could be made to have retrospective application.

PN151

Where - as I indicated at the start, this is not an application that we are making that the Commission not exercise its jurisdiction and we accept that to accede to the application that has been made by my client would mean that there would be a greater delay than there has been. At least in terms of what I have looked at, at least over the last five years although I am sure that other people who might have looked before then would tell me otherwise, if it is before then as well; we understand that.

PN152

However, we would say that, overwhelmingly when one looks at the public interest in respect of the approach that should be taken, something that maintains a sort of national approach and which has regard and takes the benefit of the work that the AFPC will have to do in coming to its conclusions, is an appropriate way to approach the matter. Now, your Honour, it will be no surprise to the members of the Bench that, you know, this application has been made in respect of all the State tribunals and has failed in respect of all the State tribunals. I am not sure whether you wish me to go to all of those decisions or whether you have got those decisions.

PN153

THE PRESIDENT: I am familiar with them.

PN154

MR AMENDOLA: That is the fact. Different tribunals have taken different approaches. In Queensland, for example, whilst rejecting the application, in its decision it in effect indicated that it would take a pause around July '06 to have regard to any decision or announcement that might be made by the Australian Fair Pay Commission.

PN155

THE PRESIDENT: Does spring come early in Queensland, does it?

PN156

MR AMENDOLA: Well, I think the use of the word "announcement" is significant in that sense, your Honour. I mean, without wishing to speculate overly much I think if the AFPC was to come out with either a set of terms of reference and an indication - - -

PN157

THE PRESIDENT: Yes.

PN158

MR AMENDOLA: - - - as to when it would make a decision, - - -

PN159

THE PRESIDENT: It is relevant.

PN160

MR AMENDOLA: - - - my sense of it is that they would take that into account in terms of going forward. In relation to South Australia the application was rejected, although there is a hearing that is being convened on Friday to take into account a submission that was accepted, because in respect of those other

tribunals one of the issues was that hearings were being convened before the proclamation of Work Choices and the pool of employees that might be effected as at this particular date would be different to the pool of employees that might be effected post, as it has turned out to be 27 March and it is reconvening on Friday to hear further submissions in relation, I suppose, to the boundaries or framework of the matter that is before it.

PN161

In Western Australia and New South Wales there were outright rejections of the application for an adjournment and directions were then given in respect of the filing of material. Your Honour, our opinion would differ about those conclusions and we would urge upon this Commission that the approach that we put forward is the proper approach; not the only approach but certainly we think the better approach in terms of trying to maintain what has occurred over a long time within various industrial relations tribunals jurisdictions.

PN162

We understand the comment that came from the Bench as to its view about Work Choices and what it brings about and we can only say that we disagree with that. Everything when it comes in and is new has a certain level of churn that is associated with it before it all settles down and goes forward. That is the nature of doing something different or doing something new. We would say that that occurred to some extent in respect of the Workplace Relations Act when it came into being in 1996, the sky hasn't fallen in, we would suggest the sky isn't necessarily going to fall in now either.

PN163

And for the purpose of maintaining an approach, despite the different statutory regimes that have applied throughout the various different tribunals, because there is not necessarily been a consistency between the Workplace Relations Act 1996 and the Queensland legislation that sets up that tribunal or the WA legislation or the South Australian legislation or the New South Wales legislation, for that matter. Nevertheless, there has been a comity in terms of the way in which the tribunals have approached decision making in respect of wage fixing and we would say that there is no reason why that shouldn't continue to be the case. If the Commission pleases.

PN164

THE PRESIDENT: All right, thank you. Does anybody want to support Mr Amendola's application? Maybe if we deal with those first. Any of the other parties. Mr Watson.

PN165

MR WATSON: We can indicate, President, that we do support the application and the submissions put by Mr Amendola.

PN166

THE PRESIDENT: You don't want to put anything else?

PN167

MR WATSON: We will deal with that in our substantive submission, President.

PN168

MR FITZGERALD: Yes, President, Members of the Bench, likewise, we - on behalf of Australian Mines and Metals Association we certainly support the submissions made by Mr Amendola.

PN169

MR RICE: Your Honour, we would support those submissions, likewise.

PN170

THE PRESIDENT: Nobody else? No. Mr Tullgren.

PN171

MR TULLGREN: Your Honour, I apologise in advance that I am being obtuse about this, but I understand from what my friend Mr Watson said, that he supports Mr Amendola's application and he is going to make some submissions - some principal submissions. That is where I have become a bit confused.

PN172

THE PRESIDENT: Yes, I must say that I was going to question that.

PN173

MR TULLGREN: I understood that Mr Amendola has put the position on behalf of the Minister as to why the matter should be adjourned and presumably the Greek chorus that supports that proposition is also going to put their position to you and then we would respond to all of those - - -

PN174

THE PRESIDENT: Yes.

PN175

MR TULLGREN: - - - as opposed to some other arrangement.

PN176

THE PRESIDENT: Yes, I mean that was the reason I asked. You are not going to get another go.

PN177

MR WATSON: Okay. Thank you, President.

PN178

THE PRESIDENT: Speak now.

PN179

MR WATSON: I am Australian, I am not Greek. If I am - - -

PN180

THE PRESIDENT: And I have not heard any of you sing.

PN181

MR WATSON: Thank you, President and Members of the Bench. I can indicate that our position in these proceedings is that the Commission should adjourn the matter pending the outcome of the Australian Fair Pay Commission's deliberations and determinations for 2006. Some of the matters that I will go to are matters that have already been covered by the submission of Mr Amendola,

but I will be brief, President. In support of this position we wish to take the Commission to three main principle matters.

PN182

The first one is the history of safety net reviews in the Tasmanian Industrial Commission and that has been that the Tasmanian Industrial Commission has followed the determinations of the Australian Industrial Relations Commission without exception. The only slight variation to that, I believe, was in 1998 where the parties actually reached agreement on an amended safety net adjustment which was paid in two parts, but the quantum was still the same and I point out that that was an agreement between the parties. But as far as I can see that was the only departure from the Federal Commission's determinations.

PN183

THE PRESIDENT: That is in respect to quantum. There have been variations as to the principles.

PN184

MR WATSON: The principles that I am talking about that - - -

PN185

THE PRESIDENT: Yes. And we don't know whether there will be any principles - - -

PN186

MR WATSON: Yes.

PN187

THE PRESIDENT: - - - at all that apply from here on in.

PN188

MR WATSON: I am talking, your Honour, about the quantum of the increase. So we submit that the Tasmanian Industrial Commission should follow its consistent approach of the past 21 years and follow the determination of the Australian Industrial Relations Commission of 21/12/05. And if I can just very briefly go to that decision. Mr Amendola has already taken you to this decision as well, but if I can just go to paragraph 10 of the decision and quote, the Commission says:

PN189

Under this section the Commission will be obliged, among other things, to have regard ...(reads)... for the fixation of minimum wages for employees covered by the federal system.

PN190

So clearly the Australian Industrial Relations Commission were convinced that they should wait for the Australian Fair Pay Commission's decision before they proceed with any review for 2006. And we say, President and Members of the Bench, that the Tasmanian Industrial Commission should adopt that approach as well. We say that the circumstances are similar in that the Federal Commission was faced with a decision potentially for transitional employees as against those employees covered by the jurisdiction of the AFPC. And the way we see here at the moment is that it is a similar circumstance in that the matter before you today

is for a group of employees that are employed by unincorporated bodies, as opposed to employees in Tasmania employed by corporations. The Commission went on to say at paragraph 11, at the middle of the paragraph:

PN191

And while it would be within our power to proceed with the claims before us ...(reads)... before the AFPC has made any determination in relation to the bulk of employees covered by the federal system.

