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TRANSCRIPT OF PROCEEDINGS

O/N 8769

TASMANIAN INDUSTRIAL COMMISSION

COMMISSIONER P.C. SHELLEY

T No 10345 of 2002

T No 10382 of 2002

**FISH, AQUACULTURE AND
MARINE PRODUCTS AWARD**

SHELLFISH INDUSTRY AWARD

**Applications pursuant to the provisions of
section 23(2)(b) of the Industrial Relations
Act 1984 to vary the above awards**

HOBART

3.00 PM, WEDNESDAY, 11 SEPTEMBER 2002

HEARING COMMENCED

[3.04pm]

PN1

MR R. FLANAGAN: I appear for the Australian Workers Union Tasmania Branch.

PN2

MR J. O'NEILL: I appear for the Tasmanian Chamber of Commerce and Industry Limited.

PN3

THE COMMISSIONER: Now, are there any - I am just looking at the parties and persons bound. Are there any other organisations that have an interest in this award?

PN4

MR FLANAGAN: The AFMEPKIU has an interest in the Fish Aquaculture and Marine Products Award but, with all respect to that organisation, their presence is not significant and the carriage of award variations has tended to be with the AWU in respect of organisations of employees making applications.

PN5

THE COMMISSIONER: Thank you.

PN6

MR FLANAGAN: So in your view, Commissioner, it is not fatal - - -

PN7

THE COMMISSIONER: Doesn't mean we shouldn't proceed?

PN8

MR FLANAGAN: Yes, yes.

PN9

THE COMMISSIONER: Well, I don't think there is anything on the file from them that indicates any reason for non-attendance. Perhaps that could be interpreted in a number of ways, couldn't it - from sharing your view that they are not particularly significant in this industry, to a lack of resources, to falling under a bus.

PN10

MR FLANAGAN: Correct, yes.

PN11

THE COMMISSIONER: Yes, thank you.

PN12

MR FLANAGAN: And as the application seeks to improve the circumstances of employees I would be surprised if they had any opposition in any event, Commissioner. Commissioner, firstly - - -

PN13

THE COMMISSIONER: Well, I haven't heard who is appearing on the other side, yet.

PN14

MR FLANAGAN: Yes.

PN15

THE COMMISSIONER: Thank you.

PN16

MR O'NEILL: I have given my appearance.

PN17

THE COMMISSIONER: Have you?

PN18

MR O'NEILL: Yes.

PN19

THE COMMISSIONER: I do apologise, Mr O'Neill. Continue, Mr Flanagan.

PN20

MR FLANAGAN: Thank you, Commissioner.

PN21

THE COMMISSIONER: It is not that you are insignificant - I just don't know what happened - a lapse of concentration on my part.

PN22

MR FLANAGAN: Commissioner, firstly the parties thank the Commission for accommodating our request for an alteration to the hearing time. There have been discussions - well, if I can go back? You will recall that on 1 August this year, consistent with the requirements of the State Wage Case, the Commission convened a conference in respect of both the Fish Aquaculture Marine Products Award and the Shellfish Industry Award and it was agreed during that conference that the AWU would proceed to make application in order to obtain the benefits provided for by principle 7 of the wage fixing principles and it was agreed that the TCCI with its members with a view to discussing their response to the application.

PN23

Since that point in time that process has occurred and we are able to inform the Commission that we propose to move forward by consent in respect of both applications. So we would be seeking to vary the application to provide for two steps in the process, if you like. In item one, statement of particulars in the application to vary the Fish Aquaculture and Marine Products Award, it states that the applications seeks to delete the current rate of pay for Process Attendant Level 1, appearing in part 3(2), wage rates of the award, and inserting in lieu thereof the amount of \$431.30. To the extent that we propose to do that in two steps if it is necessary, then we would seek to vary the application and I have the form of two draft orders which I seek to tender in respect of that award.

PN24

THE COMMISSIONER: I will give those exhibit numbers and we will mark them A1 and A2 - A1 being the shorter document?

PN25

MR FLANAGAN: Yes, Commissioner.

MFI #A1 DRAFT ORDERS SHORTER DOCUMENT

PN26

THE COMMISSIONER: And A2 the longer document.

