



TASMANIA

Tasmanian Industrial Commission

Industrial Relations Act 1984

T No. **10058 of 2002**

IN THE MATTER OF an application by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union for an interpretation of the Pasmenco Rosebery (Mining) Award

Re: Clause 2 - Scope

T No. **10178 of 2002**

IN THE MATTER OF an application by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union for an interpretation of the Metalliferous Mining and Processing Award

Re: Clause 2 - Scope

PRESIDENT LEARY

HOBART, 12 June 2002
Continued from 17 April 2002

TRANSCRIPT OF PROCEEDINGS

UNEDITED

(WOULD PARTIES PLEASE READ THIS TRANSCRIPT CAREFULLY)
(ANY QUERIES SHOULD BE DIRECTED TO THE COMMISSION WITHIN 14 DAYS)

HEARING RECOMMENCED 9.35am

PRESIDENT: One of these is a new matter and one has already had a preliminary hearing. Is there any objection to them being joined?

MR COOPER: No, we would propose that, President.

5 PRESIDENT: No objection?

MR FITZGERALD: No objection. The only issue I would raise, President, is it seemed - I always had the impression that in fact the latest application was in fact intended to replace the former application and I would just seek some clarification in respect to that. It seems a bit meaningless and I think Mr
10 Cooper acknowledged on the last occasion that the former application was meaningless in the context of what he was seeking so I just seek some clarification there.

PRESIDENT: All right. Perhaps if he can clarify that. If that is the case it then doesn't matter if they are joined.

15 MR COOPER: President, do you want me to put appearances in first, I do have Mr Jepson appearing with me today which is a change from last time.

PRESIDENT: Well, we haven't got to appearances yet.

MR COOPER: Do you want me to deal with that matter first?

PRESIDENT: Just clarify what Mr Fitzgerald understands.

20 MR COOPER: Okay. Well, I think the subsequent application does in part subsume the initial application but for completeness sake I would like both applications to be joined.

PRESIDENT: All right. In that case both 10178 and 10058 of 2002 will be formally joined. Now could I take appearances, please?

25 **MR G. COOPER:** If the Commission pleases, I appear on behalf of the AMWU. Appearing with me is **MR JOHN JEPSON**.

PRESIDENT: Thank you.

MR I. WAKEFIELD: If the Commission pleases, I appear for the Australian Workers Union, Tasmania Branch, Wakefield I.

30 **MR K. BECKER:** Becker K. I seek to intervene in this. I think I did on the last occasion and while I am on my feet, President, I have got to leave these proceedings but I shall return.

PRESIDENT: Very well.

35 **MR W. FITZGERALD:** Yes, President, I appear on behalf of Australian
Mines and Metals Association, Fitzgerald W.J. and with me is **MS K.**
CHELLIS and I assume Mr Wakefield would be seeking to intervene rather
than appearing and if that is the case, and also Mr Becker, I have no objection
to leave in those cases.

40 **PRESIDENT:** Yes, I take it that they are all interventions, yes. All right,
leave is granted to both the AWU and the CEPU in its shorthand term to
intervene.

MR COOPER: President, with respect to the application it is one which has
been I think in need in the community for some time and I think the best way
to start would be to put up to you an application - the decision, I mean, of the
45 Commissioner in the making of the subsequent award to which the second
application relates and that is the Metalliferous Mining and Processing Award
so if I could start by handing that up?

PRESIDENT: Thank you. So this is a decision of '96?

50 **MR COOPER:** Yes, 2 May 1996. It is actually a decision of Commissioner
Imlach.

PRESIDENT: Okay.

MR COOPER: And this application was an application by the Australian
Workers Union in T6140 of 1996 and the process in the State is that you make
an award in title and scope and then it subsequently has 21 days where it sits
55 for appeal and you then have the registered body's interest which is parties and
persons bound and then they make the body, that has been the pattern for
making awards in this jurisdiction. There have been - I know there was one
award that was made by a Full Bench in one go and that was the National
Training Wage Award, State Award equivalent, but generally awards of the
60 State Commission are made in the three-tier process which lends itself
sometimes to that process being delayed, frustrated, dragged on.

As you can see this award was made on 2 May 1996. The decision is there, it
is very straightforward. The application sought only the first two clauses of the
award, title and scope. The title was to be the Metalliferous Mining and
65 Processing award and the scope was read as follows. Now, it goes through the
submissions of the parties and the Commissioner was advised if you will note,
on about the fourth, fifth paragraph that the parties have been negotiating for
some time. It was proposed that the award would only come into operation
when all clauses had been settled and the scope clause in the Pasminco
70 Rosebery Mining Award had been amended simultaneously to provide for that
award to become an enterprise award in accordance with section 33(1)(b) of
the Industrial Relations Act 1984.

It talks about the other unions that were granted leave, it talks about Australian
Mines and Metals were not present but by letter dated 12 April it advised the

75 Commission that it had no objection to the application and I think it would be a prudent - although it would form part of the file, to tender a copy of that letter.

PRESIDENT: Well, I will mark the copy of the letter for the purposes of this file C1.

80 **EXHIBIT C1 - COPY OF LETTER DATED 12 APRIL**

MR COOPER: Now you will see that letter was from the then State Manager, Mr Stephen Knott, it is under his hand, it is on an Australian Mines and Metals letter head. There is a notation up the top which I assume is a Commission
85 notating recognising 15 April as the date it was received. It says AMMA will not be in attendance at the hearing for 10.30 on 22 April in T6140 of '95 which is the decision that I have just read from although the decision does talk about '96 but the application number is the same. AMMA has no objection to the statement of particulars outlined in the AWUs application to vary, making of
90 the award title clauses detailed and scope clauses detailed.

AMMA were actively involved in the development of negotiations of this award should you deem some public interest that would be made. we also seek to reserve the right to argue for revocation of variation of any determination made by you so it is spelled out clearly in that letter that they consented to the
95 application but should they not like that decision then they set out their rights to obviously appeal, if you like. Now, the difficulty of not being in attendance, I suppose, was one that was obviously taken on board by Australian Mines and Metals but as you can see in that correspondence Mr Knott was in Western Australia.

100 Now, when the award was made the decision that was made in the award is contained further in the exhibit at page 2 of the decision which is in a smaller print and you will see that the award is made in title and scope which is, I would assume, that part of the decision that was published in the - obviously in the journals that is made a public document and you will see that it says:

105 *The title of the award shall be known as the Metalliferous Mining and Processing Award. The award is established in respect of the industry of metalliferous mining, sluicing or other means of obtaining metallic minerals and/or the treatment of those minerals -*

and then it has a proviso which obviously goes to that part of the decision that I
110 refer to -

provided that until the making of this award has been finalised in respect to wage rates and conditions of employment or until this proviso has been deleted employers falling within the scope of this

115 *award shall, where appropriate classifications appear therein, observe
the Pasminco Rosebery Mining Award in all respects.*

So that award was made and obviously during the course of the submission the
issue with respect to the Rosebery Award was raised and the Commission
determined that it should make it very clear that this award would apply in title
and scope but the conditions would be drawn from the Rosebery Award until
120 this award was made in its entirety.

PRESIDENT: What happened prior to that; were people in this industry
award free or - - -

125 MR COOPER: No, no I will go to the history of the Rosebery Award simply
for the purposes of clarifying the position, I think it is important that that is
done.

PRESIDENT: I think it would be helpful.

130 MR COOPER: Yes. I will do that, and then we will go to, I think, the
principles of interpretation and some court case decisions on that and I think
that will be useful so if we start with the award, that is the award presumably
so in that regard I won't put up the title of the Pasminco Rosebery Award as we
have already talked about that, but I will just provide that as the basis of what
basically we are trying to interpret here today. In terms of the history of the
Pasminco Rosebery Award it isn't so much a chequered one but it is history
that has been there for some time and the earliest research I could find in the
135 Commission was a determination of the mining lead zinc wages board - - -

PRESIDENT: Thank you, I will mark it C2.

**EXHIBIT C2 - DETERMINATION OF MINING LEAD ZINC WAGES
BOARD**

140 MR COOPER: And you will see that that determination is dated 31 May 1971
and you will note that the scope of that award is established in respect of
mining and processing of silver, lead, zinc, ore and the award of the industrial
war continues. I think you will find that if you read through that document you
will see over the page that it is established in respect of the mining of
145 processing of silver, lead, zinc and ore and then I found a decision of
Commissioner Gozzi which actually made the Pasminco Rosebery Mining
Award, and you will see that that decision spells out a little bit of history. The
Pasminco Rosebery, that is in T2486 of 1990 and 2847 of 1990, it is called
- - -

150 PRESIDENT: Sorry, 2486?

MR COOPER: Yes, it is in the decision, Deputy President.

PRESIDENT: In this decision?

MR COOPER: Yes, if you follow that decision through there will be a copy of the award - - -

155 PRESIDENT: I see, yes, I have found it.

MR COOPER: - - - and then there will be a copy of the other one. That was made on 22 March '91. Structural efficiency principle and consolidation of new award. It talks about how it was made on 8 August 1990 and was limited to the following clauses and you will see in the third paragraph:

160 *As well the Commission has facilitated several drafting conferences with the parties to ensure the inclusion of the new award or all other relevant clauses for the Mining Lead Zinc Award and those new provisions which give effect to the Pasmaico Rosebery Mining Award through the structural efficiency measures determining this matter. As*
165 *a consequence all outstanding issues in this matter have been addressed and a consolidated award will be issued operative from 8 August 1990.*

Now, accordingly as the Mining Lead Zinc Award is now redundant it is rescinded as of the date of operation of Pasmaico Rosebery Mining Award, so that decision was made and that decision saw with it the rescision of the award and I have attached a copy of that rescision decision over the page and I have attached also the making of the complete award in 2486 of 1990 as part of that exhibit as well and that is a consolidation of the new award and you will see there in that award, and this is the Rosebery Mining Award, that the scope of this award, which is part of the application, is established in respect of the industry of mining and processing of silver, lead, zinc and ore so that is the Rosebery Award.

175 PRESIDENT: So that is now the current award?

MR COOPER: Current award.

180 PRESIDENT: Subject to variations, of course.

MR COOPER: Subject to the exhibit that I have given you on the Metalliferous Mining Award which says this award shall apply - - -

PRESIDENT: Yes.

185 MR COOPER: - - - so the scope of that award was made in respect of the industry of mining and processing of silver, lead, zinc and ore. Now, there is a little bit of history to that which I think again - I know we are dealing with interpretation but I think it is useful just to provide that history and the best form of that history, I think, can be provided to the Commission by way of transcripts so if I deal with a couple of those first and slowly work my way
190 through it.

PRESIDENT: I will mark the bundle of transcripts C3.

EXHIBIT C3 BUNDLE OF TRANSCRIPTS

195 MR FITZGERALD: Three or four is it?

PRESIDENT: Three.

MR FITZGERALD: I have just got four exhibits, I am sorry, I am just out of kilt a bit here.

PRESIDENT: All of the others were bundled together as one bundle.

200 MR FITZGERALD: Oh, I beg your pardon.

PRESIDENT: Yes.

MR COOPER: I don't think the President provided a number for the first one about the making of the award which was a copy of the Commission.

PRESIDENT: No, not of the original decision, yes.

205 MR FITZGERALD: Oh right, okay, yes.

MR COOPER: So in respect to C3 I provide that simply to show the Commission it does show a little bit of history and I know the principles of interpretation that I provide don't say that you should consider all of that, the words themselves should be part of the major interpretation, but it does talk
210 about - in this decision and transcript and this is parts of the reasons for decision. You will talk about - the Commissioner spells out in the first paragraph that it is an application by Pasminco Mining Rosebery, it is an application by the company for the restructure of the Mining Lead Zinc Award.

215 The Mining Lead Zinc Award, having seen the exhibit, is an industry award, the Pasminco Rosebery Award continue to be an industry award and he goes through all the issues that went with that. Now, I don't intend to labour that document but it is provided. I think it provides useful background. At page 5 of that decision there is an issue which I am pre empting the employers will use to say that you can't use the award anywhere else.