PN192

So again we say that we have similar circumstances here where - and I will come to this matter in a bit more detail, but clearly I think accepted by all parties and the Commission even before the advent of Work Choices legislation, Tasmania - the bulk of employers in Tasmania actually are covered by federal awards and agreements and there is a smaller percentage covered by State awards. The Commission went on to say at paragraph 13, in conclusion:

PN193

For these reasons we have decided to adopt the Commonwealth proposal ...(reads)... and that these proceedings be adjourned until the AFPC has made its first wage sitting determination in the spring of 2006.

PN194

So again we would put to the Commission that that decision of the Australian Industrial Relations Commission should be the way that the Tasmanian Industrial Commission should head, having been consistent, as I have said, in adopting the Australian Commission's decisions for the past 21 years.

PN195

THE PRESIDENT: What about our responsibility following the recent amendment, section 35(10)(a)?

PN196

MR WATSON: I will deal with that, President. The last time that the Tasmanian Industrial Commission arbitrated a State wage case was 1999 and I would just like to table that decision, please. I wish to just go to some passages out of the decision which go to some of the submissions made by the parties and also the Commission's determination. The Commission effectively was left with two primary contentions and they were an economic argument and an equity argument. Now we don't propose to go to the economic argument in these proceedings because we believe that that would be a matter more properly dealt with if the Commission decides to proceed with the case.

PN197

But certainly the equity argument, we believe, is relevant to the application or sorry, the position to adjourn the proceedings. If I can take you first of all to page 18, down the bottom of the page the heading there is merit considerations and Mr Fitzgerald for the Tasmanian Trades and Labor Council says:

PN198

There are a number of strong grounds for flow in the federal safety net decision ...(reads)... awarded by a federal national wage case -

PN199

And over the page:

PN200

or safety net decision. Indeed Full Benches of this Commission in the 1987 and 1991 State wage cases ...(reads)... to settle upon objectives manifestly inconsistent with those of the Federal Commission in a national wage case.

PN201

So we would say, as far as that passage is concerned, President, that the Federal Commission's decision of 21/12/2005 is relevant and we say that that position is the one that should be adopted by this Commission. The next passage that I wish to go to, down the page - on page 19, says:

PN202

Third, in terms of federal and State award variations it would be wrong for the Commission ...(reads)... when consideration is given to the number of workers actually covered by State private sector awards.

PN203

Now the distinction that I make here is that there is no federal award variation at the moment that the Commission is looking to and therefore we have a situation where it would be, in this particular case, a minority of employees if the Commission is to proceed with the case and make a determination who would in fact benefit from any increase determined, whereas federal award counterparts at that particular time given that the Fair Pay Commission decision is not expected before spring, would in fact not have benefited from any increase. I would take you to the second last paragraph where it says:

PN204

In light of all this evidence it would be the height of inconsistency to argue that State awards ...(reads)... should not be varied to reflect the Australian Commission's safety net decision.

PN205

Again, President and Members of the Bench, we would suggest that the sort of rough figures that have been bandied around that around 25 per cent of employees are covered by State awards - - -

PN206

THE DEPUTY PRESIDENT: Where are these figures derived from, Mr Watson?

PN207

MR WATSON: In the decision, Deputy President.

PN208

THE DEPUTY PRESIDENT: Yes, I know it says that in the decision, but where did they in turn come from?

PN209

MR WATSON: Well, I think the - - -

PN210

THE DEPUTY PRESIDENT: Do you think that is just a guesstimate, isn't it?

PN211

MR WATSON: I think they also came from information that Workplace Standards had provided through surveys and also I think there was a reference to the ABS as well.

PN212

THE DEPUTY PRESIDENT: I would be very surprised if it was only that small number of employees covered by State awards, Mr Watson, very surprised indeed.

PN213

MR WATSON: Well, Deputy President, this decision actually goes to that particular issue and I think the Commission concluded, based on the evidence before it, that those figures, although they might not be exactly correct, were pretty much in the ball park in terms of general figures of employees covered. Over the page on page 20, at the bottom of the page, it states:

PN214

Ms Fitzgerald contended that the Commission can and should place reliance on the federal safety net decision.

PN215

So we say again, President and Members of the Bench, that the Commission in this particular case should do the same and adopt the approach of the Federal Commission of December 2005. If I can take you to page 22 of the decision, in relation to the State Government submissions. Mr Willingham for the Tasmanian Government said, in the middle of the page:

PN216

The Tasmanian Government supports the Industrial Commission's adoption of the April 1999 safety net adjustment decision of the Australian Commission.

PN217

Over the page on page 23, the Government said:

PN218

The Tasmanian Commission should adopt the course the Government proposes. The most important reasons ...(reads)... to act consistently with national wage cases. There have been no radical or substantial departures from that approach.

PN219

So we would say that those reasons of consistency, comity, equity and equal treatment for all Tasmanian workers would be a reason for adjourning these proceedings to await the outcome of the Australian Fair Pay Commission's determinations.

PN220

THE PRESIDENT: Doesn't the very introduction of the Work Choices legislation result in an unequal treatment of Tasmanian employees, because some

now are covered by the Federal system and lose conditions because they are deemed prohibited, whichever is the proper vernacular, whereas employees in Tasmania in some cases will maintain those. So there is going to be an inconsistent and unequal system.

PN221

MR WATSON: There will be inconsistencies, President, I don't think we can argue that.

PN222

THE PRESIDENT: It should be very challenging.

PN223

MR WATSON: However, as far as some conditions are concerned, but our submissions here are primarily dealing with wage setting and wage structures that have been fairly consistent through federal awards and State awards for some period of time. The next paragraph, the Government says:

PN224

There are good reasons in Tasmania to adopt such a consistent approach, one such reason concerns a number of employees covered by State awards.

PN225

And then at the end of that particular paragraph, it says:

PN226

As a consequence the figure of 37 per cent probably reduces to a great deal less than 30 per cent, perhaps even 25 per cent.

PN227

And we would suggest that that percentage with Work Choices legislation coming into effect may even be as low as 10 to 15 per cent. I don't have evidence to support that, President, at this stage but they would be our submission.

PN228

THE PRESIDENT: Well, my recollection it has always been difficult to determine just how many employees are covered by the State system. It is not just because of Work Choices, it has always been the case and there has been a number of different figures bandied around.

PN229

MR WATSON: That is right.

PN230

THE PRESIDENT: But I take the point you make that with the implementation of Work Choices that number decreases.

PN231

MR WATSON: That is right.

PN232

THE PRESIDENT: Although some people have moved back into the State system. It may balance out, I don't know.

PN233

MR WATSON: I suggest, President, that those people that have moved back into the system won't be effected by this decision.

PN234

THE PRESIDENT: I take that point.

PN235

MR WATSON: Page 25, in the middle paragraph, the Government says:

PN236

It is not just industrially realistic to say that if half the workforce gets a wage increase the other half should also benefit, there is also an equity argument. What sort of anomaly or equity would this Commission create if it accepted TCCIs argument.

PN237

Now our argument in those proceedings, President, was that the Commission should not grant the increase based on the economy of the State as it was then, but if you reverse that around to the circumstances that we have now we would say that there would be an anomaly and an equity created if the Commission were to grant the Union's application or some part of it, in the exact reverse of the situation that we found ourselves in in 1999. If I can just go to briefly to page 33 of the decision, under considerations in the bottom third of the page. The Commission said:

PN238

There are two primary contentions involved in the submissions put to us, an economic argument and an equity argument.

