

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 4146 of 1992
T No. 2225 of 1989
T No. 2311 of 1990

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

re making of a new award

COMMISSIONER GOZZI

HOBART, 11 May 1993
continued from 31/3/93

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: Any changes in appearances in these matters?

MR WARWICK: If the commission pleases, I believe from my organisation's point of view our status is changed from that of intervener to an organisation with an interest in the award.

COMMISSIONER GOZZI: Yes, that's correct. Thank you, Mr Warwick.

Well, this matter was adjourned on 28th April. I think we had some discussions at that time as to just how this matter should proceed.

If I recollect correctly the parties were to have some discussions about how they saw these proceedings going, having regard to the fact that a decision was handed down by Senior Deputy President Hancock of the Australian Commission indicating that it was his intention to regulate this industry, the community services industry and social welfare industry, by way of a federal award.

Can somebody tell me what happened? Mr Paterson?

MR PATERSON: Nothing has essentially happened in terms of discussions, unfortunately. The ASU attended to the other matter that was potentially holding up proceedings, and to my understanding there hasn't been any other developments in terms of respective positions of the parties on this side of the table.

COMMISSIONER GOZZI: Well, if that is the case there is no point in asking anybody else to comment. Perhaps, Mr Paterson, can I ask you what conclusions you have come to about the discussions on record the last time we met?

MR PATERSON: I think essentially the conclusions I have come to, particularly in reading Deputy President Hancock's decision, that personally - and I am not entirely sure of the union's national position on the matter - I don't have any particular confidence in the way that decision will necessarily, or can necessarily, flow to the third federal award claim that the union is pursuing.

And whilst the deputy president indicates that a piecemeal approach is a rational approach to bringing on the decision - bring on the award regulation of the industry - it's still my belief that a state award is desirable, and I think some of the arguments do need recapping some time in this hearing.

As the commission will also be aware, that decision of Commissioner Hancock is currently subject to appeal and a

bench is sitting yesterday, today and tomorrow in Queensland in Brisbane to hear that matter.

I'm not aware of the substance of those appeals. It may be that they go to the question of whether he went beyond his brief in terms of supporting a position in terms of a broader coverage.

I guess the principal position is that no matters were put before him by any of the employers in the industry as to the question of further coverage of the industry. That it was his decision in respect of the crises assistance and supported housing award claim and the extent to which the applicants under section 111(1)(g) sought to make arguments that they had a preference for an all-embracing coverage.

He answered that by saying that given all the circumstances this was an appropriate way to proceed.

I suppose, looking at it from the other end, the arguments remain wide open as to what claims may be made under section 111(1)(g) by employers, governments or, in fact, other unions once we move to the making of that National Social and Community Services Award.

Just to briefly, while I am on my feet, to clarify some of the features of the industry.

I think it is probably worth noting very briefly that it is my understanding that we're looking at something like 12 or 13 employees who are covered by what's commonly known as the 'Skill Share Award', the CETSS Award - Community Employment Training Support Services Award.

There's some 30 to 35 employers I believe that would be covered by the CASH Award - Crises Assistance and Supported Housing Award - and I estimate that somewhere in the vicinity of 160 to 200 employers remain beyond those two and would be subject to the national SACS - Social and Community Services Award - claim.

That's interestingly reflected in our membership, that 12 to 18 months ago I would have said that - or I would have reported - that our membership was of the order of 50% covered by the CASH Award, 25% covered by the Skill Share Award, and 25% by the other award.

That balance has significantly reversed, or swung to favouring the non CASH, non skill share, where 50% of our members would be subject to the claim that is yet to be progressed to any significant extent, being the National SACS claim.

I guess that reflects two things: one, it reflects the awareness of people working in those non-primary program areas

of the union, and possibly growth and employment in those areas.

COMMISSIONER GOZZI: So what was the percentage again in that sequence?

MR PATERSON: Well, basically we are now looking at something like 51% covered - that would be subject to a decision made here, or eventually the third award claim, the Social and Community Services Award. Something like 17.1/2% of our membership would be in Skill Share and 31.1/2% in SACS Services subject to the cash award.