220 It talks about the classification structure and it talks about a skills acquisition program that was to Rosebery and it also implemented in the award a very simple classification structure and it took 156 classifications and reduced them to five which made it very simple for employers to use the award and what that did was provided enormous flexibility which was part of the structural
225 efficiency principle and it provided benefits in terms of that and at page 7 it

230 talks about a shared function which provides benefits to the employers and you
will see in the third paragraph at page 7 the principle point on that regard is that
many traditional demarcations have been resolved so not only did the
classification structure reduce but demarcations reduced with it, increased
flexibility was then available. And at page 10 there is a heading Award
Variations:

235 *Whilst the parties have sought the variation to the Mining Lead Zinc
Award application 2486 of 1990 contemplates the making of a new
award, the Pasminco Rosebery Mining Award. The intention of the
parties is to incorporate into the new award -*

this is at page 11 -

*relevant provisions from the Mining Lead Zinc and all matters germane
to the structural efficiency decision which are appropriately included in
the award document.*

240 And he goes on and talks about the purposes of decisions he joins the matters,
the latter being the application of the Mining Lead Zinc and therefore rather
than vary the Mining Lead Zinc Award to give effect to structural efficiency,
all the appropriate structural efficiency matters will be included in the new
award, which is made operative from the date of this decision. And the
245 decision goes on and talks about formatting, it talks about the initial decision to
make the award with seven clauses, and a copy of that decision is attached for
completeness sake. So that is all I wish to speak to with regard to that exhibit.

PRESIDENT: Thank you.

250 MR COOPER: Now, I think that I alluded to the Commission when I put that
exhibit up that it was transcripts. It was not actually a transcript it was actually
reasons for a decision.

PRESIDENT: Yes, I have noted that.

MR COOPER: I apologise for that, President.

PRESIDENT: That is all right.

255 MR COOPER: I do have the transcripts now, which I will take the President
through.

PRESIDENT: All right, thank you. We will make the transcript this time C4.

EXHIBIT C4 TRANSCRIPT

260

MR COOPER: Now, the reason that I think it is important just to have to spend some time on this transcript is that it is an application at the time that was made by the employer. It was made by Pasminco Rosebery and the transcript starts off as it would fairly straight forward, and at page 2 we start talking about the title and scope. And Commissioner Gozzi, about two or three paragraphs down the page says that:

So that if you can have regard for that as far as the appendix is concerned at this stage you are seeking to make the order in respect of title and scope only.

Mr Skinner, who was representing the company, says, "Yes, sir." So that is page 2 of that transcript. No objections. The Commissioner says:

Then if there are no objections I will make the awards in term of title and scope ...(reads)... Your applications for interest in the award will have to be made and we just go off the record.

So you go off the record and talk about that and they put up some exhibits, and I think the interesting thing in terms of the history that is provided at - further into the document where the proceedings were continued. So these proceedings were heard on 3 August, and if you turn through the document there was continuation of that in Hobart on 10 September.

MR FITZGERALD: What page are you on to?

MR COOPER: It is not actually numbered, but the transcript is.

PRESIDENT: The next lot of transcript.

MR COOPER: Yes. The next lot of transcript starts off at page 5.

MR FITZGERALD: Okay.

MR COOPER: And it started off with appearances and then Commissioner Gozzi says about half way down the page, at page 5 of the transcript dated the 10th of the ninth '90:

All right. We can now deal with the finalisation of the Pasminco Rosebery Mining Award and just let me indicate to you before I call that matter on they have a situation with the AWU and FEDFA.

So they talked about that, and at page 6 we go to the issue of the scope. And again, about half way down the page, after Mr Skinner says, "Yes," they talk about - that actually goes into parties and persons bound. You can see the scope. The existing scope clause, and the Commissioner says:

It is established in respect of the Industry of Mining and the processing of silver lead zinc ore. You have really included in the scope clause a mix of scope and parties, and so obviously they had a drafting problem.

So they talked about parties bound, splitting that up, and Mr Skinner agreed, so the context of the existing award, the Commissioner goes on:

300 *Is the scope satisfactory to be imported into the new award?*

And Mr Skinner says, "Yes, sir." So the Commissioner says:

Right. So it is going to be still in respect of the industry of mining and the processing of silver lead zinc and ore.

305 And the answer is, "Yes, sir." So when the award was made it was very clear. They have talked about that on transcript, and there was an issue with parties bound and the discussion continues.

PRESIDENT: That was a drafting issue, rather than an issue in principle; is that how you read it?

310 MR COOPER: That is correct. That is correct. So at the time the company, Pasminco Rosebery, was making the award. Prior to the making of this award it was bound by the terms of the Mining Lead Zinc Award. It subsequently made a new award, and made some of those provisions in that award specific to it, but didn't actually include them in the award, it included references to them in terms of its classification structure and modules and everything else.
315 But the important thing was they imported a scope which was an industry scope to all intents and purposes, and I will further deal with that during the course of these proceedings.

320 So that provides some history in respect of the Rosebery award. I think that should be enough to provide the Commission with some understanding of the Mining Lead Zinc Award being in existence, subsequently being restructured, subsequently being made to Pasminco Rosebery, and then subsequently the Metalliferous Award being made seven years later. Now, at the time of making the award there was some discussion about what would happen, and the award was made, as you have already seen, in the absence of Australian
325 Mines and Metals, who corresponded, saying that they agreed to it, and subsequently took no action to deal with any appeal or anything. In fact on 6 March 1997 in a decision of Commission Imlach in 6728 of 1997 Australian Mines and Metals became a party to that Metalliferous Mining and Processing Award.

330 You can see in that decision dated 6 March 1997 before Commissioner Imlach that AMMA, if I can use the term, made application to get an award interest that was granted effective from then, and the Commission reminded the parties in that decision, or he reminded AMMA anyway, that in - to date the relation to the award it had only been made in title and scope and that was made some 12
335 months earlier. Twelve months after that award was made AMMA became a party to it. Subsequently AMMA sought to vary the award and the applications - there were a number of them - but they subsequently sought to vary the award and discussion continued for some years.

340 Now, just to show that the award wasn't made in isolation, the TCCI, who by virtue of a provision of the Act, automatically are granted a parties and persons bound status, as are the Tasmanian Trades and Labour Council, as it was then known, and I do have a copy of some correspondence that goes to the making of that award from the TCCI.

PRESIDENT: Thank you. C5.

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EXHIBIT C5 CORRESPONDENCE FROM THE TCCI

MR COOPER: And I just provide that to show that parties weren't excluded. The TCCI then, the manager, Terry Edwards, had correspondence with myself, 350 as a then employee of the AWU, advising about the award and the AWU provided correspondence back, and it is interesting, I suppose, just for further completeness, that the letter to Mr Edwards from Mr Hays, the Branch Secretary of the AWU Amalgamated Union, as it was then, says:

355 *The application arises from discussions between the principal parties in mining, namely Australian Mines and Metals and the AWU. These discussions commenced in '94 -*

And it goes on and explains to Mr Edwards how that process was organised, and notwithstanding the - "please meet and we would be happy to discuss the provisions with you". It does expel out some history so, you know, for some 360 time after the making of the Rosebery Award the parties continued with discussions on the making of a Metalliferous Mining Award. So in providing that I have just provided that as further information to the Commission, having known that the Commission comes to this process probably without the history that people like myself and Mr Wakefield and Mr Becker would have, and to 365 some extent Mr Fitzgerald.

PRESIDENT: The letter from Terry Edwards asks that the AWU advise the companies in Tasmania, it being the AWU, says being bound by the proposed award. The response talks about the principal parties in the mining industry, not only the mines and metals, but it doesn't name any other companies. Is the 370 inference there that it is an industry award?

MR COOPER: In the sense of which award, the Rosebery Award?

PRESIDENT: Yes.

MR COOPER: Yes. That is correct.

PRESIDENT: Yes.

375 MR COOPER: That is the inference that I glean from that. And the reason
that this was happening was that at the time - again I digress a little bit, but it is
probably useful - but at the time Renison Bell Tin Mine had suffered a near
closure in '91 and it reopened. And on that reopening it had to have been
380 through several managers, and one of the managers at the time was making
sure that people who came to the mine were regulated by a form of industrial
instrument. And given the basis of any was at the time considered by
everybody to be the Pasmenco Rosebery Mining Award, there was the
development of site agreements, which happened at the time, and in part we
saw for the first time the existence of, what I would term loosely, non-union
385 agreements started to emerge in the sector.

And that was so that the employer, or the principal, Renison Bell, didn't have
any industrial problems with any contractors that came to the site. So a
number of the contractors at the time then, Mancala was one, and two or three
others started entering into part 4A agreements or 61A, or whatever they are,
390 but part 4A, not part 4. So in that regard there was a list. The AWU had it at
the time. A significant list it was then of people who would be regulated
without a proper industrial instrument by this award. So there was some
urgency to have it done. And there was some other developments with that
award. I think, just for purposes of tidying up the loop, in terms of the
395 applications to become party to the new award the Commission issued to all
the parties that had been privy to these, a letter - - -

PRESIDENT: C6.

EXHIBIT C6 LETTER FROM THE COMMISSION

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MR COOPER: - - - and you will see that time has moved on and we are now
some three years down the track. And it was a matter with respect to the
CFMEU seeking a right to become party to the new award, and you will note
that the Commission does provide a history that in March '97 I formally
405 determined the matter 6728 that AMMA had an interest. In April '97 the
President formally determined in matters 6811, 6841 and 6900 that the
AMWU, the ETU if you like, and the AWU all became parties as well. And
that was following interests, their proper procedures being followed, and then a
decision was made that the CFMEU, the only interest that needed to apply, and
410 until it did its application to intervene was not granted.

PRESIDENT: So this is a letter? It was never in the form of a decision?

MR COOPER: No, just a letter. It was a clarification issue. And it was with
respect as to how things should proceed.

PRESIDENT: Yes.

415 MR COOPER: And if you go through transcript you will see that it falls out quite neatly in terms of what was happening at the time, but it does clarify too, and it provides a neat little history of applications for interest and what happens, so the award is now made in title and scope, the new award, and it does have the TLC, the TCCI, Australian Mines and Metals and three unions parties to it at this point in time. Now, at the same time I think it is important to note, in terms of the time line, we have moved from the 1970s through to the 1990s and we have these awards being developed. I think it is prudent to observe the nature of the regulation that was applying to the Commission at the time, and these are only extracts from this wonderful thing called the computer.

420

425 PRESIDENT: I will mark them for consistency C7.

EXHIBIT C7 COMPUTER EXTRACTS

MR COOPER: And the only reason I provide these, President, is obviously you would be aware of what happened at the time, but it does take the parties through the history of the Act that was regulating the function of the Commission, if you like, and at the back of the document it talks about '92, then in the middle it talks about '86, and at the beginning it talks about '84. And you will see that what happened was at the time in '84 there were a number of awards that could be made and they were industry awards - sorry there was no industry award. There were industry awards, sorry, and then there was occupational awards, and then that was subsequently changed and you weren't allowed to make occupational awards, and then towards the end you were allowed to make enterprise awards.

430

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So at the time of the making of the Rosebery Award, the notion of an enterprise award wasn't there. So I just provide that and it is there for the parties to have a look at. It goes to how you can make an award. So I don't need to dwell on that, it is just a legislative framework in which the Commission operated at the time. I think it might be useful, President, probably to spend some time on case law in respect to the rules of interpretation, and I must say that this has been enlightening for me in terms of investigation. I found a very old decision of the State Commission, in fact T30, which I would like to provide a copy to the Commission of.

440

445

PRESIDENT: Thank you.