MFI #A2 DRAFT ORDERS LONGER DOCUMENT

PN27

MR FLANAGAN: If I can explain what the two documents are, Commissioner? A1 varies the Process Attendant Level 1 rate of pay by the amount of \$4.15 and it is proposed that it become operative from the first full pay period on or after 1 October 2002. You will see quite deliberately in A1, appearing under the heading Wage Relativity Percentage - there is no percentage which appears next to the Process Attendant Level 1.

PN28

THE COMMISSIONER: Well, does that get in there in stage 2?

PN29

MR FLANAGAN: It does, yes. The current percentage - and I will tender a copy of the recent State Wage Case variation to demonstrate it, provides for a relativity of 76 per cent. However, in applying the minimum wage, the relativities are distorted so when you go to A2 you will see that there is a further variation of \$4.15 to the Process Attendant Level 1 and that establishes the wage relativity at 82.14 per cent. Now, the other aspect of A2 is that it inserts into the award the minimum wage clause as specified in the State Wage Case and that becomes operative from 1 April. So it is a two stepped process and it is designed to take into account the fact that in this industry this award is observed.

PN30

It is not a paid rates award, it is a minimum rates award but it is observed and there are hundreds of employees which work under this classification in the Fish Aquaculture and Marine Products Award. So it is not an academic exercise. So that is what we deal in respect of the Fish Aquaculture and Marine Products Award and before I move on you will see that we have - - -

PN31

THE COMMISSIONER: And the total increase - - -

PN32

MR FLANAGAN: Is \$8.30.

PN33

THE COMMISSIONER: Is \$8.30 - and no doubt I will be addressed as to why it needs to be in two stages.

PN34

MR FLANAGAN: Yes, I will take you to that. The - - -

PN35

THE COMMISSIONER: Apart from the fact that you have agreed that it should be.

PN36

MR FLANAGAN: Yes. If I can also simply refer you to the document which I have tendered which shows order number one of 2002 in respect to the Fish Aquaculture Marine Products Award. You will see that it identifies - - -

PN37

THE COMMISSIONER: I will give that a number as well - make that A3.

**MFI #A3 FISH AQUACULTURE MARINE PRODUCTS AWARD
ORDER NUMBER ONE OF 2002**

PN38

MR FLANAGAN: You will see that A3 identifies the current wage relativity for the Process Attendant of 76 per cent and the weekly rate of pay at the moment of \$423.10, thus by going to \$431.40 there is a difference of \$8.30 a week that the parties seek to address through this application. I will speak to that but that is what we are attempting to do - and should we deal with the Shellfish matter simultaneously?

PN39

THE COMMISSIONER: Are the arguments and the circumstances pretty well the same?

PN40

MR FLANAGAN: Yes, it is the same position.

PN41

THE COMMISSIONER: Well, why don't you just say from now on the award - if that is right with you, Mr O'Neill?

PN42

MR O'NEILL: Yes, that is fine, Commissioner.

PN43

THE COMMISSIONER: - - - and we will just take it that it applies to both applications.

PN44

MR FLANAGAN: Well, I will go through the same process in respect of the Shellfish Award then. I will tender a copy of order number one of 2002.

PN45

THE COMMISSIONER: I will mark that A4.

MFI #A4 COPY OF SHELLFISH AWARD ORDER NUMBER ONE OF 2002

PN46

THE COMMISSIONER: We didn't actually address this at the beginning, but I take it that both the parties are content for the matters to be joined?

PN47

MR FLANAGAN: Yes.

PN48

MR O'NEILL: Yes, thank you.

PN49

THE COMMISSIONER: Thank you.

PN50

MR FLANAGAN: You will see in A4 again, Commissioner, that the Shellfish Farm Attendant Level 1 has a base rate relativity of 76 per cent and a rate of pay of \$423.10. So again, there is a gap between the existing rate and the State minimum rate of \$8.30 - so as is the case in the Fish Aquaculture and Marine Products Award, the parties propose a two phased variation and I will provide you with a copy of what is proposed there.

PN51

THE COMMISSIONER: A5 and A6. Again, the short one being A5 and the longer one being A6.