PN239

The Commission then at page 35 - I am sorry, at page 36. At the top of the page there said:

PN240

The uncontested assumption before us is that awards of the Federal Commission cover a substantial majority within the range of 63 to 75 per cent of Tasmanian employees.

PN241

And Deputy President on the base of that uncontested assumption, I note that you actually appeared in those proceedings.

PN242

THE DEPUTY PRESIDENT: I appeared in the proceedings, did I? But I wasn't on the Bench.

PN243

MR WATSON: And then in the middle of the page the Commission said:

PN244

In our opinion, recalling the words of the 1985 State wage case Full Bench ...(reads)... no suggestion from TCCI that had put such a case to the Federal Commission.

PN245

We say, President and Members of the Bench that in this particular case the circumstances are different. There was an argument put to the Federal Commission that the Commission should defer their determinations waiting for the AFPCs determination, and in fact that argument, primarily run by the Australian chamber, was successful. The Commission went on to say:

PN246

On this issue also it seems to us that TCCI opposes the flow on of the safety net adjustment to a minority of Tasmanian employees on the base of a submission that while it was relevant and pertinent to do so, (a) it did not put to the Federal Commission in the first place and (b) has not put in any of the federal award hearings to date.

PN247

Again, I say that the circumstances are different and that argument has been put and has succeeded at a national level. Further, both of the above issues in our judgment raise the same question of equity. It was open to TCCI to relevantly raise each matter in the Federal Commission whose awards cover the substantial majority of Tasmanian employees during the course of the April '99 safety net review case. For reasons not explained to us, however, the organisation elected not to follow that course of action. Instead it opted to promote these issues in the State Industrial jurisdiction whose awards, as we have already mentioned, only cover a minority of employees.

PN248

So what part of the argument turned on, President and Members of the Bench, was this whole issue of equity that the majority of Tasmanian employees had in fact received a safety net adjustment and the fact that it would be unfair for employees in Tasmania not to receive that increase and secondly, obviously the economic argument which wasn't accepted by the Commission. So in conclusion, on page 37 in the top paragraph, the Commission said at the very end:

PN249

We believe the applicant's equity argument should succeed.

PN250

As it did. So in summary, President and Members of the Bench, we say that as far as that 1999 State wage case decision was concerned there were - the issue of the fact that we had the majority of Tasmanian employees who had already received the increase and we believe that was a major factor in the Commission's determination that it should flow to employees under State awards. We say that those circumstances don't exist in this particular case.

PN251

THE PRESIDENT: One of the other differences currently compared to the 1999 decision, is that the economy at that time was not as healthy as it is today.

PN252

MR WATSON: That is right, President, and there was substantial argument put by Commissioner Abey as he was at that time about the state of the Tasmanian economy, but the Commission didn't accept those arguments.

PN253

THE PRESIDENT: No.

PN254

MR WATSON: If I can proceed now to section 35(7) of the Industrial Relations Act in Tasmania. This particular provision, President and Members of the Bench, is a specific provision in the Tasmanian legislation and just to quote:

PN255

Subject to this section where a Full Bench is satisfied that having regard to a decision of the Australian Commission, that is applicable to the wages payable generally to employees who are subject to awards of the Australian Commission in Tasmania, a variation should be made to the wages payable generally to employees under awards of the Commission, the Full Bench may order that any such variation be made.

PN256

Just a slight pause for a bit of humour, President and Members of the Bench, you might look at that and say, "Well, maybe the Tasmanian Government was ahead of their time, the Australian Commission could mean the Australian Fair Pay Commission."

PN257

THE PRESIDENT: Except it does define it.

PN258

THE DEPUTY PRESIDENT: A good try.

PN259

MR WATSON: However, back to serious matters. So we would say that that particular provision is a significant consideration for the Bench to consider in this particular proceeding. And that is that the decision of the Australian Industrial Relations Commission of December 2005 is extremely relevant to these circumstances and as I have said, if the Commission was to follow the consistent approach that it has in the past it would adopt that decision and adjourn these proceedings until the outcome of the AFPCs determination is known.

PN260

We also say that in the present circumstances that the Full Bench, having regard to that decision, would not be satisfied that a variation to the State award should be made. In relation to section 35(10)(a), and just following on from your question before, President, this is a new variation from the Fair Conditions Bill of late last year. It says:

PN261

A Full Bench of the Commission must convene and conduct a hearing annually to determine the Tasmanian minimum wage specified in section 47AB.

PN262

We would say that this is not a barrier for the Commission to defer the hearing of this matter prior to the Australian Fair Pay Commission's determination. It does State annually, so we would say that as long as the determination is made during 2006 that the provisions of section 35(10)(a) in fact would be satisfied.

PN263

PRESIDENT LEARY: So you are saying as long as it is done in the 12 month period?

PN264

MR WATSON: That is right, yes. President and members of the bench, employer organisations don't take decisions to oppose State wage cases lightly, and after the lessons learnt in the 1999 case, where we got beaten up severely, we now return to some of those determinations as part of our submissions today. And we believe that those arguments that defeated us in 1999 are in fact in our favour in this particular proceeding. We advise that we have consented to the last six State wage cases, and it may well be that the Tasmanian Industrial Commission may be faced with consent in 2006 as well, but not before we are aware of the 2006 Australian Fair Pay Commission decision, and have had time to analyse that against the circumstances at the time and the economy of Tasmania.

PN265

In summary, our position, as I said at the beginning of the submission, is that the Commission should defer the hearing of this matter until the outcome of the Australian Fair Pay Commission's spring determination is known, on the basis of, one, the Commission's approach to safety net reviews at the State level since the Commission's inception, and the fact that it has religiously followed the Australian Industrial Relations Commission determinations. Two, those matters that I have taken you to in the State Wage Case Decision of 1999. We believe, particularly given that it will be a narrower majority of employees that would benefit from any determination this year, absent any national decision, that those arguments in fact would turn in our favour.

PN266

Equity and consistency for all Tasmanian employees on the basis that if the Australian Fair Pay Commission decision is implemented, then it should be implemented consistently for all employees in the State. And section 35(7) of the Act, which I have taken you to, which in our view is significant to these proceedings, and is a specific provision that the bench must take account of in determining this matter. If it pleases.

PN267

PRESIDENT LEARY: Mr Fitzgerald?

PN268

MR FITZGERALD: Thank you. Look, I will brief. Mr Watson need not have given up his front row seat. Certainly we support the submissions made - comprehensive submissions made by both Mr Amendola and Mr Watson on behalf of my organisation, Australian Mines and Metals Association Incorporated. I can say, President and members of the bench, that all AMMAs

members are in fact incorporated bodies, and as a matter of law covered by the Work Choices Legislation, and my understanding of that legislation is that those awards will be transferred into the Federal sphere as preserved State agreements.

PN269

PRESIDENT LEARY: So even if the application was agreed it wouldn't affect your members; is that - - -

PN270

MR FITZGERALD: Well, that is what we are saying. We are saying it is pointless in terms to proceed, and for those reasons we would agree with the submissions made by Mr Amendola and Mr Watson that the matter be adjourned until the finding of the Australian Fair Pay Commission in spring of this year. If it pleases.

PN271

PRESIDENT LEARY: Thank you. Mr Rice, did you wish to put any submission?

PN272

MR RICE: I haven't any further submissions, your Honour.

PN273

PRESIDENT LEARY: No further submission. All right. Thank you. Mr Tullgren?