MR COOPER: T30 of 1985 was by the then President, Mr Koerbin, Lloyd Koerbin, and I think it is interesting in the sense that it was under the Industrial Relations Commission, which was formed by virtue of amendments to the act. One of the original decisions. In fact I think it was the first interpretation under section 43 of the Act and I think that is spelled out at page one.

450

455 And what was interesting in that decision is that the President thought that it was appropriate, given that it was a first decision, to set up some rules, if you like, or some guidelines or some process to follow. So at page 1 and 2 of that decision, 1 -sorry. 1, 2, yes, at the top of the page, you will see that these principles or questions or observations are spelled out:

460 *First construction or interpretation of an award provision can only be made by considering their meaning in relation to the specific facts. It is futile to attempt such an exercise in any other way.*

Second:

465 *It must be understood that in presenting an argument in support of, or in opposition to ...(reads)... That is, on the basis of what one party of the Commission believes the provisions in question should mean.*

So, it shouldn't go to merit. Third:

470 *Provided the words used are, in the general context of the Award and its application ...(reads)... a meaning different from those suggested by ordinary English usage.*

At 4 on page 2:

475 *An award must be interpreted according to the words actually used, even if it appears that the exact words used do not achieve what was intended. The words used can only have attributed to them their true meaning.*

Fifth:

If a drafting mistake has been made that has not properly expressed the intentions of the award maker, then the remedy lies in varying the award to accord with the decision given.

480 Six:

Where genuine ambiguity exists resort may be had to the judgment accompanying the award as an aid to discovering its true meaning.

And seventh:

485 *It is not permissible to import into an award by implication a provision which its language does not express ...(reads)... rather than by implying into its provisions which are not clearly expressed by its language.*

490 And that decision goes on and talks about the first day allowance in the public service and in fact he went on to say that the allowance wasn't payable under the construction of the words that were there. It is interesting in terms of that guideline. I find them useful, and that one in particular I found useful, so I

provide that to the Commission as guide of how this Commission in the first instance decided it would handle interpretations. And that was C8, President.

PRESIDENT: No, it is a decision of the Commission.

495 MR COOPER: So it doesn't have an exhibit number, thank you. All right. Now, if I can jump ahead quite a bit, again in the Tasmanian jurisdiction I found an interpretation that had actually been conducted by yourself.

PRESIDENT: It shouldn't be hard, I think there is only one.

500 MR COOPER: I think there is only one. It is for yesterday's isn't it? And this was MT9027 or 2000 and it was before yourself as President, so you would be familiar with it, and it was 12 months ago, or a little bit more, and it talks about application by the Hotels Resorts Hospitalities and Motels Award in terms of an application about clause 7. And interesting in this decision is the reference back to those principles.

505 That is contained at page 3 of the decision, and I won't repeat them, because I have simply done that in the original decision, but at page 3 of the decision the principles are as follows, and in fact throughout the decision I note, President, that those principles were actually addressed at each point with regard to the decision. And I think that was useful. Now, there was a number of other authorities which we used, and I do have a copy of some of those. Now, 510 whether that would be useful to put them up, or to rely on - I probably will just put them up, but they are referred to in here, but I think it might be useful if I do that.

PRESIDENT: Yes, that would be helpful. Thank you.

515 MR COOPER: The first one is a North West Beef Industries Limited and Anor v the AMIEU, WA. So I will provide - I think there is four or five decisions that I have got, some of them are referenced in here and some of them aren't, but I will go through them anyway. That was a decision by Kennedy Anor - do these need exhibit numbers, President?

PRESIDENT: No, we won't do authorities. We won't mark those.

520 MR COOPER: Okay. That was dated 30 April. It was an award interpretation meat industry and I think the relevant parts of this decision are contained at page - it is not very clear - it is 319. You can see 318 but you can't see 319 very well. So it comes in the last paragraph on the bottom of that page:

525 *Where lawyers are frequently included to proceed with difficulties in a matter which to a layman are clear, but in this case both the other Tribunals had no difficulty in reading clause 12.*

I like that quote.

So as to put an interpretation on to which -

PRESIDENT: A lot of us like that quote.

530 MR COOPER:

- an interpretation which precisely coincided with that sought by the respondent ...(reads)... Their effect when translated into complete English is construction. The difficulty in this case is a matter of interpretation, and for these reasons.

535 And what they go on to say in the decision right towards the back at page 331 they put out a helpful guide, or a statement, if you like, at page 331, about half way down the page, they talk about:

540 *The correct approach to the interpretation of the Industrial Award is to read the document itself, and give to the words use their ordinary common sense English meaning.*

And there is a reference there, see Jackson J, United Furniture Trades v Dale Manufacturing.

545 *Then the first task in every case will be to determine whether the words used ...(reads)... further consideration of the expressed or supposed intention of the award making Tribunal does not fall to be considered.*

The majority of the Full Bench in this case took the view that they said - and this quote is contained in your decision, President:

550 *It is now trite law that when the meaning of language read in its ordinary natural sense is obtained is not necessary when deemed permissible to look to the intention of the parties.*

555 And I think they are quite useful guides, if you like. So in terms of that case there is consideration with regard to that for the purposes of this matter. The next case is Health Administration, and I will just rung the Commission quickly through that. That again is an authority of the Industrial Commission of New South Wales, it is an interpretation of an award Sweeney J and I think at page 122 there is a paragraph under a reference with respect to corp session and it is indented and it is in inverted commas:

560 *While unable to agree with the decision the magistrate placed on the award ...(reads)... even if satisfied that the words did not carry out the intention.*

It is a repeat of that previous decision, so it is obviously a useful one. And again over the page at page 123, directly opposite that quote:

If the language is unclear and unambiguous words must be read according to their normal and natural meaning.

565 So over the page and about two thirds of the way up, they go on to say that.
And again over the page at 124, there is a letter there, and the second paragraph
from the bottom, and again there is another quote:

*In my opinion the language used in the award provisions should be
570 given its ordinary meaning within the context of the award, but should
not be used to either disband or contract that ordinary meaning.*

So that decision simply reads dates - the days previous matters that I have
referred to, and they do go on. I have one more, which was an AWU matter. It
is not a very big decision. And the relevant quote from that decision, the
AWU, E.A. Abey and Others v the Graziers Association of New South Wales,
575 is at page 495, the second and third paragraph from the bottom, where he talks
about:

*Where the Court is asked to interpret an award, its function is to
ascertain the meaning of the words used ...(reads)... To the Court the
proper method of remedying the matter is to apply for variation.*

580 Again, a principle that is enunciated by Koerbin. So that is on the second and
third paragraphs from the bottom of page 495. And that decision, that was only
a very small decision. And the other one I think that is probably of importance
and I think is quoted again in your decision, President, is the Federal Court of
Australia v City of Wannaroo. Now, this decision is an extensive decision, so I
585 have only copied an extract from it. And that extract comes, it should come in
the form of - it is not actually numbered, but again I got this off the computer.
It is wonderful.

PRESIDENT: Oh, yes.

MR COOPER: You just go into the office and bang, bang, bang.

590 MR FITZGERALD: Very impressed.

PRESIDENT: Osiris.

MR COOPER: Yes. Actually, yes, Osiris and Ostley, Ostley Aid, yes. It is a
funny. You have got to just know to find it. So I was coached.

PRESIDENT: Yes, I need a lot of that too.

595 MR COOPER: So at point 43 of that page what I have done, President, I have
included the front page of the search that I used and then I just, rather than
photocopies the 20-odd pages of the decision, I have just extracted that, and the
relevant matter is contained at .43. The interpretation begins with a
consolidation of the ordinary meaning of its words, and there is a quote that is
600 contained there. And again, they simply keep restating those principles of
those decisions that I have previously put up, and you will note that they say
you should look at the words and see what they say. They again quote the
AWU v Graziers Association decision at the bottom of the page.

605 And I think what they are saying are that the words are the words and if you
put them in an award they should be able to be construed without ambiguity,
and if they can you take them for what they are. And again that was a Federal
Court of Australia High Court federal judiciary, so the reference is at the front
of it. So that brings us back to your decision, President, and again I think you
will note in this decision there are some very relevant matters contained in it,
610 and I will just highlight them at page 3, the principles of President Koerbin, at
6 there are a number of references, one we have just referred to, and there is
Bryson Attley and there is a very good quote there. Again it says:

615 *The meaning is to ascertain primarily from consideration of the words
actually used ...(reads)... The significance, however, may need to be
construed in that light.*

Now, I think what I have demonstrated here with the history is that the parties
in making the awards were very clear what the words were to mean, and I will
go to the construction of those words in terms of what I consider to be key
words. I may not completely cover that, but I think I will do a reasonable job,
620 and, in any event, it talks about again the AWU decision. At page 6 it talks
about the trite. The trite quote is on page 7, and then the decision is there, and
I don't know if we necessarily have to go to the findings, but you do when you
deliver your findings go through each point of the Koerbin decision and
address that, and I think that was a useful process.

625 So that decision again sets the scene, if you like, for interpretations and how
they should be used. The principles that are used in that decision make good
sense to me, and when referencing the original decisions to which it referred,
you can understand why they would be used. So having done all that they are
getting to, I suppose, meaning of words, and I know this is always difficult.
630 What I have done is from the dictionaries that are available in my office I have
taken the liberty of providing a definition of several words.

PRESIDENT: Thank you.

MR COOPER: From three dictionaries though. It is a little bit painful to go
through, I know, but it might be useful.

635 PRESIDENT: It depends whether they are all different or not, doesn't it? I
will mark the dictionary definitions, if that is what we call it, C8.

EXHIBIT C8 DICTIONARY DEFINITIONS

640 MR COOPER: C8. This one here is from the Macquarie dictionary, a new
budget edition, and very good. It is only a very thin dictionary.

PRESIDENT: Cheap, is it?

645 MR COOPER: And the words that I think are important, in terms of the scope of the award, and if I can rely simply on the Metalliferous Mining and Processing Award, I think the key words in that award decision are "industry," "mining," "processing," those sort of words are important, right. So in terms of this there is a word in here, "industry," and it talks about - wherever it is alphabetically - it is on page 206:

650 *Industry - a particular branch of trade or manufacture, any large scale business activity, manufacture or trade as a whole, assiduous activity of any work or task.*

655 So that is the "industry" defined in this dictionary. We then have a definition of "metalliferous", which wasn't easy to find. I don't think it actually contained the definition of metalliferous but it did contain a definition of metal and for the purpose of establishing the scope I think those definitions are important, and that was contained over the page. I don't intend to take the Commission to that. Mineral is another interesting word that is contained because it comes with mine and mining and you can see that the scope with awards is established in the industry of metalliferous mining, so, having looked at metals on the page before and then talk about mining, it talks about a whole scope of work that could be covered by this award, bearing in mind it talks about metalliferous mining in that sense.

660 So you can see the word "mine" is used there and obviously from it you can extract what mining means. And over the page the word "ore" I think is important and the word "ore" appears in the Pasminco Rosebery Award and you can see there that "ore" - where is it?

PRESIDENT: It is o-r-e, of course?

665 MR COOPER: Yes. I think I am really - this definition claim is a very precise definition. It says:

670 *...a metal bearing mineral, or rock.*

675 So in that regard it is pretty straightforward. And then I did have the word "processing" provided just to show that processing is simply that. There is no way you can misconstrue what the word "processing" means; it is pretty straightforward. So I did that out of the Macquarie Dictionary, which is a budget one. And then we had two different dictionaries in the office. One was a really thick one - I hope I haven't copied the same one - the Concise Oxford Dictionary and, again, I have simply provided copies of the same words.

PRESIDENT: Thank you. The Oxford Dictionary extractions will be C9.

680 **EXHIBIT C9 OXFORD DICTIONARY EXTRACTIONS**

MR COOPER: Again, if you look at the words, the same words that have been copied, "industry" - what does industry mean? It means, oh, well, in a sense, this sense it applied a different meaning in terms of diligence, habitual
685 employment and useful work, but it talks about branch, or trade of manufacture, those as a whole, the diligent study of a particular topic. So that in terms of industry in that sense, the industry of metalliferous mining could be construed as the type of work that is performed under metalliferous mining.