As for the number of employers, I mean it is difficult to estimate. I think when we served that rest of the world, the National Social and Community Services Award claim in 1990 I think I identified something like 300 organisations, but some of those were health services union coverage by virtue of existing awards and have been dropped out of that claim; and a significant number of others either don't exist as employers or don't exist at all any more.

Of course the other question that I continually raise, and of course there are different ways of dealing with it, is that since those two latter claims, the CASH Award claim and the National SACS Industry Award claim, there are a significant number of new employers in the industry who have not been logged.

Another interesting development that again doesn't necessarily push us one way or the other, but the services we visited in the inspection - one of which was the Competitive Employment and Training Placement Service Equity Personnel that we visited in Burnie - the union has sought to rope those into the National Skill Share Award on the grounds that they are a community based labour market program with a specific clientele, being disability services, or people with a disability.

The position at the moment is that that is not being done, and there are none of the three employers - none of the three employers in this state are consenting to being roped in, and the national employer organisation in that award is saying that there are difficulties in doing that and that the award may not be appropriate.

So that demonstrates, I suppose, that the roping-in process is by no means an easy one, even aside from the question of identifying the employers.

I recognise that the union does have options, in terms of if the commission's decision is not to proceed with this matter. Then the throwing of weight behind a national award, the development of a fully-fledged national award is an option

that we would have to pursue in those circumstances, and once made then counterpart awards may be appropriate if there are a significant number of employers not covered by those federal awards.

The other option that I haven't had any opportunity to explore with our union federally is that if it was seen as desirable, then a federal award in respect of Tasmanian services could be made which would prevent that matter from being held up by negotiations in other states with other unions or other employers.

The critical issue I would believe is that, well I suppose the other observation to make, is that the union recognises that if this award is made then it may well have a bearing on first award principles when it comes to the making of a subsequent federal award, which would clearly override a state award, and I expect our position in terms of advocating that this award process here proceed is in light of recognising that fact and weighing that against the benefits of getting a speedy document of an award in place.

We certainly don't resile from our intention to pursue federal awards in the long term, but as I have mentioned throughout these proceedings our confidence in that being an expeditious process is at a very low level.

I suppose that I put to you a position that says in the event that you are persuaded not to proceed to the full extent of incapacity with these proceedings that the issue perhaps should be looked at as one in terms of - should be looked at in terms of one of proceeding with the award but in a limited way - because there award-free personnel out there who are unprotected in terms of their industrial rights.

And whilst the union clearly has the ability to bring on disputes the provisions of the award in terms of an educative role and bringing employers to a common level of understanding about their rights, duties and obligations is important; and rather than not proceedings at all, I would suggest that the option is one of proceeding to make an award that reflects community standards in areas of agreement that the union and the employers have no problem with.

The corollary, I suspect, is one of that if the decision is not to proceed here with this award, then I would hope and expect that the corollary of that is that the decision would be in principle translated into one that enterprise agreements in this state would not be similarly being pursued.

It would be illogical for me to look at a situation where the commission has declined to make a state award on the grounds that it is going to be covered by the federal jurisdiction and then to turn around and have another commissioner of the

Tasmanian Industrial Commission ratify enterprise agreements in this jurisdiction.

The principal -

COMMISSIONER GOZZI: It won't be in this jurisdiction.

MR PATERSON: Well in the jurisdiction of the Industrial Commission. Isn't that where the enterprise agreements are to be ratified?

COMMISSIONER GOZZI: Oh, well, I suppose if it turns on a fine point, I -

MR PATERSON: you to allude to another commissioner doing that.

COMMISSIONER GOZZI: Yes. Another building, I suppose. It doesn't separate jurisdictions. Different titles.

MR PATERSON: Under the common act of the State Government.

The position I expect at the end of the day really does depend on the employers and their position. If the employers are ready, willing and able to negotiate on a federal award, then I expect that we have no problem in pursuing that course of action.

As I have alluded to, though, throughout these proceedings, I think the material that has been put forward throughout the proceedings will clearly indicate that the employers have a genuine difficulty in organising and developing an industrial position of their own, which is not to cast any dispersions on the ability or the willingness of those parties to do so. It is a genuinely difficult task to do.