PN274

MR TULLGREN: Thank you. Your Honour, I might commence by dealing with a couple of points that have been raised by my friends. The first one that I just want to take the Commission to briefly is the position that Mr Amendola put concerning the views of the various State Tribunals, about adjournment. He took you to the Queensland decision, but not the complete decision. At paragraph 40 the Full Bench said:

PN275

This Commission will hear the current applications in -

PN276

and then it gives the numbers of them -

PN277

within the time frame established by the previous proposed directions. ...(reads)... the opportunity to place that announcement or decision before this Full Bench.

PN278

So the Full Bench had decided to run the case, but just to wait to see whether - - -

PN279

PRESIDENT LEARY: Yes.

PN280

MR TULLGREN: - - - anything emanated, and that is - that taken in its completeness is somewhat different than the position that Mr Amendola put to

you. My friend, Mr Watson, relies heavily on the 1999 State Wage Case, and in some ways we share with him the nostalgia for those days, when what was being discussed were national wage principles set by the Australian Industrial Relations Commission, but the great whirligig of time moves on, and things have changed. Most of the quotes, and I won't take you to all of the ones that my friend put to you, relate to decisions of the Australian Industrial Relations Commission establishing national wage principles. Well, they are no longer able to do that. Work choices has finished that off.

PN281

And so therefore any of the arguments or the references there really, apart from a nostalgic wander down the particular case, don't assist the Commission, and don't assist my friend's argument in relation to those matters, because the situation is different. He did refer to page 25 and references to the inequity or equity argument. In my respectful submission the appropriate time, if my friend wants to mount those, is if the Commission doesn't adjourn these proceedings, and actually proceeds to hear the State wage case, to put that argument at that particular time. Because that is what that really goes to, not something at the moment. My friend says that he believes that even though the TCCI were, to use his elegant term, beaten up, in that proceeding - - -

PN282

PRESIDENT LEARY: A new legal term I understand.

PN283

MR TULLGREN: - - - one might hazard a guess that the reason, if they were beaten up was because the TCCI engaged in a piece of clever-dickery in putting the proposition to the Commission, and they got their come-uppance. But leaving aside that the case is of no assistance to my friend in relation to this, because it deals with entirely different matters. He said that this Commission has religiously followed various decisions over a period of time. The metaphor is probably correct, but the metaphor can be expended to say that using the imagery in the new testament of a journey that this Commission, the TCCI, that those that instruct me, have all been engaged on a journey on the same road. Let us say to Damascus. But unfortunately the Commonwealth has decided to part company there, and head for somewhere else.

PN284

DEPUTY PRESIDENT SHELLEY: Where?

PN285

MR TULLGREN: There are numerous places, but one perhaps leaves it to the imagination. Although there were some fairly desolate places past Damascus anyway. They have decided to go off on a particular road. That doesn't mean that those of us who are committed to following the right and true course should be in some way driven away from that on the basis that one party, ignoring the views of the Prophet Isaiah, has simply decided to engage in its own practices. So none of that we say, with respect, would support, or any way give justification to adjourning these proceedings. Now, it is now time for me to apologise in advance. We propose to make a fairly comprehensive submission about a number of the matters, and so I do apologise in advance if I bore the Commission with some of these submissions.

PN286

But we believe, for the purpose of completeness in dealing with what is a significant application, that is to adjourn the matter, that the Commission should be addressed on them. The first one is the jurisdiction of this Commission to actually hear the application made by Unions Tasmania. Section 35 deals with matters that are to be dealt with by a Full Bench, and section 35(7) deals with orders that can be made by this Commission varying awards arising out of a decision by the Australian Commission in relation to national wage cases, however they may be titled. Subsection 35(8) deals with orders that can be made, and subsection (9) deals with who can make an application for an order under subsection (7). Section 35(7) says:

PN287

A decision of the Australian Commission that is applicable to the wages payable ...(reads)... which are provided for in the new Part V(A) of the Workplace Relations Act.

PN288

And the one exception to that is in relation to employees covered by Federal awards, who are employed by non-constitutional corporations. Any decision - - -

PN289

PRESIDENT LEARY: Mr Tullgren, I don't know whether anyone is challenging our jurisdiction to hear the matter.

PN290

MR TULLGREN: No. But for the purposes of completeness, and I go on to deal with a matter that my friend, Mr Watson, dealt with about what section 35 really means. Any decision fixing wages for transitional employees, that is employees of non-constitutional corporations, whose terms and conditions of employment are regulated by federal awards, will only affect a minority proportion of employees in Tasmania, subject to the jurisdiction of the Australian Commission. The majority of employees subject to awards of the Australian Commission will have the minimum wages determined by the AFPC. A decision of a Full Bench of the Australian Commission that affects only a minority of employees, subject to its awards, cannot be said to be a decision:

PN291

That is applicable to the wages payable generally to employees who are subject to awards of the Australian Commission in Tasmania.

PN292

Further, we say the Commission should not seek to follow a decision of the Australian Commission that in all likelihood would simply follow a decision of the AFPC. The Unions Tasmania application in these proceedings is for varying all private sector awards in relation to wages that is made under section 35(1)(d). It is not an application to give effect to a national wage decision, as defined in section 35(7). There is no express limitation or qualification on the making of an application under section 35(1)(d). It certainly is not limited to when or whether a national wage decision is made. The absence of a national wage decision is no barrier to the Commission varying awards in terms sought.

PN293

Further, the State wage fixing principles do not prevent the Commission from considering the application, and making the orders sought. The Commission, in dealing with such an application, must determine it according to section 20, section 21(2)(n) and section 36. And they go to equity and good conscience, acting expeditiously, and in the public interest. Nothing in the operation of any other law, including work choices, prevents this Commission from dealing with the application on its merits. Further, the Commission, in our submission, is empowered under section 35(1)(d) to make at any time wage principles, or, as the Act says:

PN294

Provision for, or altering rates of wages generally, or a manner in which rates of wages generally are to be ascertained.

PN295

And that is if they are warranted on the merits. Again, there is no express limitation or qualification on the operation of the section. We say the Commission has wide and unfettered powers to fix wages that are not confined to the implementation or rejection of a national wage decision. We also say that section 3, which defines industrial matter, is to include terms and conditions, clearly means that the application is about an industrial matter. Section 35(10)(a) provides that:

PN296

a Full Bench of the Commission must convene and conduct a hearing annually to determine the Tasmanian minimum wage specified in section 47AB.

PN297

Section 47AB, which is headed Minimum Weekly Wage, appears in division 2A, which is headed Minimum Conditions of Employment Relating to Employees, and it provides:

PN298

The minimum weekly wage for an adult full-time employee is the Tasmanian minimum wage as determined annually by the Commission under section 35(10)(a).

PN299

These provisions, but more particularly section 35(10)(a), mandate that this Commission must determine annually the Tasmanian minimum wage. The last time the Commission did this was on 22 July 2005, with effect from 1 August 2005. Therefore the Commission must determine the new minimum wage by 1 August 2006. My friend, Mr Watson, puts what I think is a quite fanciful proposition that in effect the Commission could wait until the end of November, the end of spring, when, on the off chance that the Australian Fair Pay Commission would make a decision, and then the State Commission could make a decision by the end of December, which would be the end of the annual period, the 12 months. My friend knows, and everyone knows, that unless there is going to be some written consent given in advance that that sort of time line is just totally unrealistic.

PN300

The application to adjourn these proceedings is based on awaiting a decision of the Fair Pay Commission, which at its earliest would make a decision in September 2006, has the effect of asking the Commission to act, we say, contrary to the provisions of section 35(10)(a), based on when the last minimum wage was set. Further, even if it was to be argued that annually could mean from the date the AFPC made its first determination, which could be anywhere from November to December, the AFPC is not required to make decisions annually, and this Commission would be faced with having to continue to make annual decisions, which could, or will be out of alignment with those of the AFPC, thus leading to the possibility of a disruption to the orderly handling of industrial relations in this State.