Again, I have tried to find a definition of the word "metalliferous" and it comes
690 under "metallic" in this dictionary:

...gold, silver, copper, characteristics of metals, particular sheen of metals, like struck metal - sharp and ringing -

hence, incognisant, and then it talks about metalliferous which obviously is a variation of how you would apply those words. So metalliferous implies in the
695 scope, a very broad scope of minerals that would be covered by the industry:

...industry being work of a similar nature -

and then you talk about metalliferous, dredging, sluicing of minerals. then it goes on an explains all that. And then you will see over the page we should have a definition of mine and minerals. Minerals - and at page, I think it is 43,
700 you talk about mine and then you talk about minerals:

...obtained by mining belonging to any of the species into which inorganic substances are classified, oil, petroleum -

and then it goes on and explains all that. So in terms of the scope you have a very, very specific scope. It talks about the industry of minerals and mining
705 and processing of those. Again, I have taken a definition of ore because "ore" is a key word in the Pasmaico Rosebery Award. It talks about silver, lead, zinc and ore, and you can see that ore picks up the catch-all for all other ores and is fairly straightforward again there. And that this definition:

Solid, naturally-occurring mineral or aggregate from which metal, or other valuable constituents may be usefully extracted. Metal, especially gold and -
710

blah-blah-blah it talks about. And, again, I have included the definition of the word "processing" because I think that is important to provide. So those two definitions roughly align with one another and, for completeness sake, I
715 photocopied the third dictionary we had in our office.

PRESIDENT: This Concise English Dictionary will be C10.

EXHIBIT C10 CONCISE ENGLISH DICTIONARY

720 MR COOPER: And, again, President, look, all I have done is, again, I have just simply sought to include the same words as I have previously "industry", which is at page 601:

Any business or pursuit -

sorry:

725 *Steady application to any business, or pursuit, useful work*
...(reads)... the employment of labour in production -

that talks about industry. You will see a definition should be there of metals - yes, metals is there over the page at 727 and included in that definition metals is the word "metalliferous" and, again, it talks about mining and minerals and
730 gold, silver, lead, copper, iron - all those, tin, the whole range of those metals are contained there. Again, over the page sticking to the same words is "mine". I think this one actually ran over two pages - yes, it did. Talks about:

To dig into, or burrow in to obtain by excavation in the earth
...(reads)... practice secret methods of inquiry -

735 which is probably not appropriate:

And the excavation of earth for the purpose of obtaining minerals
...(reads)... collapse of a wall -

to all things related to mining, we know the process talks about that. So it then goes and we talk about minerals, again, the definition is complete there and
740 over the page you will find a definition of "ore", again, which is included and tends to repeat a little bit what minerals are. But this definition - I think this one here didn't come out very well, yes, it is the bottom of page 802.

PRESIDENT: Yes.

745 MR COOPER: But a natural substance from which metals may be profitably extracted. And over the page again is processing which is a word contained in the Rosebery award. So having assigned to those words very straightforward meanings, I think the scope of the award is very clear. I don't know whether it can be misconstrued - it is fairly straightforward. Which brings us to, I suppose, the last point I wish to make and that is, there were a number of
750 applications made to the Pasmaico Rosebery Mining Award, and when you look at the transcript of those, there is general consideration and they were made by a number of people and I don't intend to provide a detailed copy of transcript. It is a matter of record and I will just simply quote from it. At page 1 of matter T7984 and T8092 in October '98, there was hearing about these
755 awards and - - -

MR FITZGERALD: Are both those October '98?

MR COOPER: Sorry, there was T8029 of 1998, that is the heading that it came under, but on transcript it quotes 7984 as well. And there was an application where Mr Fitzgerald appeared for Mines and Metals and Mr Flanagan, Mr Becker and Mr Harding were all appearance on that day and they were talking about making applications for interpretation. Now, at that time there was an application in T8028 for interpretation of the Metalliferous Mining Award, the AWA arguing:

760
765 *...the application by AMMA cannot be considered in isolation. It needs to be examined in the context of that award.*

They talked about all that. But what was clearly being said at that time was the rights and obligations of employees engaged in metalliferous mining in Tasmania within a safe jurisdiction, does come under an award. Now, that was discussed then, is on the record, and what happened was, it was agreed that that matter be stood over and it was. And then we had a discussion about wage rates that would be paid because, again, the award was made in title and scope.

770
775 And that point is reinforced right throughout the transcript and at page 6 of that transcript they were talking about the standards that would apply if you were to make the Metalliferous Mining Award in its entirety and the AWU said that it should be based that it should be based on what is in Rosebery and if it was a position that we would advance and interpretation applications would need to proceed, but we haven't put that position, so they let it go.

780 It is talked about here and it is very clear for the parties that back - we are back in '98 now, so it would be some two years after the award was made in title and scope, the new award and we are some seven years after the Pasmaenco Rosebery Award that was converted from the Mining and Zinc Award. And Mr Flanagan at that time said:

785 *It needs to be understood that the concern that we have in respect of the Pasmaenco Rosebery site is not in isolation ...(reads)... and what we do with that award.*

790 And then Mr Harding got up and talked about the history back to 1934, as he would, and Mr Becker got up too and made a comment about Rosebery in the awards then. So that goes on, and there are several transcripts that confirm the parties knew the problem. Mr Fitzgerald says at page 9, on 28 October in the same matters, 28 October 1998:

The other matter we want clarification on is a vexed issue regarding the Commission's statement ...(reads)... Pasmaenco Rosebery only, and no other.

795 So that is at page 9 of transcript in these matters on 28 October. So that is Mr Fitzgerald and Mr Flanagan confirmed that. So the only issue the unions had then was that if you took that award, that it wouldn't apply to any other contractor on site, but you would have in its place a Metalliferous Mining

Award which may very well catch them up, so that was the only concern the union had.

800 PRESIDENT: So are you saying that what was said would mean that the Metalliferous Award, had the process continued, would reflect what is now in the Pasminco Award; the Pasminco Award would then become an enterprise award by a series of variations and applications?

805 MR COOPER: That is correct, yes. To be fair to the Commission, that is the union's view. The union's view - - -

PRESIDENT: Yes, that is what I asked you.

MR COOPER: Yes, the union's view is that the new award would look like the Pasminco Rosebery Award, have a new name.

PRESIDENT: Yes.

810 MR COOPER: Same title, oh, same scope varied a little bit to modernise it and have those conditions. The employer said, "No, no, no, they're enterprise rates. We have to have a minimum rate." And we haven't finished that debate yet, but it is very clear, though, from the quote that I have just made, that Mr Fitzgerald, at that point in time in 1998, was very clear that it would make it
815 clear, the Rosebery Award would then become an enterprise award and would apply to Rosebery and no other. So it is very clear from those words, implied, is that the award had a greater application.

MR FITZGERALD: Well, don't speak for me.

820 MR COOPER: I am only reading the words from transcript. And, again, Mr Becker talks about if the Commission was to rule on the Pasminco - well, this is at page 11 of that transcript, then he would make it an enterprise award. They might want to make submissions about precedence and wage rates and so that was discussed. The matter, though, continued on and that was actually in '98. In '99 it continued on and similar comments were made throughout the
825 transcript. And, again, these are being raised by the employer. So Mr Fitzgerald appeared in this matter which is - it has actually had a number added to it. There is now T7984, T8092 and T8044, and this is in December '98, and the matters are not joined - it is noted at the bottom of transcript.

PRESIDENT: Is it 8092, or 8029?

830 MR COOPER: 8029; sorry.

PRESIDENT: 8029.

MR FITZGERALD: So what was the other one, 7984?

MR COOPER: Yes, 8029.

MR FITZGERALD: Yes.

835 MR COOPER: And 8044.

MR FITZGERALD: Thank you.

MR COOPER: Mr Fitzgerald says at page 14 of that transcript:

*If we're just going to keep going as we are we'll have more of the same
...(reads)... up in the air and disputed -*

840 and he goes on to say:

*It's our view that in the public interest that should be clarified
...(reads)... the moment that is unclear.*

That is his - - -

845 PRESIDENT: When we talk about "declaration", what are we talking about?
Is that a decision, or - - -

MR COOPER: Okay. When there is a - when someone does (a) an agreement, if they wanted to do an AWA, or a Federal agreement, you have to provide award so there is no disadvantage.

PRESIDENT: Yes. Right.

850 MR COOPER: That is the declaration he is talking about. It says - I will just repeat it:

*Obviously, in the terms of the Federal jurisdiction, in terms of
designation of a relevant award for the purpose of no disadvantage
- - -*

855 PRESIDENT: Designated award; yes.

MR COOPER: Yes, designated award. So that is what he is talking about.

PRESIDENT: Okay. Right, thank you.

860 MR COOPER: So at that point in time, this is 1998, this is Christmas time nearly, there is still that issue that is being raised by Australian Mines and Metals. This is some seven years after the Pasminco Rosebery Award was made. Mr Becker continued on in this matters and he said at page 19:

*Thanks, Commissioner, I'll be brief. There is no doubt that there are
some problems hanging around ...(reads)... no doubt what applies.*

865 Mr Becker was - I can't say what he was referring to but I do know that he was talking about the no disadvantage test that was applied to AWAs which, at the

time, I think a company, Peabody's, had actually named that award in their agreement.

PRESIDENT: AWAs or agreements?

MR COOPER: Oh sorry, agreements, yes.

870 PRESIDENT: Agreements, yes.

MR COOPER: AWAs came later, yes. Now, in March 1999 this hearing was commenced again but it was under 7984 so we have moved on and 8029 and the other one have been dropped off and we now are under 7984, 15 March '99. Now, Mr Fitzgerald in reporting back again states about making the award:

875 *Now, it is the position of the unions, and they can speak for themselves, that the minimum in their view would be based on ...(reads)... as to its legal status for some time now.*

Now that legal status was obviously was it an award or does it contain a view and he goes on to talk about we believe that is wrong but he also says - I will
880 just read it. It is at point 30 on page 26:

We believe that approach is totally wrong and as a result I have suggested we are at somewhat of a loggerhead situation ...(reads)... in the rest of the industry and we would then be able to move forward.

So Australian Mines and Metals representative was clearly saying the
885 Pasminco Rosebery Award only applied to Rosebery. They were saying that and they continue to say that and they continue to say that today and that is one of the reasons, I suppose, we are having this interpretation. In April '99 this matter continues on, variation of award, again under that matter 7984 of 1998 and Mr Fitzgerald is still making the same submissions. At page 35 in
890 transcript on that matter:

But it is our view that it is not -

I don't wish to put too much on the record in that regard -

*it is in the public interest that this award has been wrapped up very quickly from this point of time ...(reads)... your opinion be expedited so
895 as to give some guidance to the parties about the approach -*

and they were talking about wage fixing principles that then existed at the time and one of the principles was the first award principle so if there was an award existing and you make a new one then you use the first award principle, so you don't simply go backwards, so those discussions again kept reiterating the
900 position of AMMA and those matters continued on in May 2001, same T number, 7984. It was an application by AMMA to vary the award to include all conditions. Same argument was coming out.

Mr Fitzgerald again says there was an issue about lack of faith but at page 47 of transcript there is uncertainty at point 29. Mr Fitzgerald again says:

905 *There is uncertainties relating to the alleged application of the Pasminco Rosebery Mining Award ...(reads)... and it is in the public interest, is to remedy the situation quickly.*

That was in May 2001 and the arguments haven't changed so they have been running them since '98. And then those discussions go on but on 22 May 2001 at page 51 of the transcript Mr Fitzgerald had been talking and it is actually my submissions there and I go on to say:

910 *I think we need to be a little bit aggressive if we are going to make this award, if we are going to make it as a safety net ...(reads)... to finalising this award because we think it is necessary.*

915 Pasminco Rosebery Mining Award as we all know by an early decision of the Commission, is the underpinning award that applies to this date and in some respects it is probably not appropriate so we even admit that, right, and we talk about specific references that that award has to Pasminco Rosebery, so it is very clear all through those proceedings that the wages need to be fixed and the award was an issue.