For all those reasons, I believe that the matter should be progressed, and the question should be one of to what extent do we wish to go into the more higher areas of development of particularly the central ones of wages and classifications.

If the commission pleases.

COMMISSIONER GOZZI: Yes. Thank you, Mr Paterson. Mr Warwick?

MR WARWICK: Thank you, Mr Commissioner. I have had an opportunity to communicate with my national office with respect to the questions which were raised by you at the last hearing, and I am more than happy to give you some idea of the advice that has been given to me.

I am not sure that it is necessarily what Mr Paterson wants to hear me say, necessarily what I want to put, but it is the

view of our national office that there will be a significant period of time before any party to the federal award applications is aware of even fundamentally which enterprises, if any, will be covered by those awards.

And, certainly that is a matter that has to be considered before the award-making process itself gets under way in full swing.

There has been significant progress between the Australian Services Union and ourselves in respect to reaching accommodation, or accommodations, in the other states in relation to demarcation arrangements, similar to the arrangement which has been reached here, and while those issues in the other states are less of an obstacle than they were, the principal question of the attitude - the principal question of the complex legal arguments - which have to be put in respect to the making of these principal awards is the significant factor in terms of time.

I am advised that the Queensland Government, the Victorian Government in particular are almost violently opposed to the making of all the awards sought, and there will be extremely complex legal argument put in respect to those.

And my national office was in fact prepared to put a time on it. Indeed, an absolute minimum of a year before any significant process will be made and, indeed, probably 2 years before anything like a concrete award -

COMMISSIONER GOZZI: Well, you should have left Tasmania off the claim.

MR WARWICK: Sorry, Mr Commissioner?

COMMISSIONER GOZZI: You should have left Tasmania off the claim.

MR WARWICK: We have no claims, Mr Commissioner, for federal awards.

COMMISSIONER GOZZI: Well, your federal organisation. I mean - and Mr Paterson's.

MR WARWICK: Mm, well I guess that is a question for Mr Paterson. We don't have applications before the federal commission, Mr Commissioner Gozzi.

COMMISSIONER GOZZI: Yes. So, 1 to 2 years is the estimate made by your federal office?

MR WARWICK: That's if these awards are to be made, and these -

COMMISSIONER GOZZI: Following the legal arguments.

MR WARWICK: Sorry?

COMMISSIONER GOZZI: Following the legal arguments.

MR WARWICK: Yes. Yes. And I am not sure whether Mr Paterson is comfortable with me putting that view, and he is entirely entitled to.

COMMISSIONER GOZZI: Oh, well I think Mr Paterson is probably agreeing with you that it is going to take some time to get it all sorted out.

MR WARWICK: Yes. I would like to agree absolutely with I think the closing comments put by Mr Paterson in respect to the question of award protection, particularly in relation to the people for whom we sought, recently sought, an award interest.

We've had discussions about industrial agreements in respect to those people. Those extensive discussions have not reached, or not born the fruit that we hoped that they would. The employers are not prepared to enter into industrial agreements with us in respect to the home care services.

COMMISSIONER GOZZI: So you have had discussions with employers, have you?

MR WARWICK: Yes, Mr Commissioner, over a significant period of time, in relation to various groups who provide the home care services comprehended by the award.

COMMISSIONER GOZZI: So, what, they have decided not to enter into an agreement at all?

MR WARWICK: That's correct. I am referring there to section 55 - Industrial Agreements, of course, Mr Commissioner.

COMMISSIONER GOZZI: Yes.

MR WARWICK: And we similarly share an aversion to this process not proceeding, and out of that there being some prospect of enterprise agreements coming to light - particularly in the home care service areas - in lieu of the process which the applications before you comprehend.

So, clearly, Mr Commissioner, we see every reason to proceed to make an award forthwith.

COMMISSIONER GOZZI: The award-making process wouldn't preclude the making of enterprise agreements though, would it?

MR WARWICK: Indeed not, Mr Commissioner, but without an award-making process there is only the enterprise agreement option.