PN301

The application before you made by the unions seeks in part to establish a minimum wage of $503.80 a week, and in determining that part of the application the Commission would be complying with section 35(10)(a). I want to turn now to the Federal AIRCs decision of 2005, which my friends have both referred to. And I will seek, I think, for the purposes of completeness, to tender a copy of that decision. On 21 December 2005 in print PR966840 a Full Bench of the AIRC dealt with the implications of the introduction of work choices, which in part established the AFPC, and which commenced operation on 14 December 2006 [sic]. As a result of the enactment of that legislation, the AIRC has had substantial limitations placed upon its powers and jurisdictions.

PN302

As the Full Bench indicated in its decision at paragraph 9, it says:

PN303

It is clear that after the commencement of the legislation expected in March 2006 ...(reads)... for wages and other specified monetary amounts, having regard to -

PN304

and then the Commission sets out the relevant provisions which I will not read. At paragraph 10 of the decision the Commission continues:

PN305

Under this section the Commission will be obliged among other things ...(reads)... the AFPC will be the body primarily responsible for the fixing of minimum wages for employees covered by the Federal system.

PN306

At paragraph 11 the Commission continues by saying:

PN307

And while it would be within our power to proceed with the claims before us ...(reads)... The legislation gives the lead role in that regard to the AFPC.

PN308

The provisions of the Tasmanian Industrial Relations Act do not require this Commission to consider AFPC determinations or deliberations before determining Tasmanian wage cases. If this was thought by the parliament of

Tasmania to be a requirement it would have done so when it amended the Act in late-2005, after the AFPC had been legislated into existence. On the basis of the decision of the AIRC to adjourn the application before it was brought about by the provisions of the Work Choices Act, a decision this Commission does not encounter the legislative difficulties faced by the AIRC in December 2005. This decision is not a national - the decision of the AIRC is not a national wage decision as defined in section 35 of the Tasmanian Act. The decision on 21 December, as the Western Australian Commission said, in paragraph 28 of its judgment:

PN309

However, while it may be said in a general sense to relate to wages ...(reads)... sense envisaged by section 51(2) of the Act -

PN310

or in our case section 35(7) of the Act -

PN311

In our opinion, section 51(2) -

PN312

or in our case section 35(7) -

PN313

envisages a decision which operates more directly upon rates of wages and awards ...(reads)... it could be the subject of a general order -

PN314

or in our case a variation under section 35(7) -

PN315

which gives effect to it in State awards.

PN316

The Full Bench then went on to say:

PN317

We do not consider that the decision relates to wages in the ordinary sense of the term. ...(reads)... awards made under the Commonwealth Act -

PN318

when our case awards to the Australian Commission in Tasmania.

PN319

The subject of the proceedings before the AIRC may be said to do so, however the decision relates to the conduct of proceedings only.

PN320

We say the Commission should adopt these provisions as applying to this case. We also say that no assistance can be taken from the AIRC decision, because with respect to that Commission it was in exactly the position of court eunuchs in the Ottoman Empire. They were told what to do. They could make some decision about how they might do it, but at the end of the day they had no choice, and in fact that is exactly what the Federal Commission, the position that it was in

in relation to that decision. Now, addressing the Australian Fair Pay Commission, which Mr Amendola took this commission to, we say that adjourning these proceedings, pending a decision of the AFPC is inappropriate, because there is no indication exactly of when the AFPC would make a decision.

PN321

In fact there is no legislative requirement for it to issue any decision within any time frame. It is also - the time frames can be - it is subject to further instructions which can be issue through the regulation making power of the minister, and that is contained in section 7K(3) of the Work Choices amendments. All of this means that the cycling which the AFPC makes determinations varies, being shorter or longer than the process that was adopted by the AIRC, leading to variations and confusion, or the potential for them. There can be no confidence that the AFPC will make a determination prior to the end of November 2006, and even if there were an earlier determination it would be after the operative date sought by the Unions Tasmania in this application.

PN322

We also say that there could be further delay imposed upon the State process, should the Commission wait for the AIRC to subsequently conclude a determination pertaining to transitional employees, because the AIRC would have to deal with any application before it, make a decision, and then have this Commission list and hear the Unions Tasmania application. All this could mean that this application being pushed out to April or May 2007. A Full Bench of the New South Wales Industrial Commission in dealing with similar matters, and I seek to provide a copy of that decision to the Commission, at paragraph 47 of the decision they said, in dealing with an application by the commonwealth minister to intervene and to seek an adjournment of the State wage case lodged by Unions New South Wales, and they said:

PN323

Accordingly we consider the balance of convenience lies in favour ...(reads)... ultimately could prove to have been unjustifiable.

PN324

We say the Commission should so find in and adopt in relation to this matter. There is no assurance that any decision of the AFPC would achieve a consistent approach to minimum wage fixing, or setting in any event. In fact it would make more sense for the AFPC to consider the outcome of all the state wage cases. That is, in New South Wales, South Australia, Victoria and Western Australia. The AFPC has been created in order to bring about minimum wage outcomes, more in line with those stated of the Commonwealth Government, and the ACCI, of bringing about lower wage outcomes than those previously determined by the AIRC. This is borne out by the fact, members of the Commission, that if the Commonwealth had had its way, since 1996 the current minimum wage would be $50 a week less than it is now.

PN325

The section 7I of the Work Choices legislation, which deals with the AFPC says that it may conduct what are called reviews, and to exercise its wage fixed setting powers as necessary. In fixing wages, the AFPC must, as a result of section 7J, take into account the needs of the unemployed and low paid to obtain and remain

in employment, employment and competitiveness, the provision of a safety net for the low paid, and ensuring juniors, trainees and workers with a disability are competitive in the labour market. None of those terms are defined in the legislation. The AFPC is not required to consider living standards in the community, fairness and the needs of the low paid, and the public interest, matters that the AIRC was previously obliged to consider under section 88B(2). Again, as the Full Bench of the New South Wales - or the Industrial Commission of New South Wales said at paragraph 93 of their decision:

PN326

Whilst one of the AFPCs wage setting parameters is to provide a safety net ...(reads)... notion in the Federal and New South Wales systems of industrial relations throughout history.

PN327

We can pause here to say that the observation about the New South Wales system is apposite in relation to the Tasmanian system, even adding that the Tasmanian system is not of the same degree of antiquity as that in New South Wales. The New South Wales Commission continues:

PN328

But it is difficult to overlook the fact that, unlike the relevant former provision ...(reads)... a deliberate omission by the Federal legislature of the criterion of fairness.

PN329

Again, we say that those views and observations in the New South Wales Commission are relevant, and would urge their adoption by the Commission. At paragraphs 40 to 45 the New South Wales Commission says:

PN330

Secondly, while the Australian Commission will continue to have the responsibility ...(reads)... in the interests of promoting employment and competitiveness across the economy.

PN331

And I pause here to say that recently the Prime Minister, when interviewed on radio, effectively echoed those comments in relation to, it won't be a question of people having payment if they are in the low paid if it is fair, it is that they will have a job. The New South Wales Commission continued at paragraph 42 to say:

PN332

Whilst the New South Wales statute requires the Commission to take into account the public interest ...(reads)... the economy of New South Wales and the likely effect of its decision on the economy -

PN333

and it refers to section 146(2) -

PN334

its functions do not extend for instance to the speculative realm ...(reads)... that we should await the subsequent decision of the Australian Commission -

PN335

a bit like today really -

PN336

before proceeding to hear and determine the present application by Unions New South Wales. ...(reads)... It is only a national decision of the Australian Commission that we are required to consider under section 50.