MFI #A5 PROPOSAL FOR TWO PHASED VARIATION TO AWARD - SHORT DOCUMENT

MFI #A6 PROPOSAL FOR TWO PHASED VARIATION TO AWARD - LONG DOCUMENT

PN52

MR FLANAGAN: If I can take you to A5, Commissioner, you will see again in A5 what we seek to do is to delete the current rate of pay and insert a variation to the base rate of pay and the weekly rate of pay which has the effect of increasing that rate by \$4.15 per week. On the second page of A5, you will see under the heading Classification Descriptors, the percentage has been removed. In A6, similar to the previous position - A6 identifies the new relativity for the Shellfish Farm Attendant Level 1 as 82.14. It increases the rate of pay at the base rate and at the weekly wage rate by \$4.15 and it is proposed that that second rate of - or that second variation also include the required minimum wage clause, together with an operative date of 1 April 2003. So if I can first take you to - - -

PN53

THE COMMISSIONER: Sorry, just before you move on. So the 1 April movement, would that be another application?

PN54

MR FLANAGAN: In our view no. The State Wage Case - and I will take you to it, indicates that there must be an application, a separate application, following the conference convened by the Commission to give effect to the state minimum wage. This application seeks to give effect to that state minimum wage and this is the mechanism by which the parties have agreed to go down that path. Unlike the minimum rate adjustment process which very specifically requires separate applications at each stage, the State Wage Case does not identify that as a requirement. So we have got an application - - -

PN55

THE COMMISSIONER: So in your draft order for the Shellfish Industry Award, have you got one A6 which refers to 1 October 2002. Where is the one
- - -

PN56

MR FLANAGAN: That is 1 April, A6, 1 April 2003.

PN57

THE COMMISSIONER: Well, the one that I have got, the A6 that I have got says 1 October 2002.

PN58

MR FLANAGAN: Okay. Well, there may be some difficulty with what I have handed up. Can I tender an amended A6?

PN59

THE COMMISSIONER: Yes. Let me just have a look at fish aquaculture and make sure that we have actually got the all the relevant dates tendered for those. Yes, I have for fish aquaculture and I think we are now right for shellfish.

PN60

MR FLANAGAN: So that if I can just clarify - A1?

PN61

THE COMMISSIONER: Yes, A1 is 1 October 2002 for fish aquaculture.

PN62

MR FLANAGAN: And A2?

PN63

THE COMMISSIONER: Is 1 April 2003 for fish aquaculture and marine products.

PN64

MR FLANAGAN: A5?

PN65

THE COMMISSIONER: Is Shellfish Industry Award, 1 October 2002; and A6, I still have one that says 1 October 2002. A6 still says 1 October 2002.

PN66

MR FLANAGAN: The last document I handed up I am certain identified 1 April.

PN67

THE COMMISSIONER: I have two A6s now and they both say 1 October.

PN68

MR FLANAGAN: I will give you a third one.

PN69

THE COMMISSIONER: Okay. There is a problem with that, Mr Flanagan.

PN70

MR FLANAGAN: Yes, there is, thank you, Commissioner, quite right. There is an oversight in A6, at the end of A6, that identifies an operative date of 1 April, but under the heading Clause 1, Wage Rates, where it refers to 1 October, it should refer to 1 April. I apologise to the Commission for any confusion that has caused and would seek leave to amend the application to give effect - - -

PN71

THE COMMISSIONER: So clause 1(a), after the word "classification" it should read "1 April 2003."

PN72

MR FLANAGAN: That is correct, yes.

PN73

THE COMMISSIONER: Okay. Thank you.

PN74

MR FLANAGAN: Thank you, Commissioner. If I can then address the Commission on the relevant considerations, section 35(1)(b) of the Act provides the Full Bench of the Commission to make an award or to prove an industrial agreement in respect of making provision or altering a minimum wage that is payable to adults without the regard to work performed; and, consistent with that requirement, in the State wage case of this year, the Full Bench observed on page 6 under paragraph 16:

PN75

The application to introduce the Federal minimum wage into awards was not opposed by the TCCI where the award rate is presently at the level of the Federal minimum wage or in excess therefore. Nevertheless, we are of the view that the application requires further consideration in as much as the current provision in awards is not consistent. During proceedings a number of issues which were identified which may require attention, to that end we determined the following:

PN76

And at the third dot point under paragraph 16 it identifies that:

PN77

Pursuant to the provisions of section 35(1)(b) of the Industrial Relations Act 1984, the Act, the minimum wage will be \$431.40.