920 Now, the reason I highlighted the Commission and deliberated on those transcripts is that there is quite a few of them and they do go on for some pages and in considering them - - -

PRESIDENT: They all seem to say much the same things though.

925 MR COOPER: Over a long period of time.

PRESIDENT: Consistency, yes.

MR COOPER: Over a long period of time they do, that is correct, so the reason I do that is because when you refer back to the Commission's decision on and I rely on your decision, President, I think the reason I would do that is because it does contain a wrap up of all the decisions that apply, we see that if there is ambiguity or uncertainty or there is a problem with legal status, then there is a remedy, the remedy is to vary. That hasn't been done to date. You still have in place the Metalliferous Mining and Processing Award which scope I think is very clear. Let us have a look at it:

930 *This award is established in respect of the industry of metalliferous mining, dredging, sluicing or other means of obtaining metallic minerals and/or the treatment of those minerals -*

and it is very clear in the scope -

940 *provided that until the making of this award has been finalised in
respect to wage rates and conditions of employment ...(reads)... observe
the Pasmaenco Rosebery Mining Award in all respects.*

Now, in terms of plain English I don't know if you can get much plainer than
that, that is pretty straightforward. I have taken the Commission to a number
of decisions that say what should be relied upon by jurisdiction when dealing
945 with those matters so if we have an employer out there that is engaged in the
industry of mining what would apply to them? What are the facts? The facts
are the industry of the employer and the Commission would be aware that this
application by its nature falls out of another application that was being heard
and we won't deal with merit but it is just I think it is important that that
950 application was one which involved a contractor in the mining industry, and
that was under T9736 of 2001 and that matter was actually adjourned on the
basis of well, what applies there is needed to be clarified for the purposes of
what award applies and we say that it is very clear that the award that applies is
this award.

955 Now, I don't think it would be appropriate, President, to go to that case other
than to mention it because this case is mentioned in our application as being a
reason. Now, the merits of that case will stand on their own and whether that
contractor is employed under the Pasmaenco Rosebery Mining Award is
something this interpretation will determine and clearly - - -

960 PRESIDENT: The interpretation will perhaps be relevant but it won't
necessarily determine the outcome.

MR COOPER: Yes. So we are not going to merit. General context of the
award, there is a new award made and if there was some ambiguity over the
Pasmaenco Rosebery Award it was certainly taken away when the Metalliferous
965 Mining Award was made so if someone wants to argue that well, you're out in
the industry and you pick up the Pasmaenco Rosebery Mining Award and it is
the Pasmaenco Rosebery Mine, why would it apply to me?

If that was the case from '91 when the Mining Lead Zinc Award was rescinded,
up until March - May '96 or March '96 whenever it was done, May '96, then
970 there might have been some ambiguity there but nothing was done. When this
award was made, this metalliferous award, that very clearly fixed it up. It said
if there is a classification in the Pasmaenco Award then you pay by it until this
award is made, very clear.

That application was made by consent. AMMA weren't present but they
975 subsequently wrote and advised we have rights and if we don't like your
decision we will appeal. They didn't do that. The decision has stood and is a
valid decision so general context of the award, new award, everyone agrees it
should be made, very clear what happens, so if I come under this scope the
industry of metalliferous mining, dredging, sluicing or other means of
980 obtaining metallic minerals and/or the treatment of those minerals then until
this award is made in terms of its wage rates if I got a classification under the

985 Rosebery award then I will observe this award and again it is very clear, the
Rosebery award contains a number of classifications which I have spoken to
the Commission about and it went from 100-odd down to four or five and those
classifications are fairly straightforward.

990 In the initial there was loco drivers and miners, you now have trades, you have
surface operators and you have underground operators and I think that is very
straightforward. You have a mill operator, a surface operator and miner,
mechanical trades and electrical trades so if you are a tradesman or you are a
mine worker then you are covered by that award and those definitions are very
broad and would pick everybody up so we have an award now that applies to
this industry in terms of five classifications and I think that is pretty
straightforward.

995 PRESIDENT: Was the award made on a draft provided by what, the unions at
the time?

MR COOPER: The AWU provided the draft at the time.

PRESIDENT: And the award was made based on that draft without any
variation or argument obviously, because the employers weren't present.

MR COOPER: Yes, but it is interesting that you should dwell on that. In C1:

1000 *AMMA has no objection to the statement of particulars outlined in the
AWUs application to vary, ie, making of the award.*

The clause - title clause is detailed and the scope clause is detailed and the title
clause is detailed is that which is contained in the Commission's decision.

1005 PRESIDENT: Yes, I understand precisely what you are putting, it is just that
a very quick look through the first couple of pages of the Pasmenco Award, it is
contradictory anyway. It talks about - it says that it covers all employers,
etcetera, etcetera, and then when you look at the definitions it says the
definition of employer is Pasmenco Mining Rosebery.

MR COOPER: Yes.

1010 PRESIDENT: So not commenting one way or other on what you are putting
to me I don't want to go any further in case I find more contradictions, that is
all.

1015 MR COOPER: Yes. No, I understand that and that is why - that is why there
has been legitimate continual submission by the parties about the relevance of
that award.

PRESIDENT: Sure, yes.

MR COOPER: But in any event what I say in my submissions is that if there was some ambiguity for the six years that that award sat in isolation of anything else after the rescission - - -

1020 PRESIDENT: It has taken a hell of a long time to get here - - -

MR COOPER: It has taken a long time to get here.

PRESIDENT: - - - to be determined.

1025 MR COOPER: But in any event May '96 - May '96? Yes, May '96 this award was made, Metalliferous Mining and Processing Award and if there was ambiguity it went when this was made because what it said very clearly this award is made direct to this industry and if you don't know what is going on until this award is finished go to Rosebery, have a look there if there is a - - -

PRESIDENT: That could well change the status of any ambiguity or contradiction or whatever that may or may not be in this award.

1030 MR COOPER: That is right. So in any event we say that that tidies that up and look, President, with respect to my union we are keen to have this award finished. We have been through the AMMA drafts and we have made comments, we simply can't agree on a couple of fundamentals, perhaps we should bite the bullet and have it heard. I think we are waiting for an
1035 impending retirement before we give it to someone to - - -

PRESIDENT: That is on the record.

MR COOPER: I think he has had enough of it and I can understand that, 10 years - - -

PRESIDENT: I can understand that too.

1040 MR COOPER: - - - 10 years, you know, it is a long time.

MR FITZGERALD: Well, we will have to have it heard within the next couple of weeks, I suggest.

MR COOPER: I don't think that will happen. So in terms - - -

PRESIDENT: It can be arranged.

1045 MR COOPER: So in terms of the application to make, which was made, you have the letter from the employer. Now, as they say they had the right to appeal, they didn't, they didn't appeal and I think the Commission in its wisdom or whatever - in its wisdom I say, very clearly tidied this up for the industry for the last six years, it has been very clear, and that has been reflected in what
1050 goes on out there but that gets to merit a little bit and as I said, there have been a number of agreements that have been registered both before the non-union section of the Commission and before everybody else and they name this

award, the Pasminco Mining Rosebery Award, as the underpinning award for the purposes of the tests. So - - -

1055 PRESIDENT: And that is basically an interim arrangement subject to the making of a true award.

MR COOPER: That is correct, that is correct, but let us go back though to the construction of the words and the construction of the words in the Metalliferous Mining Award are industry and the construction of the words in the Rosebery Award also contain the word "industry" so it doesn't say, "If it was an enterprise award would apply to the enterprise of," and name that and what happened at the same time this was going on the Goliath Award was turned from an industry award to an enterprise award; the Pasminco Hobart Smelter Award was - it was EZ Electrolytic Zinc Award, that was changed to an enterprise award and the Tempco Award, which was an industry award was changed from an enterprise award, so there were three variations of significant employers in the State in arguably broadly termed the minerals sector, mining and processing.

1070 Goliath being a quarry and a processing plant that makes cement, now Australian Cement Holdings; Tempco being part of Cementcorp; BHP now still there as Tempco, has it's own award, and obviously Pasminco Hobart, so if it was an issue then it could have been deal with. Now, the interesting point about those other awards was they were varied to be enterprise specific because the enterprise was contained in one isolated place. Tempco were Tempco, 1075 Pasminco Hobart was Pasminco Hobart and Goliath was Goliath.

The Pasminco Rosebery Award though applied to arguably several mines so that is why it was never ever affected in terms of a consent variation to change the scope and so there is an issue there that needs to be considered and it is a difficult one and it has taken a long time to get here but it does need to be 1080 determined so what we say in considering your decision of March 2001, in considering the precedents that are contained in there and having taken the Commission through the construction of the award, through the relevant legislative framework, if you like, that allow the Commission to operate, and having made the applications that we say it is very clear that the Metalliferous 1085 Mining and Processing Award is an industry award that incorporates by virtue of its scope clause the Pasminco Rosebery Award for the purposes of conditions and wage rates.

Now, we say that is very clear and we would seek a ruling from the Commission that reflects our understanding of that positions. I think that 1090 concludes, President.

PRESIDENT: Can I just ask you, you may have addressed the numbers of which there are a few - may have passed me by. The Pasminco Award itself talks about at clause 5 the supersession provision.

MR COOPER: Yes.

1095 PRESIDENT: It incorporates or supersedes a whole range of awards or whatever they were. As far as you know did they all specifically apply only to the Pasminco Rosebery-type operation or are they industry awards or - - -

MR COOPER: No, those supersessions - I don't have it in front of me but what I do know is that when the Commission makes a variation to an award or
1100 makes a consolidated award it usually supersedes the previous award so that if someone wants the history they can go back to those files and that is not uncommon in awards of this jurisdiction.

PRESIDENT: No, that is right.

MR COOPER: And the awards it would have superseded would have been
1105 awards made since 1991.

PRESIDENT: Okay.

MR COOPER: And the original award you do have a copy of, that was made for seven clauses and that was in the decision of Commissioner Gozzi.

PRESIDENT: Is this the August one?

1110 MR COOPER: August - yes, I am pretty sure it was August.

PRESIDENT: August 90?

MR COOPER: N2846.

PRESIDENT: 2486 and 2487 of August 1990.

MR COOPER: That will be it - that would be those. So the only awards that
1115 would have been superseded would have been awards made from that date because the Mining Lead Zinc Award was rescinded so it would have been dealing with Pasminco - an award titled Pasminco Rosebery Mining Award. The difficulty we have obviously is the application of clause 2.

PRESIDENT: Yes.

1120 MR COOPER: Okay, so - - -

PRESIDENT: If I go back through those decisions I should be able to find somewhere where all of those other awards have gone.

MR COOPER: That is right, yes.

PRESIDENT: Okay. That will determine what they are.

1125 MR COOPER: So what we say is on the application of this clause and the sad part about this, I suppose, is it is a significant matter and it will have consequences and while I have digressed a number of times it is unfortunate

1130 that in the matter that brings this application on was one which we had tried in
good faith to resolve for two years and we weren't able to because the employer
at that time thought it was better to go down a different track and regulate this
industry by individual contracts which is right. But unfortunately falling out of
that now is what applied until that happened and what applies to other
employees out there. Now, I understand through AMA that most people are
1135 regulated by some instrument that would protect them from this interpretation
and I think that is significant.

If you look at the history of mines in Tasmania, Deputy President - sorry,
President - wrong jurisdiction - they do have a history of having their own
awards. Beaconsfield, for instance, has its own award which is a Federal
award. Mount Lyell, when it was first opened for 100 years had its Mount
1140 Lyell Award and they were site specific; Luina Tin Mine which is gone had its
own award; Aberfoyle, which was a mine that is now gone, had its own award;
Que River had its own award; Pasminco Rosebery operated under the state
system so was subject to a state award and subsequently restructured but kept
the same scope - and everybody else had their own award.