PN337

At paragraph 47 the Commission continued by saying:

PN338

The divergence between the changes that have brought about by the Work Choices Act ...(reads)... that ultimately may prove to have been unjustifiable.

PN339

We respectfully say that this analysis is correct, and that the Commission should adopt it, and in doing so refuse to grant the proposed adjournment. The AFPC is not a Tribunal, there is no ability for any person or organisation such as the ACTU to make an application to the AFPC, and there is no requirement for the AFPC to conduct hearings or hear evidence. There is no challenge or appeal process in respect of decisions of the AFPC, and under 7K(3), the timing frequency, scope and manner at which their reviews are conducted are subject to direction through the minister. Now, turning to the Work Choices Act itself. In addressing the issue we commence by saying that all the States, and a number of unions, have challenged the constitutional validity of this legislation, and that challenge is to be heard in May 2006.

PN340

In say that, that is just as a factual position. We accept as, as I said my friend, Mr Amendola, said the legislation is effective and lawful until and if the High Court were to determine otherwise. The Work Choices amends the Workplace Relations Act in a variety of ways, including how minimum wages are to be set. These changes are contained in a number of schedules, with the main amendments in schedule 1. Schedule 15 dealt with transitional treatment of State employment agreements and State awards, and is relevant to matters here under consideration. As the Full Bench of the New South Wales Commission said at paragraph 29:

PN341

Whatever uncertainties surround the actual operation of the amended Act -

PN342

referring to Work Choices -

PN343

one thing is clear, it will not exclude the operation of the State jurisdictions with respect to certain employees not covered by a federal instrument, including where the employer is not a constitutional corporation.

PN344

At paragraph 33, after reviewing how Work Choices will impact on State awards and agreements, summarised the relevant provisions, and their purported effect on State awards, as follows:

PN345

One, the Work Choices Act is subject to wide ranging challenge to its constitutional validity. ...(reads)... to be known as notional agreements preserving State awards. New South Wales awards -

PN346

and then we say in this case, Tasmanian awards -

PN347

will continue to have day to day relevance and application to employers and employees ...(reads)... desirability of its decision being consistent with the wage setting decisions of the AFPC.

PN348

Work Choices does not make all State industrial laws inoperative, and I accept that no one is arguing that. What it does is provide that Work Choices would operate to the exclusion of present and future State and Territory industrial jurisdictions in their application to employers and employees who fall within the general constitutional coverage of the amended Act as set out by the New South Wales Commission. Therefore, this Commission still has an independent wage fixing responsibility for those employers and employees not covered by the Work Choices. While it is true that in the past the Commission has adopted a consistent approach to wage fixing with development at the commonwealth level, however, the radical changes made by Work Choices, including the effective removal of the role of the AIRC in setting wages, will mean that there will be no more national wage cases.

PN349

The only matter therefore that employees remaining in the State jurisdiction are able to receive the benefits of a wage increased, based upon State wage case considerations, is via the Unions Tasmania application. The application is not sought in haste, an effective date of 1 August 2006 is sought. The Commission should distinguish between delaying the hearing for an event which may occur at some point in the future, and delaying the hearing when it is clear that there will not be a national wage case decision in future.

PN350

We further say that any final decision by the AIRC near June proceedings presently before it will not be applicable generally to awards made under the commonwealth. It will be applicable only to those awards applicable to transitional employees. These at best are no more than a sub-set of awards of the Australian Commission in Tasmania, as those words are used in section 37(7). Even that limited decision cannot ensure consistency. We further say that consistency does not mean, as the West Australian Full Bench observed at paragraph 53:

PN351

The respective minimum wages are to be identical. ...(reads)... this Commission delaying the exercise of its statutory duty to await an event at some unspecified future time.

PN352

We say that Tasmanian workers should not miss out on the benefit of a wage increase because of the absence of a national wage decision, for the purposes of section 35(7). Further, if there was to be an adjournment, on the basis of this Commission considering the AFPC review, which might assist to maintain consistency between minimum wage adjustments between the Federal and State industrial jurisdictions, we say there is no assurance that it would necessarily achieve that result, or a consistent result. It would make more sense for the AFPC to await the outcomes of all the State wage cases that are proceeding. We say that any adjournment would raise the question of retrospectivity, and all the issues attached to such consideration.

PN353

We would reserve our rights fully if this matter is adjourned to argue for retrospectivity, if any adjournment were to prejudice the operative date that the Unions Tasmania application seeks. I have already taken the Commission to the provisions of section 35(1)(d), the 20, 21 and 36. We say that this Commission is being lawfully requested to exercise its jurisdiction and to refuse to exercise it, in effect to do so upon no better ground than speculation about an application to another Tribunal, which has not at the time been made and is both uncertain as to time and substance, would be wrong. We also ask this Commission to adopt the view of the West Australian Full Bench at paragraph 55 where they said:

PN354

We do not consider it consistent with the obligations on us ...(reads)... from different decisions which arise from its own legislative changes.

PN355

We also say that the commonwealth minister's arguments about consistency are disingenuous, because the whole thrust of the Work Choices is to destroy collective wage and condition structures, and replace them with the individual worker negotiating with his employer, leading to inconsistent wage outcomes between individuals, workplaces and industries. If one was concerned about consistency one would not create a system designed to bring about no consistency. We say that if the minister really wanted to maintain consistency he would have heeded the words of the evangelist, Matthew, who said at chapter 7, about remaining with the States on the narrow way, and not moving to a path which leads to destruction.

PN356

Adjourning this matter would lead to serious injustice for those Unions Tasmania represents, employees covered by awards of its affiliates, whereas the injustice to the Commonwealth, and in turn to the employees represented here who remain in the State jurisdiction, and upon the granting of the claim if we succeed, would be to pay a wage increase to employees who have not received a wage increase since 1 August 2005, and which may possibly be inconsistent with a future decision of the AFPC, which will not apply to them. Adjourning this matter will not cause

the wolf to dwell with the lamb, or the leopard to lie down with the kid, as the Prophet Isaiah said, but to assist the wolf to devour the lamb. For these reasons we oppose the application to have this matter adjourned.

PN357

PRESIDENT LEARY: Thank you. Mr Baker, did you wish to address us?

PN358

MR BAKER: Thank you. Much of the ground that I intended to transverse has in fact been covered by Mr Tullgren, and I have no intention of revisiting it, simply not in the same depth.

PN359

MR WATSON: Or the same style.

PN360

MR BAKER: Or the same style. Thank you. Our submission to this bench is that in our view the Commission has a clear jurisdiction and legislative responsibility, and within that I include the term, the delay, which I shall address, responsibility to hear and determine the application for the award and the wage adjustments for employees and employers employed in our system. And in turning to the issue of delay, it is our submission that to delay these proceedings for up to a period that may well be somewhere in the vicinity of 12 months, is in fact unacceptable, and in fact would breach the obligations that are imposed on this Commission by sections 20 and 21 of our Act, which details the way in which matters are dealt with by this Commission, and the way in which they are brought to a conclusion.