PN78

It then goes on on the following dot point to say:

PN79

In respect to awards, where the lowest adult weekly wage rate prescribed therein is less than \$431.40 that each member of the Commission will, in their respective area of responsibility, convene a conference of the parties who have a statutory or registered interest in each of the awards that fall into the categories specified above.

PN80

Then it goes on to say:

PN81

Those conferences will consider -

PN82

and it identifies a number of matters but, specifically, in point 2 it says -

PN83

the specific conditions prescribed in the award and the effect and any additional cost, if any, that may result in the introduction of a minimum wage of \$431.40.

PN84

And it also says in point 3:

PN85

...as a part of that process, whether or not the particular circumstances of the award warrant the phasing in of the minimum wage over a period. However, we are of the view that within a period of no longer than three years all of the awards of the TIC will reflect a minimum wage amount, being the same as the Federal minimum wage.

PN86

So those were the matters to be dealt with in conference and, consistent with that obligation, on 1 August the Commission, as currently constituted, convened that conference. In the course of that conference it was recognised by both the AWU and the TCCI that these are awards which are relevant to the industry in the sense that they are awards which are observed. The level of enterprise bargaining within the scope of the Fish Aquaculture and Marine Products Award and the Shellfish Industry Award is minimal when compared to the level of industrial agreements or enterprise agreements that may occur in other sectors.

PN87

The general position is that people are employed pursuant to these awards and paid pursuant to these awards. So, in coming up with the phasing-in arrangements, the parties have had regard particularly to point 2 and point 3 of paragraph 17 of the reasons for the decision by the Full Bench of the Commission. But I think the other thing that we need to address the Commission on is clause 7, the State minimum wage, that is, principle 7, State minimum wage. It says:

PN88

In accordance with the July 2002 State wage case decision, awards will, subject to the conditions specified in that decision -

PN89

and, with respect, we would say that we have dealt with the relevant conditions specified in the decision -

PN90

be varied to provide for a minimum wage rate for full-time employees of \$431.40 per week, and for junior, part-time and casual employees proportionate adjustment subject to the following: the operative date will be no earlier than the date of the variation to the award.

PN91

Well, in the circumstances of this particular application the proposed dates of variation are 1 October, which is some three weeks out; and then, subsequent to that, 1 April, so it will satisfy the requirements of clause A of principle 7. Then in clause B and C the commission requires that a separate clause be inserted into the awards under the hearing Minimum Wage. You will see that, consistent with that requirement, A6 places that clause into the Shellfish Industry Award, and A2 places that clause into the Fish Aquaculture and Marine Products Award, so the parties have satisfied that requirement of principle 7 of the State wage case as well.

PN92

The additional matter which the Commission needs to take into account, in our view and submissions, is the requirements of section 36, that the Commission must be satisfied of the public interest. The spirit of what the parties have done or proposed to do is to put to the Commission a scheme which sees the award brought into line with the State minimum wage. It is done well and truly within the time-frame required by that principle, ie, the three years rather than it being a three-year phasing in period.

PN93

The parties have agreed to give effect to it until April of next year - eight months or thereabouts, and having regard for particularly point 2 and point 3 of paragraph 17 of the reasons for the decision in the State wage case, together with the obligations on section 36, the parties have attempted to make that move forward in circumstances where it will have an effect on many hundreds of employees in the industry but to do it in a way which takes into account the cost impact on industry and minimises that cost impact in a responsible way. So, in those circumstances, Commissioner, the parties, by consent, would seek that the Commission approve the applications as sought and varied by A1, A2, A5 and A6 before you today. If it pleases the Commission.