We would certainly submit that the employees ought to have at least the option of an award or an enterprise agreement at the very least or, indeed, a section 55 industrial agreement, but in this case it would appear that that's not an avenue that's acceptable to the employers.

If the commission pleases.

COMMISSIONER GOZZI: Thank you, Mr Warwick. Mr Fitzgerald?

MR FITZGERALD: Thank you, commissioner. I am not really certain how to respond, given those positions have only been put today.

But I can say that it is difficult responding to somewhat of a scattergun approach of the ASU.

It is our view that given the appeal process has commenced that we should in fact wait for that issue to be determined. That would determine the issue of jurisdiction.

If in fact the appeal is dismissed, we should then turn our resources and time to the federal jurisdiction, and the employers who are in favour of the making of an appropriate award, whichever jurisdiction.

However, given this appeal process, I think we should wait for the result of that, and it is under way. As Mr Paterson indicated, that did occur on - the sittings did commence yesterday in Brisbane. Given the venue, I am a bit sorry that we didn't appeal ourselves.

But we should wait at least for those - until proceedings to be finalised and that will determine the issue of jurisdiction. I think it would be a wasteful exercise for us to engage in more award making process in this jurisdiction.

The - the issue which was raised by Mr Warwick in terms of - was - was simply speculation on enterprise agreements made in the - the home care area and I haven't any instructions. I believe all that can be seen is the speculation. There is no hard evidence that that is occurring. If it - even if it is occurring it may be - it may be in fact an appropriate course to proceed with. But certainly I have no instruction in that regard.

So in our view, Mr Commissioner, we believe that it would be inappropriate at this time to proceed with whether award making proceedings whilst the question of jurisdiction in the SAP areas still to be determined. There may be some further

time required for an award - if in fact the appeal is dismissed and a federal award isn't made, there may be some further time required for that award-making process. But I don't think that's necessarily the issue. I think we should just wait and see what the result of the appeal is to see whether in fact the federal commission does in fact assume its own jurisdiction to proceed with a federal award.

If it upholds the appeal then I think yes, it's appropriate that we proceed with - with state award proceedings. So that's our position, Mr Commissioner.

COMMISSIONER GOZZI: If it dismisses the appeal?

MR FITZGERALD: Sorry, if it up - if it upholds the appeal and the employers who have appealed are successful, then that would prevent any federal award-making process, then we - we believe then we should reopen these proceedings.

COMMISSIONER GOZZI: Oh, I see. What if the appeal is dismissed and -

MR FITZGERALD: I think - I think then -

COMMISSIONER GOZZI: - and then -

MR FITZGERALD: Sorry.

MR PATERSON: Queensland goes to the High Court.

COMMISSIONER GOZZI: - if the appeal - if the appeal is dismissed and the decision of Commissioner Hancock remains intact, what would be the position of the TCI and the employers you represent.

MR FITZGERALD: I'd have to take some further instructions on that, Mr Commissioner, but our preliminary view is that we would proceed within that federal jurisdiction. Employers are, as I indicated, committed to an award - an appropriate award for the industry.

COMMISSIONER GOZZI: So you -

MR FITZGERALD: So if that be in the federal jurisdiction as a result of that appeal proceeding then we'd proceed that way.

COMMISSIONER GOZZI: Mm.

MR FITZGERALD: But certainly that is subject to final instructions.

COMMISSIONER GOZZI: See if the appeal was dismissed then of course the move to making a federal award in the areas which are award free and given that the award-making process for the

areas that Commissioner Hancock proposes to cover, it'll take some time anyway and you could probably say that if the appeal was dismissed that the award-making process for the areas that we're talking about could well be out some, oh, I'd say, two, 3 years or longer even.

MR FITZGERALD: It could be and certainly there's been other matters which have taken that long, but what I'm saying simply, commissioner, is the issue of jurisdiction will be finally determined by the appeal. As Mr Paterson indicated that could be subject to legal process appeal to the High Court.

COMMISSIONER GOZZI: Yes.

MR FITZGERALD: But once that's finally determined the issue of jurisdiction will be determined and at least employers will know which jurisdiction to respond.

COMMISSIONER GOZZI: Yes.