1145 I think the only place that didn't was Anchor Tin Mine and that had an
agreement with the AWU at the time. So the rest of the industry was regulated
- Savage River prior to its closure and reopening had a single award and they
were all Federal awards - they were all Federal awards - for all intents and
purposes enterprise specific awards. They named the employer, the named the
1150 site and they named the union's party. So the regulation of the industry has
been one which has a history of being regulated by appropriate industrial
instruments - normally awards that are converted to agreements. And even
with contractors coming to the state now, with the latest Barminco, they even
have their regulation by individual contract registered in the Federal
1155 Commission - so there is a regulation there.

Beaconsfield Gold has underpinning award and individual AWUs - AWAs,
sorry - similarly with Barminco. So you have this history - Henry Walker
Elton, when it was in the state, had a part 4A agreement. So the interpretation
of this award in that sense will not unnecessarily flow to a whole range of
1160 people being caught up in a safety net. It won't happen on my understanding of
the industry and I have been involved in mining since the late 80s so I have had
12 years or more involved in this industry and I can say to the Commission that
it is very well regulated and it is only a few contractors that fall out and even
this contractor that is subject to this dispute now is regulated.

1165 PRESIDENT: I guess if the decision goes your way it could well be that the
argument then is at the time that those individual arrangements or collective
arrangements were made, did they pass a no disadvantage test at that time,
rather than a retrospective application.

MR COOPER: That is another argument.

1170 PRESIDENT: That is right.

MR COOPER: But I understand that even if that was the case there is still a test that needs to be applied and we have spoken to the employment advocate in this state in any regard to determine the appropriateness of the test and while we disagree we have actually corresponded. I note the AWU have as well with him about that and he confirms in writing back to us that the appropriate test has been applied and there is no disadvantage - using the Pasminco Rosebery Mining Award.

PRESIDENT: Oh, I see. So that was the - I don't know under the AWAs whether they are called designated awards - I think they are.

MR COOPER: Well, I am not sure but we are precluded from that process but we do have - - -

PRESIDENT: So are we, it is all right, don't feel bad.

MR COOPER: So in that regard, I think the reason I am making that submission towards the end is that I don't know that this application will in itself, even if the interpretation is handed down in favour of what the unions are seeking and that is that the award would be an industry award for all purposes from the date of its making, which is the Metalliferous Mining Award - - -

PRESIDENT: Yes.

MR COOPER: In any event - and we would be seeking that from the date of that award's making which is May '96 and would not be seeking from the Commission August '91 - I think that is important in that context - we would be seeking May '96 and, as I say to you, I think it would not harm the public interest to have that finalised or clarified because the regulation that applied in the industry would not see a plethora of underpayment claims come out of it.

PRESIDENT: If the determination goes against you, would it then be that employees and employers in the mining industry would be award free?

MR COOPER: Arguably, yes.

PRESIDENT: Yes.

MR COOPER: Arguably yes, that would be the case. Now, on the construction of that scenario I can't see how the application would go against us because I think the words are very clear.

PRESIDENT: Well, that is your submission of course.

MR COOPER: That is my submission, yes, and I assume I am entitled to make that. So my submission is that it is clear and the intent of the parties too - I know you don't go to merit, but the intent of the unions and Australian Mines and Metals is way back when Mr Knop was there was to make an award - clear the Pasminco issue up - make an award. Now, for whatever reasons and there

1210 are a number of them - and there are a whole range of issues that affect us, we haven't been able to do that. Now, I think that is incumbent on us to fix that but in the meantime I would like this issue tidied up, if you are able to do that. So I will leave my submissions at that, President.

PRESIDENT: All right, thank you. Mr Wakefield, did you wish to put any submissions?

1215 MR WAKEFIELD: Just to say that we support the submissions of Mr Cooper. His knowledge and experience with this matter is extensive. It goes right back to when - - -

PRESIDENT: A bit of local knowledge helps, doesn't it at times?

1220 MR WAKEFIELD: It does. It goes right back to when he worked for the AWU and - - -

PRESIDENT: Good grounding, was it? Is that what you are saying?

MR WAKEFIELD: We taught him, yes. So his submissions are excellent and we fully support those submissions. If the Commission pleases.

1225 PRESIDENT: All right, thank you. Mr Becker hasn't returned. Perhaps, if he does return, we will ask him what his position is - one could presume what that may be. Mr Fitzgerald?

1230 MR FITZGERALD: President, I wonder whether it is appropriate if we just have a five minute adjournment. Matters of this kind are not particularly riveting and I can tell you that my submissions won't be any more entertaining than Mr Cooper's and I realise that he had a matter yesterday - but I wonder whether we can just have a five or 10 minute adjournment?

PRESIDENT: Yes, that is fine. All right, what if we come back at about a quarter past 11?

MR FITZGERALD: That would be fine, thank you.

1235 PRESIDENT: Will you be an hour or so?

MR FITZGERALD: I think so - maybe a little bit longer. I was hoping to complete by lunch but I think we should be able to complete by lunch.

PRESIDENT: You will complete by lunch even if it means we are having a late lunch.

1240 MR FITZGERALD: Yes, okay. I get the message.

PRESIDENT: All right, we will resume at a quarter past.

SHORT ADJOURNMENT [11.06am]

1245 **RESUMED [11.20am]**

PRESIDENT: Thank you, Mr Fitzgerald?

MR FITZGERALD: Thank you, President. I will certainly try to be brief and it is my goal to finish by lunch time as was indicated prior - - -

1250 PRESIDENT: Can I just tell you, I have a commitment which will require me leaving here by about 1.15 at the latest.

MR FITZGERALD: Okay, thank you. Well, I will certainly bear that in mind. President, I just noticed your comment about - your response to the quote by Mr Cooper where, I think, lawyers were accused of confusing matters. I agree with that. We are trying to look at a plain english interpretation - we certainly don't want, despite my legal background, want to approach this matter on the basis of legal argument. We are looking at clearly what the award says and what was meant - - -

PRESIDENT: We have never held your legal background against you before.

1260 MR FITZGERALD: Thank you. Yes, thank you.

PRESIDENT: We are not going to start now.

MR FITZGERALD: I have been trying to divest myself of any tainted image associated with being legally qualified. One thing I should say from the very start, it is a significant case, President. It has taken a long time to get here and the reason being is that we have consistently held, as Mr Cooper indicated - although he did interpret fairly freely my submissions in the Commission before Commissioner Imlach, but we have consistently held the view that the Pasmaico Rosebery Award, by reference - by this reference in the Mining Award, if I can call it the Mining Award for the sake of brevity, does not have any application whatsoever.

We are of the view that - and I will come to it later, that the exercise which Mr Commissioner Imlach was involved in in making that award, where we didn't appear and where Mr Knop wrote to the Commission and consented to the clause - you will notice that I am sure and I think you have already picked it up - the clause which we consented to was simply the making of the award the title and the scope clause. Now, the scope clause did not contain that little proviso which is the essence of this case and that is the proviso relating to provided where there are appropriate classifications and that was something which Commissioner Imlach appeared to add following his decision. It is not mentioned in his decision but it appears in the order.

1285 So we had no means of appealing that because the decision by Commissioner
Imlach was simply endorsing what we thought we were endorsing at that time
and then he, for whatever reason, adds in the proviso relating to the Pasminco
Award should apply. Now, the reason why we haven't challenged that is, is
1290 simply the original decision made by Commissioner Imlach was not
appealable, in our view. The order which came down later may have been
appealable in another place but it is our view that, you know, why should we
take the trouble and expense of launching an appeal in say the Supreme Court
in respect to an invalid order when we don't hold - when we simply take the
view that it is not valid in the first instance.

1295 So that is the reason why and I will take more about that later, President, but
certainly it has taken a while to get here. We see this as a test case and we are
rather surprised by the lack of submission by the AWU in this matter, given the
importance - given they are the principal union in the industry and we also note
that Mr Becker is not here to make any supporting submissions. I will be using
the same exhibits in some cases, so I won't present them again, I will just
simply refer to them. We believe clearly in the rules of interpretation which is
included in T30 of 1985 and then confirmed by you in the most recent decision
apply and make it quite clear that in this instance the award can't apply.

1300 Now, the basis of interpretations, and I have been involved in a number, in my
view is that they can't be, in terms of the rules of interpretation, determined in
isolation and merit clearly can't be included. So we can't say what we think the
award means - it must be in accordance with the words which are used but
there has to have been some sort of contextual context in which this matter is
1305 before you. Now, as the application Mr Cooper has made refers to a matter
relating to one of AMA members first contracting and the alleged
underpayment of some six employees - well, I think it is seven employees -
well, maybe six.

1310 I would have thought, in the context of whether this award applies, there would
have been some necessity to lead by evidence or at least by affidavit and Mr
Jepson, who is I understand an ex-employee of Gaspersic Contracting could
have done that here today. Mr Cooper can run his case as he pleases but in the
context of satisfying the onus of proof which is on Mr Cooper, we would say
that that proof has not been satisfied in the absence of that evidence. In respect
1315 of that, if I could just say briefly that the six employees which is the subject of
the application before Commissioner Imlach, I understand that five are no
longer employed by Mr Gaspersic including Mr Jepson and one is currently -
their only employee is subject to an Australian Workplace Agreement.

1320 But what I think is - and I should also say that the employees engaged by Mr
Gaspersic and Gaspersic Contracting performed a diversity of tasks. Some of
them were engaged solely on mining duties, some were engaged solely on non-
mining duties - that is the nature of the business. Gaspersic Contracting is a
small contractor which provides services to the mines, local government - they
have a limestone quarry and a crusher which is effectively an in-house
1325 operation. They also have accommodation services and a workshop which is

also in-house and they provide general maintenance including painting and gardening, which again is in-house.

1330 Employees are often allocated tasks according to the availability of work and the relevant skills. What I believe Mr Cooper was required to do is to satisfy - in satisfying the owners is to show conclusively to the Commission that either Mr Jepson or his colleagues - or his past colleagues, performed certain functions which are within the terms of this application. Now, that has not been done.

PRESIDENT: But that matter is not before me.

1335 MR FITZGERALD: It is not - - -

PRESIDENT: No.

1340 MR FITZGERALD: No, it is not but in order to show conclusively that the tasks which were performed by these employees falls within the scope of the mining award, in my submission, President, there needs to be some proof of what the tasks actually were.

1345 PRESIDENT: Certainly that would have to be - well, the onus would rest with the union or the applicant, in that matter, to determine that yes, they were in the mining industry or performing work that comes into the scope of the Metalliferous Mining Industry Award. But the matter that is before me today, as I understand it, is whether the terms and conditions found in the Pasmenco Award apply to the mining industry generally - if I can use those broad terms?

MR FITZGERALD: Yes.

1350 PRESIDENT: The merits of the Gaspersic matter will turn on their own circumstances and certainly it will be up to the applicant if the union is successful in this matter to prove that yes, Gaspersic does fall under the scope. This matter is specific, as I understand it, and that is to interpret what is in the Metalliferous Award and whether in fact the proviso under the scope provision in fact does apply to the Pasmenco Award.

1355 MR FITZGERALD: Well, I can understand your remarks but I still hold to the view, President, that in order to prove that application before you there needs to be some evidence of the tasks performed and the proportion of tasks performed within the mining industry to make it a declaration that the award has application. At the moment we simply have this, if you like, conceptual application and that is all that has been before you. There has been no
1360 evidence whatsoever about - - -

PRESIDENT: But it is an application for interpretation. It is not an application - - -

1365 MR FITZGERALD: I understand that but in the rules of interpretation I believe there needs to be some reference to the context in which the application is brought.

PRESIDENT: But if we take that to its logical extension, what the union would have to do would demonstrate that every employer it says is covered by the award has to be looked at specifically.