PN361

I will offer a quote from the TCCI, arising from the 1999 decision in relation to that matter, about process, later in my submission. In our view there is no requirement for this Commission to follow, or wait for a decision at the Federal level in making the adjustment. As I have indicated, the delay in these - in any proceeding that may arise from a delay, may in fact be substantial, so substantial that it may in fact prejudice the outcome of these proceedings. We are advised by the minister, and indeed through publications, that the Australian Fair Pay Commission, and I love these phrases like the Fair Pay Commission, a Fair Pay Commission that doesn't have to consider the word "fair" in its charter, will meet and determine the matter some time between - in spring of this year, which is, at its earlier, September, at its latest December.

PN362

Following that there then needs to be a hearing of some description for the Australian Commission to "flow" the decision of the AFPC into - for employees of its area of jurisdiction. And finally there would then need to be a hearing of this Commission if the employer submission is accepted, to flow that decision, or to seek, by either flow or through an arbitrated outcome of that into this Commission, in which case, given the fact that Christmas will intervene, it may well be March/April, this time next year, when the application is back before the Commission.

PN363

PRESIDENT LEARY: Last I looked Christmas was only one day.

PN364

MR BAKER: Yes. But it seems to sort of slow things down dramatically through that period. In addition to that, of course, the concept of - there was also - I beg your pardon I lost the train of thought there for a moment.

PN365

PRESIDENT LEARY: I am sorry. We are up to March or April 2007.

PN366

MR BAKER: There is, as has been alluded to by Mr Tullgren, the issue of the adjustment, or the review of the minimum wage, as it is now expressed, in the Act at 47AA:

PN367

The purpose of this division is to establish a safety net of fair minimum conditions of employment.

PN368

And at 47AB:

PN369

The minimum weekly wage for an adult full-time employee in the Tasmanian minimum wage is determined annually by the Commission under section 35(10)(a).

PN370

There is no requirement on the Commission to increase the minimum wage, but there is a requirement to review the minimum wage. Now, it would be our submission that any review of the wage would take into account movements in various indices that are consistent with the right, or the obligation of the Commission to set the wage. And it would be somewhat difficult to comprehend a situation where this bench would not, in all circumstances, vary that wage by an appropriate amount. We have addressed the issue - well, I might just make a comment in relation to the concerns about differing wage outcomes, and as I indicated in my earlier comments before the Commission, that that is not the making of this Commission, nor of this government.

PN371

Indeed, as I indicated, or alluded to at the outset, there have been now 21 years of decisions of a Commission that have indicated - I am sorry - that have consistently - not consistently, but by and large adopted what has moved in the Federal jurisdiction. Indeed, in the very first decision of this Commission in respect of such matters, in T96 and 99 of 1985 the Commission indicated:

PN372

This Commission has already adopted mutatis mutandis the principles of the Australian Commission ...(reads)... as impinging upon the statutory independence of this Commission.

PN373

And then there was just - it concludes. So that really set the basis of a uniform approach as far as wage movements for minimum award wages were concerned in the State. And that has been the case, as I have indicated, for 20-odd years. Now, in the decision in 1999 there is an interesting quotation that was brought to the attention of the bench, at page 19 of the 1999 decision:

PN374

Only in an extraordinary circumstance would it be desirable to settle upon objectives manifestly inconsistent with those of the Federal Commission in a national wage case.

PN375

Now, we would submit that circumstances have now reached that extraordinary phase, because circumstances have moved, and indeed in that decision movements and variances between the Federal and State Commissions were indeed recognised and acknowledged by the Tasmanian Chamber of Commerce, at page 28 of the decision:

PN376

The Tasmanian Industrial Commission is not simply an arm of the Australian Industrial Relations Commission. ...(reads)... for the Tasmanian Commission to demonstrate its relevance in relation to wage fixation in this State.

PN377

A quote that I would say reflects the application that is before the Commission today. The TCCI contends that there are cogent grounds for this Commission to critically analyse the Federal safety net review decision, and for the purpose of producing a decision that is consistent with the Tasmanian circumstances. Much of the economic foundation upon which the Federal decision relies is not repeated in Tasmania. The TCCI strongly submits that this Commission must test the key assumptions and foundations of the National decision in a Tasmanian context and test the TTLCs claims in light of the result of that exercise. To do otherwise the Commission would be acting without regard to its statutory responsibilities under the IR Act of '84.

PN378

We would say, President and members of the bench, that is exactly what this bench should do in 2006, as opposed to 1999, test the application that is before the Commission, test the application by way of a fair ballot assessment of the competing positions in the parties, as supported by the evidence. That cannot be the approach that is adopted by the AFPC. These proceedings are about, and I stress this, are about the interests of low paid workers, and this government, and the government before the one that is to be elected, has regularly and invariably argued to this Commission, and on behalf of workers nationally, in the past years not to lose sight of the interests of low paid workers. Any delay in these proceedings will in fact prejudice the low paid workers of this State.

PN379

And there is an issue that I again must refer back to the 1999 decision, as it relates to the former director of the Industrial Relations here in Tasmania, Mr Willingham, made the point in relation to safety net increases:

PN380

In this Commission our principles still apply. Our wage fixing principles continue to apply as they relate to the award safety net and the arbitration of that safety net, in principles 4 and 5.

PN381

And Mr Willingham, at page 23 of the decision says:

PN382

The whole point of safety net increases is that they serve to underpin ...(reads)... weekly earnings in Tasmania is $686 a week -

PN383

which I understand has now risen to around 820:

PN384

An increase of $10 per week represents -

PN385

etcetera. And there in the second paragraph:

PN386

It is argued that safety net increases are modest ...(reads)... have no incentive to do whatever to do anything else.

PN387

And on that basis we would strongly suggest to this Commission that, as I have indicated, that this Commission has an obligation to proceed to determine the matter that is before it, consistent with its own wage fixing guidelines, together with the obligations that are imposed upon it under the Act, and in particular under section 21N of the Act which says - - -

PN388

PRESIDENT LEARY: Just on that point, Mr Baker. If you look at the 1999 decision at page 20, the second last paragraph, it talks about a 1995 survey which showed that Tasmanian employees represent the highest number who literally rely on the safety net. Is it your view, or you may not know, that that is still the case, that a majority of employees in Tasmania rely on the safety net increases, rather than enterprise bargain?

PN389

MR BAKER: Well, I can't confirm that with any degree of certainty, but clearly that has been a comment that has been regularly made by both employer and employee organisations over the years.

PN390

PRESIDENT LEARY: Because the application only refers to private sector awards.

PN391

MR BAKER: That is correct, but the other - and I think - thank you for bringing that to my attention. There has been a review that has been undertaken, and it is certainly not an accurate review, but there was a review obviously undertaken of employers who are covered by - who are incorporated, versus unincorporated organisations, for the consideration of the Work Choices legislation, because we need to have a bit of an idea as to who was who. That survey has no scientific basis, but from the information that we were able to gather it would that something like 46 per cent of employers in the State do not fall within the confines of the Work Choices legislation. They are unincorporated businesses.

PN392

PRESIDENT LEARY: That doesn't include public sector employers?

PN393

MR BAKER: No, it does not.

PN394

PRESIDENT LEARY: No.

PN395

MR BAKER: And if you sort of think about where we have got over 50 per cent of businesses in this State that employ less than five employees, it probably gives some credence to the figure. So whereas the figure that we have been talking about, somewhere between 25 and 30 per cent of employees who may be covered by State awards, the actual number of employers who employ those employees is in fact quite considerably more.

PN396

PRESIDENT LEARY: Thank you.

PN397

MR BAKER: So I will conclude by referring you to section 21N of the Act, and that is to generally give all directions and do such things as are necessary, or expedient, for the expeditious and just hearing and determination of the matter. And I would conclude there with the comment that I believe to delay these proceedings for up to, and including 12 months, without any definitive time line, in fact would be a breach of that section of the Act, it would be a breach of the Commission's obligations to hear and determine matters in accord with the Act.