MR FITZGERALD: At the moment, as I indicated, I think it's a scatter - scatter gun approach and it's -

COMMISSIONER GOZZI: Yes.

MR FITZGERALD: - a little bit of a double jeopardy situation occurring if we respond in this jurisdiction as well as the federal jurisdiction.

COMMISSIONER GOZZI: Mr Paterson, I think, and Mr Warwick both of them are going a bit further than perhaps you are. Whilst jurisdiction will be determined one way or the other with - with the appeal hearing, I think Mr Warwick and Mr Paterson are saying that even if the appeal is dismissed then it will - it will still take some considerable time to get around to making an award in these -

MR FITZGERALD: Yes.

COMMISSIONER GOZZI: - award-free areas. And I think they're saying to me, well even if the appeal is dismissed - or if the appeal is dismissed - continue to make an award to cover the -

MR FITZGERALD: The rest.

COMMISSIONER GOZZI: - cover the rest, because of the length of time they estimate it will take to get a federal award up. So if the appeal is dismissed obviously you'll need to have a position one way or the other.

MR FITZGERALD: Yes, yes. Yes, well I think we'll need - take some instructions on that following the result of the appeal.

COMMISSIONER GOZZI: Right. Thank you, Mr Fitzgerald. Mr Paterson?

MR PATERSON: In response to what Mr Fitzgerald said, I think there is probably two very important points; that if the jurisdiction was going to be settled by Commissioner Hancock's decision, then why in fact wasn't it settled by the making of the Award, that in fact 50% of the industry has no part in the proceedings to date and the - and the abstaining from making an award in these proceedings on the basis of a decision in respect of the CASH Award claim and 111.1 decision - 111(1)(g) decision, could extend logically as an argument to the abstaining from making an award until there is a fully - you know, until the jurisdiction is settled in respect of the whole industry.

COMMISSIONER GOZZI: Yes, well look, I - I -

MR PATERSON: And I don't believe that that's clearly settled.

COMMISSIONER GOZZI: - I think what you need to take - I think what you need to take on board is that whilst the award process that's under appeal goes to the CASH and the home assistance - the Crisis Assistance and Housing Support Award, whilst that's the direct basis of the appeal, he nevertheless put in this decision that the whole of the industry ought to be regulated under federal award.

Now I think to the extent that all of that is under appeal doesn't Mr Fitzgerald have a point that we should await the outcome of the appeal, because if the appeal is dismissed on all counts, that means then that the decision of Commissioner Hancock stands and he then can progress to making an award as he sees fit. Now I understand your concern about that process and the length of it - that - that's probably another argument, but would you agree that if the appeal was dismissed the way is then open to the making of a federal award to cover the entire industry.

MR PATERSON: Without seeing - without knowing the grounds of the appeal I'm really not in a position to comment on that.

COMMISSIONER GOZZI: Well it's either - that part of his decision is either appealed or not appealed.

MR PATERSON: Yes.

COMMISSIONER GOZZI: If it's not appealed it stands, and if it's appealed and it's dismissed it still stands.

MR PATERSON: Well I mean the decision in fact says that the considerations support the view that the piecemeal approach is the most practical.

COMMISSIONER GOZZI: Mm.

MR PATERSON: And I suppose I have difficulty reading into that the extent of the - the decision that you're putting onto it, but that may well be the case, I'm not disputing that that's not the case. I suppose the principal argument would be that, you know, it will depend on the appeal decision, I suppose, to the extent that that view is supported or rejected and to the extent that the - the bench hearing the appeal endorses a position which does in fact cut off appeals against the federal jurisdiction.

COMMISSIONER GOZZI: See, in simple - in simple terms it comes down to his either acted out - beyond jurisdiction in adopting that view - that approach and it is that part of an appeal, if there is an appeal and it's upheld, or alternatively, that approach is endorsed by the - the bench hearing the appeal which then leaves the issue here as to whether or not I should proceed to make an award because of the time that the process he's outlined in his decision taking - taking a considerable period of time.

Now I can say that - that in my opinion - and I haven't heard Mr Warwick yet - in my opinion I think the parties should wait for the outcome of the appeal decision and we take it from there.