1370 MR FITZGERALD: Well, I think in the context of at least one employee that was required. There was a matter which I was involved with and I will present this now, slightly out of order and unfortunately I didn't bring enough copies. I have got one for Mr Cooper but I didn't bring enough copies for the other unions because I thought they weren't going to be here, but in the context of this, and I can understand what you are saying, President, this is a decision by
1375 former President Westwood, in respect to the scope clause again, but you will notice in reading that there is a great deal of evidence by the parties concerned.

PRESIDENT: It is seeking an application in respect to a particular employer. As I understand the union application, it is an interpretation as to the application of the provision generally. It is not aimed - I mean, if it is aimed at
1380 one employer maybe Mr Cooper needs to tell me that because he has not referred to any particular employer as being the one that we should look at. I think it is a general interpretation. Is that correct, Mr Cooper? It is an industry interpretation you are looking for?

1385 MR COOPER: Yes. President, with respect, yes, that is exactly correct. We are seeking to understand from you what the words mean and if it was to be in context of Gaspersic for instance, then I could produce any amount of evidence. We haven't done that because we want a general application.

PRESIDENT: All right.

MR COOPER: We want to know what the award applies generally.

1390 PRESIDENT: Okay.

MR FITZGERALD: I think we probably just differ in our view here. The principles of interpretation and the way I read them is the clause number - the first principle which is:

1395 *...construction or interpretation of award provisions can only be made by considering their meaning in relation to special facts. It is futile to attempt such an exercise in any other way.*

Now, what I say about that, President, is that it is exactly what Mr Cooper is doing here, just considering it as a conceptual argument whereas, in fact, it has got to be considered in the context of the special facts which are the facts
1400 relating to Gaspersic.

PRESIDENT: All right, that is your submission?

MR FITZGERALD: That would be my submission. I will refer to that matter later. It may be - we don't need a reference number for that, do we?

PRESIDENT: No, it is a printed - it is of this Commission, yes.

1405 MR FITZGERALD: It is a decision of the Commission.

PRESIDENT: Of this Commission, yes.

MR FITZGERALD: This case, we regard as a test case and, again, I am surprised by the lack of substantive submission by the AWU and, indeed, the CEPU, but it is their choice to simply support Mr Cooper's submissions but they are, the AWU are the majority union by far in the industry and we have known for some time that ultimately this will come before us - before the Commission, but we have always taken the view and consistently held the view, as Mr Cooper read out in the transcript, that we don't accept that this - the mining which references the Pasmaico Award, provides a valid binding effect and it is principally for the reason where appropriate classifications are provided therein, and I will talk more about that later.

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We don't accept, necessarily, the submissions made by Mr Cooper at the end that it will have little, or no impact. It has wide impact. I can say for the purpose of the record, Mr Cooper mentioned one particular employer which was Peabody, I understand, which was a company involved in the construction of the Henty Gold Mine, which was subject to a Part IVA agreement, and I think my colleague, Mr Knight or Mr Massom, handled that agreement.

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But I can say in respect to that agreement and in respect to a number of other Part IVA agreements which have applied in the industry, we have consistently held the view and maintain the view in, before the enterprise Commissioner and again before the Commissioner, and I think the latest one was the Henty Part IVA agreement which was approved before Commissioner Abey, we have consistently held the view in terms of which is the relevant award for the purpose of the fairness test in the Part IVA agreement, and for the purposes of the no disadvantage test, and for the purpose of AWAs, or certified agreements, we have consistently put to the Commission in those respective cases that we do not accept that the Pasmaico Rosebery Award has any application as a relevant award, but for the purposes of comparison we have simply accepted that as the award, simply for that purpose only and we have consistently maintained that view.

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It is, you know, it is only up until today that we have been tested in that view because we have maintained, as you alluded to at the conclusion of the submissions, we have maintained that the employees are award free. So why should we challenge it? That is the reason. We now have got to respond to the challenge, but we have always advised our members that, given that our view of this whole exercise is that the employees are award free, but where there is a necessity to have a Part IVA agreement, or an AWA, there will be some need to actually reference award, but not necessarily legally obliging. It is also

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1445 interesting, and I will take you to this later, that the employment advocate supported by the Workplace Standards Authority, have also confirmed that view and it is for the reason that - - -

PRESIDENT: Has it been tested, or have they just accepted what has been put?

1450 MR FITZGERALD: It is - they have just accepted it, and I accept that that is the case until, and, you know, I suppose it is up to the unions in the case of Beaconsfield Gold, the officer of the employment advocate, and I will present an exhibit to you later, indicated that in respect to trades classifications the State, for want of a better title, Metals Award would apply in respect to electrical - the classification, the electrical engineers would apply.

1455 Now, that has been based on their view and their own legal research and the consultation with workplace standards. That was also supported by a decision which - by a view, and I accept it is only a view, by highly esteemed solicitors Blakes, in Sydney, who have confirmed that clearly because of this issue relating to the reference to the appropriate classification that, clearly, the
1460 Pasmenco Award can't apply as a general industry award.

It was convenient, I think, although I don't think it really did much to conclude whether there is an application in the award, or not, for Mr Cooper to take you through the history of the matter and it has been long and tortuous, to say the least, and matters have stalled for a number of reasons and we have - one of the
1465 reasons why it stalled is that we have continually maintained that there is no general industry application of the award. And, you know, clearly, the unions want the award made on the basis of the existing Pasmenco Award.

So we would say that this matter has great significance. It has, and I think it assumes test case status in that it will not only apply to Gaspersic contracting but it will apply to the rest of the industry in terms of a relevant award for the
1470 purposes of fairness test and Part IVA agreements and for the purposes of a relevant award, for the purposes of the no disadvantage test for AWAs and certified agreements.

PRESIDENT: Just on that, and it has got nothing to do with what we are determining, one would have to ask why that is a great problem? I mean, it is
1475 not an award that has outrageous positions in it, is it? It is pretty standard stuff.

MR FITZGERALD: The no disadvantage test, of course, is simply that.

PRESIDENT: That is right, yes, it is global test.

1480 MR FITZGERALD: It is a - well, that is right. The award in its current form, the Pasmenco Rosebery Award, is, if you like, an old style award. It doesn't reflect the roll-up of rates and conditions or in 12-hour shifts. It is essentially a Monday to Friday award, so - - -

PRESIDENT: There are a lot of awards that still reflect that.

1485 MR FITZGERALD: That is for sure, so in terms of - in some cases in small contractors it could be problematic - could be, if I can just put it as highly as that.

PRESIDENT: I mean, it is not an award from my very quick reading of it, that has provisions that are extraordinary, they are pretty basic standard, maybe old-fashioned provisions, if we could be so bold.

1490 MR FITZGERALD: Well, certainly, but it is one which Pasmenco themselves have consented to and I will go to that later where - - -

PRESIDENT: I presume that was the case somewhere down the track.

1495 MR FITZGERALD: Yes, of course but, you know, and again I just say how can -can that suddenly turn, where there is a consent to the enterprise award being made, how can that then be - where they were the only parties and you have probably noticed that Pasmenco Rosebery with two management representatives appearing, how can they legitimately declare that to have some industry status past their own enterprise.

1500 We will come to that later because there is clearly an anomaly between the scope of the award and we say that it is the scope of the employer, Pasmenco Rosebery, no other, because that is where the definition of an employer is and it must be - that is a very clear term - it must be interpreted that way, in our submission. I will move on to the exercise of the question of whether there was a valid award-making exercise and exhibit C1, which I think was the letter from Mr Knop, clearly indicated there was consent to the making of the Metalliferous Mining and Processing Award, the clauses detailed the scope clauses detailed.

1505 PRESIDENT: One presumes that for that letter to even be generated that AMMA had a copy of the draft award, or the proposed award, or whatever?

1510 MR FITZGERALD: My instructions only, talking to both Mr Knop and Mr Massom, is clearly not. The only one - the only clause they had was, as I think indicated in the decision of Commissioner Imlach of 2 May, where it just simply refers to clause 2 scope. The scope was read as follows and this is, you know, this is clear proof that that is all AMMA had at that time:

1515 *The award is established in respect to the industry ...(reads)... the treatment of those metals.*

Now, the added bit, the proviso, came in some time after that when the order was issued and that was provided that:

1520 *... until the making of this award has been finalised ...(reads)... observe the Pasmenco Rosebery Mining Award in all respects.*

PRESIDENT: But the letter pre-dates the decision, so they must have had something on which they could say that they had no objection, surely? Or was it just a verbal arrangement?

1525 MR FITZGERALD: They had simply the two clauses as detailed in the first page of Commissioner Imlach's decision. They simply had the type - - -

PRESIDENT: Well, where did - was that part of some draft, was it?

MR FITZGERALD: Well, it is not common practice in this Commission, as you are probably aware now, to provide draft orders in every instance.

1530 PRESIDENT: No, I wasn't aware, but that obviously has some problems that I can see.

MR FITZGERALD: Well, I think it probably is a practice which needs to be tightened up.

PRESIDENT: Yes.

1535 MR FITZGERALD: But I can't explain how the order is different to the application which AMMA consented to. AMMA didn't consent to - - -

PRESIDENT: Okay, so they had a copy of the application?

MR FITZGERALD: I understand so, yes, yes.

PRESIDENT: Right, that is what I am trying to establish.

MR FITZGERALD: Yes.

1540 PRESIDENT: That what was given to them as being the matter that was before the Commission - - -

MR FITZGERALD: Yes.

PRESIDENT: - - - is different to the final order that was issued.

1545 MR FITZGERALD: Well, the application which Mr - and I have spoken to both Mr Knop and Mr Massom because he was involved later, the application which was consented to was simply as indicated in the first page of Commissioner Imlach's decision.

PRESIDENT: So that was the application. That is, you are saying, that was the basis on which AMMA gave the okay.

1550 MR FITZGERALD: That is right.

PRESIDENT: And then when the award was finally printed it had the additional part in the scope provision; is that what you are saying?

MR FITZGERALD: Yes. Yes.

PRESIDENT: Okay.

1555 MR FITZGERALD: So the decision came down 2 May. I don't know when the order was actually - but the usual process is that, particularly in those times, President, is that the Commission - the decision was obviously dated 2 May.

PRESIDENT: Yes.

1560 MR FITZGERALD: But it is usually some time, a fair long time afterwards that the actual order is issued. Now, we have obviously missed it, but we relied on simply the decision.

PRESIDENT: It was issued on 29 May.

MR FITZGERALD: Well, it is some time afterwards.

PRESIDENT: Seven days.

1565 MR FITZGERALD: It would have been - well, it would have been - - -

PRESIDENT: A record.

1570 MR FITZGERALD: It would have come into the office and, you know, we would have - and I assume that whoever was there at the time just filed it but they would have taken notice of the decision which doesn't, I don't think, make any reference to this additional proviso. It just simply makes reference to the two clauses which AMMA has consented to. Now, the proviso is a significant bit.

PRESIDENT: Well, that is the issue.

MR FITZGERALD: Yes.

1575 PRESIDENT: But that is what I am trying to establish how it got in there? Was it something the Commission put it? Was it part of a draft order that was provided? Was it in the original application? I would imagine that the original file still exists?

1580 MR FITZGERALD: Well, again, this is hearsay only, but I can say that Mr Knop had absolutely no knowledge of this proviso until, you know, well after the event. So in good faith, you know, we thought, as often these matters are fairly mechanical procedural matters, in good faith we appeared - we didn't appear in the Commission because what we thought was being consented to was simply the application in terms of clause 1 and clause 2. The proviso has
1585 come in somewhere subsequently.

I can't speculate. It may have been Commissioner Imlach felt that that was wise to include that because of the, obviously, the delays in the making of the

award - I assume that was the case, but there was no opportunity whatsoever in AMMA - and they can't appeal that decision because the decision which was
1590 issued is one, on the face of it, is valid. It is the subsequent order which is invalid and the only way which I suggest we can turn that process around is to legally challenge the making of the order in those terms and we could only do that, I would suggest, by procedures outside this - by legal procedures outside this Commission.