PN398

PRESIDENT LEARY: Did you want to say something, Mr Watson or are you just getting comfortable in your front seat chair?

PN399

MR WATSON: I just wanted to, if I may be permitted, President, just to make a comment on that percentage that Mr Baker has put to you.

PN400

PRESIDENT LEARY: The survey that Mr Baker was referring to?

PN401

MR WATSON: That is right.

PN402

PRESIDENT LEARY: I think he said it was unscientific.

PN403

MR WATSON: That's right, so on that basis we would either need to see it and see what its foundations are or otherwise I believe that the Commission would probably not take that into account in these proceedings.

PN404

PRESIDENT LEARY: All right, thank you. Do you want to adjourn for lunch or are you going to have a lengthy reply?

PN405

MR AMENDOLA: It won't be a lengthy reply, your Honour.

PN406

PRESIDENT LEARY: Are you happy to do it now rather than adjourn?

PN407

MR AMENDOLA: I am happy to do it now and see if we can perhaps conclude this portion of the proceedings.

PN408

PRESIDENT LEARY: All right, that is fine. Thank you.

PN409

MR AMENDOLA: If the Commission pleases, lots of submissions were put which seem to suggest that we were suggesting that the Commission shouldn't exercise its jurisdiction. There is no issue as to - we are not suggesting that the claim that has been the subject of the application before you has been not brought properly within the Tasmanian legislation nor are we suggesting that the Tasmanian Commission should not move to deal with the matter. What we do suggest is a - what we do put forward is how we think it ought to deal with the matter.

PN410

We are not suggesting that there is some legislative mandate that requires the Commission to take into account a decision of the Australian Fair Pay Commission, just that it would be good and sensible to do so, so submissions about we had no statutory requirement are irrelevant to the submissions that we are putting. We are not suggesting there is a statutory requirement, we are just suggesting it is a good idea. As we indicated during the course of submissions the AIRC doesn't mandate annual reviews either. There is nothing in the statute or the old Workplace Relations Act or previous legislation which said there will be an annual determination by the AIRC in respect of wage fixing, but lo and behold, somehow it worked out that way.

PN411

Moreover, the fact that apparently the AFPC is not an industrial tribunal having adversarial proceedings, somehow diminishes the scope of what the AFPC is supposed to do. It's complete nonsense. My learned friend, Mr Tullgren, took the Commission to great slabs of what the New South Wales Commission had to say about the way in which the AFPC is meant to deal with things going forward.

What I think might be useful, if the Commission pleases, is to look at section 36 of the Tasmanian legislation as to the matters which the Commission has to take into account because the provision is headed The Commission Has To Be Satisfied Of The public Interest.

PN412

Before the Commission makes an award under this Act the Commission - I am talking about awards here so I will skip over some words - the Commission shall be satisfied that the award is consistent with the public interest. In deciding whether a proposed award would be consistent with the public interest the Commission shall (a) consider the economic position of any industry likely to be affected by the proposed award; (b) consider the economy of Tasmania and the likely effect of the proposed award on the economy of Tasmania with particular reference to the level of employment and take into account any other matter considered by the Commission to be relevant to the public interest.

PN413

When one looks at the wage setting parameters that are set out in section 23 of work choices the AFPC is to have regard to the capacity for the unemployed and low paid to obtain and remain in employment, the employment and competitiveness across the economy providing a safety net for the low paid and then providing minimum wages for junior employees, employees with disabilities and the like. It is not that dissimilar to the public interest tests that are set out in section 36 and whilst I unfortunately don't have a copy of it to hand out when I was looking at the last Tasmanian Commission wage decision, Mr Cocker, on behalf of the TTLC submitted at paragraph 16 - the Commission sets it out, he sets out the requirements of the Commission under section 36 and says:

PN414

It is submitted that the matters which may be considered relevant to the public interest include the needs of the low paid -

PN415

lo and behold -

PN416

equity for Tasmanian award workers.

PN417

In other words whether or not the word "fair" is used, doesn't mean that it isn't implicit within the wage setting parameters that are set out within section 23 and just for the sake of the record, we disagree with the conclusions that were drawn by the New South Wales Commission in relation to what they had to say about those wage setting parameters. It is suggested my by friends that there is no assurance of consistency by the approach that is put forward.

PN418

That is right. We are not suggesting that it will bring about consistency What we are suggesting is that it is an appropriate framework to bring about the possibility of consistency and when one looks at the way things have happened for the last decade where you have an AIRC that is not mandated to have annual reviews but does so, and the way in which the State Commissions has then gone about

approaching their tasks, where they are not obliged to apply the AIRC decision, nevertheless consistency has been achieved and all we are suggesting is that the same approach be taken. It doesn't matter otherwise - - -

PN419

PRESIDENT LEARY: Reading the AFPC for the AIRC?

PN420

MR AMENDOLA: Indeed.

PN421

PRESIDENT LEARY: Yes.

PN422

MR AMENDOLA: Indeed. You know, there is no magic in what took place in the past and somehow the fact that it isn't mandated or regulated now doesn't make any difference going forward in terms of what might happen in the future. The only other matter that I would seek to address, if the Commission pleases, because I didn't expressly address it and I only want to bring the Commission's attention to it, section 35(10)A is there in the Tasmanian legislation and it does require an annual review. I don't - as I read it, I don't think it reads in the way that Mr Tullgren suggested, it is suggested that there be a review every 12 months, it doesn't necessarily mean it has to be every July or things have to happen every August, but nevertheless that provision is there and we understand and accept that and I draw the Commission's attention to paragraph 17 to 19 of the submissions that we filed which set out an alternative approach which was essentially one that if the commission was not minded to adjourn the proceedings that it hear the proceedings and then adjourn to see where the position of the AFPC is at that point in time.

PN423

There was one final matter. I think it was suggested by my learned friend, Mr Tullgren, that somehow the AFPC is subject to ministerial direction. I don't know where he sees that, I don't know where it comes from. It is certainly not in the legislation.

PN424

PRESIDENT LEARY: I think he said that there could be some change by regulation.

PN425

MR AMENDOLA: I think the regulations here is the AFPC - section 24, I have got the renumbered version unfortunately - - -

PN426

PRESIDENT LEARY: Oh, have you?

PN427

MR AMENDOLA: Yes, 7K:

PN428

The AFPC can determine the timing and frequency -

PN429

etcetera -

PN430

what it might do is it might undertake research, consult with any other person, monitor and evaluate the impact of wage setting. Subsection (1) and (2) have effect subject to this Act, and any regulations made under this Act.

PN431

I don't see that as ministerial direction, your Honour.

PN432

PRESIDENT LEARY: I guess that is a matter of perception.

PN433

MR AMENDOLA: Maybe. There is nothing else I would seek to put, if the Commission pleases.

PN434

PRESIDENT LEARY: All right, thank you. On that last matter that Mr Amendola raised, section 35(10)A, do you want to make any further comment on that or - - -

PN435

MR TULLGREN: The only point I was making was that the power of subsection 7(k)(iii) specifically provides for the Minister to make regulations which can affect the provisions in section 7(k)(i) and (ii), it is about how they operate. It is no more than that, it was just simply to say that there is that power.

PN436

PRESIDENT LEARY: Yes, that was what I understood you to say. Well, I think we have heard from everybody. Thank you for your submissions, we will reserve our decision and address the issues that have been raised. Thank you.

ADJOURNED INDEFINITELY **[12.45pm]**