MR PATERSON: I suppose I'm just alert to the danger that that position could then subsequently be adopted in the respect of the third matter which will if - if the appeal decision does not truncate the options for employers who have not been represented in those proceedings and I imagine that we logged - well basically we logged something like 800 employers nationally in the CASH Award. We logged something like 4,000 employers in the rest of the industry award. We're talking about some 3,200 employers who have not been party to the process and I imagine that the appeal bench would have difficulty in adopting any position that cut off their options to pursue 111(1)(g) argument on new material or new grounds. They may limit it to the extent that the matters were run in this decision. I'm just alert to the danger that we may then progress to see the award being dealt with in the federal commission to find a new rash of 111(1)(g) decisions, a new decision by the president - deputy president or a commissioner and new appeal and in the meantime we are still in fact leaving, you know, the expediting of award is not being facilitated at all.

COMMISSIONER GOZZI: Mm.

MR PATERSON: Just further to one other issue raised by Mr Fitzgerald, I do have indications that enterprise agreements are being sought and are being advocated by the TCI as an option in our industry, and the position that I am put in quite clearly to our members is that they should reject such approaches until such times as there is an award in place by which they can measure the - the options that are being put to them. But it is certainly not just a fiction and the - the moves, the suggestions for enterprise agreements, the proposals on paper for enterprise agreements tend to be coming more out of the Launceston office of the TCI than the Hobart office, but they are real and they're by no means a figment of imagination of unions concerned about being written out of the process.

I'll - I suppose the question of - of whether we leave these matters now pending the decision on the appeal is probably a rational decision but without knowing the grounds of the appeal and also on the other hand knowing that the particular cases being run by Victoria and Queensland have their own bent, if you like, and without knowing the grounds of the appeal at a disadvantage in terms of answering that question.

COMMISSIONER GOZZI: Mm. Mr Warwick, anything further?

MR WARWICK: Thank you, Mr Commissioner. I must say I'm at something of a disadvantage in respect to the question of the appeal on the processes under way. It was my intention to ask you, Mr Commissioner, whether you were prepared to speculate how long an appeal decision might take, but bearing in mind Mr Paterson's comments that it may lead to a further process of 111(1)(g) and further appeals from that, I guess that question on my part may be irrelevant anyway.

I don't know that I have a significant submission to make to you in respect to that - the question of the appeal that's pending other than to say that the advice from my national officers. The whole issue is not going to be resolved in a hurry - there's no question about that.

I'd like to make a couple of comments about those things put to you by Mr Fitzgerald. It was his view that it may be wasteful for this commission to look at an award and then - and then indeed have a federal commissioner moving down the same path in the future.

I'd submit to you, Mr Commissioner, that the - the principles themselves prohibit the waste that Mr Fitzgerald alludes to. The first award is an extension to existing awards principles. At point (c) it clearly says that - and there is the converse in the federal principles - that the existing state award rates and conditions prima facie will be the proper award rates and conditions where awards change jurisdiction, so the

rates and conditions set by you would - would in fact with some automaticity be adopted.

COMMISSIONER GOZZI: Do you think so?

MR WARWICK: In a new federal award.

COMMISSIONER GOZZI: I don't think you can say that with any real conviction, Mr Warwick.

MR WARWICK: Well I think that there may be processes putting away - put in place afterwards.

COMMISSIONER GOZZI: I mean I didn't mention that to Mr Paterson. I thought you might venture down that track but you know and I know and Mr Fitzgerald certainly would be aware, that in the nurses case we toiled away as a full bench of this commission for I don't know how long, but I must say I think it was probably about 2 years.

MR FITZGERALD: Yes.

COMMISSIONER GOZZI: And we had issued interim decisions to cover nurses in this state. We gave them, I think, a collective increase of something like about 23%. We had indicated in our decision mechanisms for addressing the rest of the career structure for nurses and notwithstanding all that, the federal commission just came in over the top, not only did they totally disregard what we did in Tasmania with respect to rates of pay, they gave them another serve on top.