PN94

THE COMMISSIONER: Yes, thank you. It is probably more in Mr O'Neill's court than yours, Mr Flanagan - in the decision of the Full Bench in the reasons for decision at paragraph 17, I think, why one of the dot points requires the Commission to look at the specific conditions in the award and the effect of any

additional costs which you have done to a certain extent when you have referred to the number of employees, dot point 3 says, as part of that process, whether the circumstances warrant the phasing - and I think perhaps that needs to be explored just a little bit more - Mr O'Neill, I will hear from you.

PN95

MR O'NEILL: Thank you, Commissioner. Well, firstly, TCCI consent to the submissions as put to you by Mr Flanagan today in both applications. We submit that these applications are in accordance with the State wage case decision of July 2002 and that it is in accordance with section 36 of the Industrial Relations Act in that it satisfies the public interest. We consent also to the operative dates being phased in at 1 October and 1 April of next year. The main reason for the phasing in of these two applications is clearly the impact of the industry.

PN96

I think Mr Flanagan did briefly allude to the fact that a significant number of our members have employees at that initial classification because of the nature of the work. There is a high degree of casualisation due to the nature of the work and, therefore, the numbers of employees at both level 1 classifications in those awards is high. It was certainly the view of our members, once put to them, that they would certainly prefer the application to be phased in over the period of time. As Mr Flanagan has put to you, and we consent, that in no way offends any of the principles contained within the State wage case, nor section 36 of the Act; and, on that basis, we put it to you that these applications be approved. If it pleases.

PN97

THE COMMISSIONER: Thank you.

PN98

MR FLANAGAN: If I can just make an additional comment, Commissioner? If this was an award expressed as a minimum but one where it was an industry which had a significant level of regulation by either industrial or enterprise agreements, or it was an industry where there was substantial overpayments, then, in that case, it would be the union's view that it would not be appropriate to phase in the gap between the existing rate and the minimum rate. But that is not the case with this award. It has a real impact. It has a real cost impact.

PN99

The seasonal nature of the work is such that we do have a lot of people coming through each season who have not previously worked in the industry. Sometimes they will get the three months up; many times they won't, particularly in wild fisheries covered by the Fish Aquaculture Marine Products Award. So, having regard for the fact that it is real, the cost is real, that is the only basis upon which the union has consented to the phasing in arrangements. If it pleases the Commission.

PN100

THE COMMISSIONER: Thank you for that. Yes, that is helpful and it is just, as I said, the two dot points are separate. There is one that looks at the cost and the other one looks at, as part of that process, whether the circumstances warrant

the phasing in, but you have described the circumstances. Did you want to add something?

PN101

MR FLANAGAN: Yes. If I could just seek a point of clarification - and perhaps we could just go off the record to do that?

PN102

THE COMMISSIONER: Yes. Can we go off the record? Thanks.

OFF THE RECORD

[3.36pm]

RESUMED

[3.39pm]

PN103

THE COMMISSIONER: We are back on record.

PN104

MR FLANAGAN: Thank you, Commissioner. The other observation we need to make or leave we need to make to amend what is before you is in respect of A2 and A6. It has just become apparent that the relativities which are appearing in A2 and A6 of 82.14 should, in fact, be a relativity of 78. So if I can take you firstly to A2, under the first variation, where the process attendant level 1 is identified as 82.14, that should say 78 per cent. So that is the only variation which is required to A2.

PN105

Then in A6, if I can take you to that, again, shellfish farm attendant level 1 has a relativity of 82.14 that should say 78; and on the following page, under the heading Classification Descriptor, where it says 82.14, that should say 78 per cent.

PN106

THE COMMISSIONER: Do you agree with that amendment, Mr O'Neill?

PN107

MR O'NEILL: Yes, I do, thank you, Commissioner.

PN108

THE COMMISSIONER: Thank you.

PN109

MR FLANAGAN: So having identified those errors in the amended schedules, we would simply seek that the Commission approve the application, as sought by the parties, by consent.

PN110

THE COMMISSIONER: Thank you. Well, I indicate to the parties that the awards will be varied in the manner sought and also from the operative dates sought according to the amended draft orders submitted today by the applicant

union, and that is according to exhibit numbers A2 and A6, and A1 and A5. The decision will issue in due course. The matter is adjourned.

ADJOURNED INDEFINITELY

[3.40pm]

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