Now, I get quite agitated about that sort of operation between tribunals because, quite frankly, there isn't any when it comes to matters such as this.

The feds, for want of a better word, if they decide to make a federal award, then what happens here is really immaterial.

And it concerns me. I am caught between the Devil and the deep blue sea, because I am unhappy about leaving the area unregulated knowing - and I accept, Mr Paterson, what your saying - that the length of time could be years that we sit on our hands while they decide what they are going to do.

But the fact is the organisations, your organisations bounce the ball in that direction. The employers thwart it. They look as though they are going to get rolled should they in equity be put through a process here when they thwart your case.

In other words, you won, Mr Warick and Mr Paterson.

MR WARWICK: Well, I am not sure they are our applications, Mr Commissioner.

COMMISSIONER GOZZI: Well, you know, how does a state organisation separate itself from a federal organisation in matters of this kind?

I mean, if you are rolled by your organisation. You've put a point of view. Well, then I don't know. I don't know whether anybody thought to put a point of view.

But, you know, it is not uncommon for states to say they're federal organisations. Well, we don't want a federal award, - don't log Tasmania, or don't log whatever state. But this didn't happen here.

MR WARWICK: Well, there are no applications by my organisation I mean, largely Mr Paterson's application, or the applications of Mr Paterson go to areas outside our constitutional coverage.

COMMISSIONER GOZZI: Well, both organisations, I mean, yes.

MR WARWICK: And our involvement in those proceedings has largely been with a view to seeking exclusions.

COMMISSIONER GOZZI: Yes.

MR WARWICK: I know, I appreciate the difficulty that you find yourself in, Mr Commissioner.

COMMISSIONER GOZZI: Yes. And the bottom line, Mr Warwick and Mr Paterson really is, and I will address this to Mr Fitzgerald as well, the bottom line really is that is the appeal is dismissed and that part of Commissioner Hancock's decision stands to regulate the industry and do it on a piecemeal basis, and look at each area on a piecemeal basis, the reality is if I continue to make an award in an area that he intends to move in, I could in fact be prevented from doing so.

I mean, if Mr Fitzgerald on behalf of employers wanted to seek to prevent the commission from doing that that would be a course open to him.

I mean, that's where we get to at the end of the day.

Now, when I say I am caught between the Devil and the deep blue sea that's quite right, because I am unhappy, I am unhappy that I am in this position in the first place. I am unhappy that we have got a significant number of employees out there not covered by anything at the present time. I am unhappy that in the exercise of choice they could only perhaps be offered one choice.

But that problem is not of my making. Not this time around, anyway.

MR WARWICK: Indeed.

COMMISSIONER GOZZI: I mean, it was the federal bodies of the organisation that decided to go down that path, and you will recall there was a particular case in this jurisdiction some time ago where in fact an employee organisation sought to prevent the commission from continuing with the hearing - which was overturned, which was not upheld by the federal commission - but that course is open.

MR WARWICK: Yes, indeed. There is one I still - I think I have made the point on previous occasions, Mr Commissioner - that there is one line of thinking which I think is worth keeping on the table, and that is that there is a clear understanding between the ASU and ourselves that their federal awards will not cover home carers.

And I appreciate the difficulty in which you find yourself, but those difficulties do not apply in respect to the people in relation to whom I speak.

And while certainly we are not wedded to the idea at this stage, it may well be that down the track - if the final result is a state award covering the whole industry - there may be a division for those people in fact, for those home carer people.

So, it is a difficult position, Mr Commissioner.

COMMISSIONER GOZZI: I mean, what would prevent the HSUA from seeking to put a division for home carers in the WAVA Award?

The reason I mention that is because you'll recall in some of our earlier discussions to try and rationalise this whole area we, we - I mean the full bench - in making the Community Services Award - establishing the Community Services Award in respect of title and scope - did in fact put forward a proposal - I think it was a five or six step proposal - of how the area could be rationalised, vis-a-vis awards, over time; and I think we cited that you need to look at the WAVA Award, you need to look at the Hostels Award, and I think certain parts of - I can't recollect the other one - but we certainly put forward some proposals with a view of vacating those areas and having it all under one.

But why wouldn't you revert back to seeking to put classifications in existing awards if the scope of those awards permitted that to happen?

MR WARWICK: Well if the scope permitted that to happen, then we could do that, but it would need consent on the part of Mr

Fitzgerald, I think, given that a full bench decision in relation to the scope of the Community Services Award stands.

The scope of WAVA at the moment talks about, if you like, bricks and mortar in terms of sheltered workshops and group homes, and so forth, so there would need to be a significant change to the common rule quality of the scope of that award, and there would need to be a subsequent consent variation to the full bench decision in respect of CSA.

COMMISSIONER GOZZI: The other difficulty - and these comments are not just addressed to you, Mr Warwick, you happen to be on your feet - but the other aspects of it is, of course, that even when a federal award is made it will only apply to those named respondents, and it is not uncommon of course to have a state award pick up the residue, if you like, by virtue of its common law application.

And so I guess whatever happens at the end of the day, given that you have got these employers springing up here, there and everywhere, over time some will come and some will go, they are only going to be a respondent as long as they are named respondents, and the state award would apply to pick up those that are not named as respondents in the federal award; and there are examples of this already in the state of course where federal awards apply and the state award picks up the unnamed respondents by virtue of its common law application.

But in those circumstances, by and large the state award reflects very much what's in the federal award.

I am just trying to think of one off the top of my head, and I think the -

MR FITZGERALD: The Metal Industry and the engineering award.

COMMISSIONER GOZZI: Yes. And I think the Musicians Award also was in that category for a time. I'm not sure. But there are a number of them that do that.

MR WARWICK: Yes. Well certainly, Mr Commissioner, if Mr Fitzgerald is prepared to spring to his feet, I'll forego any argument about right of reply if he wants to put a proposal about changing WAVA or doing some of those thing, I am more than happy for him to do that.

COMMISSIONER GOZZI: Well, look, perhaps there won't be a need for Mr Fitzgerald to do that. If you have got nothing further to add perhaps I'll just make the observation that I think we should wait until the appeal hearing is finalised and the decision is handed down.

If the appeal is dismissed, then obviously Commissioner Hancock's decision will stand, and the only concern to me will

then be the length of time it could take for him to get around making an award to cover the employees we are talking about.

My inclination at this stage would be to move, notwithstanding to make an award in this area, and I would only desist if in fact I was forced to desist.

And, as far as that goes, that ball would be fairly and squarely in Mr Fitzgerald's court, because I can understand the view that he is expressing about that, and I think we need to stop going around this merry-go-round, so I am prepared to give these fairly broad indications.

If the appeal is upheld, then obviously there is nothing to talk about.

The effect of the appeal being upheld would be for Commissioner Hancock's decision to be quashed, presumably, or there might be some other direction to him as a consequence of it, but certainly if the appeal was upheld then I would want to proceed with the making of this award post haste.

In summary, I am really indicating that I would proceed to make the award, but would take on board some further submissions about the proposed length of time that it would take for the award to be, for the federal award, to be made in the area that I am talking about.

And, obviously Mr Fitzgerald will need to take some instructions about that course of action, because no doubt the employers could have a view about that.

And, look, I understand that. I am just concerned about leaving this area unregulated for the next 3, 4 or 5 years - and that's my estimate of the time, quite honestly - by the time this thing runs through all the processes.

So, at this stage my best advice to you is to hold some discussions to see at least what common areas could be distilled between you, and come back to me after the appeal decision is handed down.

So I am going to adjourn it sine die, leaving it in your court to come back to me when the appeal decision is down.

But I really strongly recommend that you shouldn't, if I can call it, waste that time. I think you should try and get agreement on those matters that are able to be agreed, and I should imagine there would be quite a few of them.

I mean, the only real difference between you is going to be amount of money, it is going to go to hours of work and the rates that apply to what might be regarded as work outside normal hours.

And, obviously I would expect there to be some flexibility in those areas, and I wouldn't think it would be impossible to reach agreement on those matters.

So I think that's as much as we can do at this point in time.

We'll adjourn sine die. Thank you.

HEARING ADJOURNED SINE DIE