1595 PRESIDENT: And I guess it begs the question then why wasn't that done, because the issue, or the difficulty that I am faced with today is an interpretation of what the words say.

MR FITZGERALD: Yes. Yes.

1600 PRESIDENT: The history of it is certainly relevant and very interesting, I might add. But whether that changes what the task is before me is something I will have to think very seriously about.

MR FITZGERALD: I have spoken to my colleagues before about their role in this matter, that they should have - - -

PRESIDENT: I am sure you have.

1605 MR FITZGERALD: You know, I seem to be left with the baby, holding the baby, so as to speak.

PRESIDENT: Yes, that happens, doesn't it?

MR FITZGERALD: It does. But they vow and declare no liability in these circumstances, but - - -

1610 PRESIDENT: It still doesn't fix the problem.

MR FITZGERALD: It doesn't, no, it doesn't. But it is an issue I think which clearly the Commission needs to take into account, I believe.

PRESIDENT: Oh, of course.

1615 MR FITZGERALD: The other aspect about that as a valid award making exercise, and, you know, again, I don't think you can just simply declare it to be valid. I mean, if it is valid, invalid, it is always invalid from the very start, is whether the Commission has got the power, or whether the Commissioner Imlach had the power to simply purport to make an award by those means. In other words, just simply by reference. Now, I am aware of other awards and
1620 examples in the Commission - Transport and Vegetable Preservers Award is a good example where - and I had some involvement in those awards way back. The Vegetable Preservers Award simply used to refer to the Food Preservers Award, and there was nothing there.

1625 So from a users perspective, you go to the State Workplace Standards
Authority and ask which award, and you go to the Vegetable Preservers
Award, which refers you to a Federal Award. Now, I use that analogy, and I
don't think that is a valid award making exercise, because you haven't gone
through the process of actually making a full award. Now, in the terms of what
1630 Commissioner Imlach did then, I would strongly submit that what he did by
simply including that proviso without any reference to the parties, or any
opportunity for the parties to - - -

PRESIDENT: Well, we are not too sure whether that is the case.

MR FITZGERALD: We are not too sure.

PRESIDENT: No.

1635 MR FITZGERALD: But by including that just by reference, whether that in
fact provides a valid award making exercise, because the valid award making
exercise is going through the complete process of making the award, as of
stand alone award. And I don't think there are any examples left in this
Commission of awards which are other than stand alone awards.

1640 PRESIDENT: Oh, yes, there are.

MR FITZGERALD: Are there.

PRESIDENT: There are awards in title only.

MR FITZGERALD: Oh, like the Fertiliser Industry Award and others.

1645 PRESIDENT: Yes, there are three or four of them that I am aware of. I had to
deal with them.

MR FITZGERALD: I don't know whether they actually - - -

PRESIDENT: It was relevant to something I was doing yesterday that I
discovered that we have these funny little circumstances, where we have an
award that has a name and some title.

1650 MR FITZGERALD: But where they refer to other awards as providing the
comprehensive rates and conditions is the other aspect.

PRESIDENT: I don't know whether they still do that, but they certainly was
one not so long ago that did that.

MR FITZGERALD: Well, I am aware of the Fertiliser - - -

1655 PRESIDENT: It is an unusual approach - - -

MR FITZGERALD: Yes, it is. It is.

PRESIDENT: - - - but then it is an unusual Tribunal on legislation.

1660 MR FITZGERALD: The other aspect, and I think Mr Cooper - and I won't go
to all the aspects relating to - and this is where I think I can shorten my
1665 submissions - Mr Cooper indicated in terms of legislation at the time that the
Pasminco Award was made there was no actual provision for the making of an
enterprise award. Well, effectively we had at that time a de facto awards,
enterprise awards in place at any event and Mr Cooper referred to a number of
them. The Tempco Award, the Pasminco Hobart Smelter Award, which I think
was the old EZ Electrolytic Award, and there was a Goliath Award as well.

1670 Now, they were existing prior to the - in the earliest part of the legislation again
I, like Mr Cooper, I was involved from the very start when the legislation was
put in place. What occurred is that there was no restriction or no prescription
as to on what basis awards could be made. But what we had is effectively in
1675 place, de facto, if I can call them that, enterprise awards, even though there
wasn't prescription for them. Now, that - there are some good examples of
that. As I said, the Pasminco Award, the Tempco Award, because they were
the only plants operating those sorts of enterprises. Now, again, equally the
Mining and Lead Zinc Award, which is one which Mr Cooper referred to, is
1680 one which was in a de facto sense one which applied only to Pasminco
Rosebery, and I think you asked some questions along those lines.

1680 Now, to my knowledge, to the best of my knowledge, there were no other
organisations which were subject to the award at the time. So effectively,
because others were covered by, as Mr Cooper indicated, by Federal
regulations, so the Mining and Lead Zinc Award effectively only applied to
Pasminco - the enterprise of Pasminco Rosebery. And that was then converted
into a - even though there may not have been any legislative prescription - - -

PRESIDENT: Only because it was the only operator in the State.

1685 MR FITZGERALD: That is right. Exactly. Exactly. But certainly, and I will
come to this soon in more detail, certainly it wasn't - and though the
inconsistencies particularly which you are referring to, it wasn't open for Mr
Skinner, and I think Mr Evatt, which were representing Pasminco Rosebery to -
any way to declare or take responsibility for the award applying past, or outside
1690 Pasminco Rosebery, was clearly or only to that particular enterprise. In respect
to the proviso which we referred to, it is indeed curious, and in terms of
guideline 4, it is only possible to interpret guideline 4 of T30 - it is only
possible to interpret the award in terms of the actual words used, and I will just
go to that. It indicates:

1695 *Provided that until the making of this Award has been finalised in
respect of wage rates and conditions of employment, or until this
proviso has been deleted -*

And I think if I could just interpose there what that is saying, I think, is there is some contemplation of an actual mining award being made, and then the proviso would be deleted totally, and I could just continue quoting:

1700 *Employers falling within the scope of this award shall, where appropriate classifications appear therein, observe the Pasmaenco Rosebery Mining Award in all respects.*

Now, clearly the Pasmaenco Mining Award and its predecessor, the Mining and Lead Zinc Award, which Mr Cooper indicated had some 150 classifications, the only ones who converted those into four or five classifications was in fact Pasmaenco Rosebery. So there is no industry implication, even though it could have potentially covered other employers. There was no industry implication of the Mining and Lead Zinc Award. So what we have then is, if you like, a restructuring of some 150 classifications down to four or five classifications, but what I think in terms of this interpretation, which is the key to this whole issue, with respect, President, is you must take the - in interpreting this Award - the classification structure in its totality.

It is not possible to selectively - and Mr Cooper hasn't addressed this, because it is fatal to his argument in my view. The classifications which appear in the Pasmaenco Rosebery Award are very specific to Pasmaenco Rosebery, and if I can just go to that, and I won't go to - you have an exhibit, I think, by - have you not, of the Pasmaenco Rosebery Award?

PRESIDENT: Yes, I do have a copy of it, yes.

MR FITZGERALD: You have. Yes, of course. But if I go to the definition - firstly, you have already pointed out - oh, firstly, sorry, if I can go to the scope for a start:

The Award is established in respect of the industry of mining and processing of silver, lead, zinc, ore -

And I think that in itself is even a little misleading. Mr Wakefield, being an ex-miner, would vouch, I think, vouch to this. In respect to ore there are particular types, silver, lead and zinc, so it is not silver, lead, zinc, ore, it is the ores of those particular types which should be referred to. It is a bit hard to express accurately, but there is not four types of material. It is all ore, it is just whether it is silver, lead or zinc. I think that is correct, I would suggest. So that in itself is a little misleading. In terms of the definitions, and - sorry, parties and persons bound for a start, if I can call it. 6A refers to all employers. Now, again I can't speak as to why that is included in that way in the plural, but it seems to be contradicted specifically by the definition in clause 7 definition, the definition of employer, which means Pasmaenco Rosebery Mine in Rosebery, so - - -

PRESIDENT: Well, the parties and persons bound provision has been there since the Gozzi decision in 1990.

1740 MR FITZGERALD: Yes. So, I mean, again, without speculating too much
that parties and persons bound probably should have been amended to refer not
to all employers, but to Pasminco Rosebery Mining. It doesn't, but I think if
there is any doubt about that it is quite clearly clarified by the definition of
what an employer is. It doesn't include any other employers. So in terms of
the plural denunciation of all employers in the parties and persons bound it has
got to be read in the context of what the definition of what an employer is, and
1745 that clearly is Pasminco Rosebery Mining only, no one else.

Now, in terms of the classifications, and this is where, I think, our - the
position of AMMA maintaining there has always been an award free status, the
classification structure is clearly set out in the Pasminco Rosebery Mining
Award, and there are the actual operator provision - or the provisions which are
1750 contained in the classification structures are comprehensively defined, and you
will notice that in every case it talks about within their classification and
competency determined by the Rosebery Skills Acquisition Program, as set out
in clause 29, Rosebery Acquisition Program. Now, that applies in every
instance.

1755 So the classification structure just can't be read simply as in clause 8, minor
trades, etcetera, it must be read in the context of the definition, and the only
way I would suggest that this Award can have any industry application, and it
is an absurd proposition, is if employers, such as Mr Gaspersic, has a
classification structure which mirrors the Pasminco Rosebery Mining Award in
1760 every respect, including the provision relating to the Rosebery Skills
Acquisition Program. And for the sake of completeness, I will just hand it up
to the Commission.

PRESIDENT: I will mark that F1.

1765

EXHIBIT F1 DOCUMENT

MR WAKEFIELD: Could you provide us with copies, please?

1770 MR FITZGERALD: If you have told me you were here, I would have. Thank
you. I will undertake to get these to the AWU and the CEPU as well.

PRESIDENT: Thank you.

MR FITZGERALD: Some advance notice would have helped.

MR WAKEFIELD: You might have expected us.

1775 MR FITZGERALD: So, now, it is indeed curious. It is not possible just to take bits out of the - and as I said, Mr Cooper hasn't addressed this - but it is not just possible just to address simply the bland classification of mine ore tradesmen. It must be read in the context of the definition. So that is the only way, and this is a key to this whole issue of interpretation. That is the only other way in which this award can apply. The other curious aspect relating to 1780 the award making process of Commissioner Imlach, and I suppose with his impending retirement he probably won't mind me saying this, but I think - - -

PRESIDENT: He may.

1785 MR FITZGERALD: He may? He - it is certainly an incomplete process. We would question quite strongly the - in terms of the way the Metalliferous Mining and Processing Award is structured, as to how this can have any legal application, given it simply has a title, index, scope, date of operation and award interest.

PRESIDENT: Are you saying that is not an award?

MR FITZGERALD: It is not. I mean there - it doesn't - - -

1790 PRESIDENT: You need to speak to the employer who was appearing before me yesterday.

MR FITZGERALD: Well, I was aware that you had another matter like this, so I was surprised that you had two interpretations matters following each other. I thought you would - - -

1795 PRESIDENT: I am a devil for punishment.

1800 MR FITZGERALD: I thought you would program things better than that. But certainly we would say that in terms of who does that apply to, if you look at the Pasmaenco Rosebery Mining Award as an appropriate award, the parties and persons bound, which an absolutely essential clause in any award, refers to the employees within the scope of the award. Now, this Award doesn't do that in any respect. So it is not only the issue of whether there is an appropriate classification, which I think is a conclusive argument, in my submission.

1805 It is the issue of whether there is a valid award there in the first place. I didn't want to spend too much time on the F1, but in perusing that you will see, Deputy [sic] President, that it is clearly enterprise specific. It refers to modules and training, which is specific to Pasmaenco Rosebery Mining. It is one which is not transferable in a generally industry sense, I would suggest.

PRESIDENT: There are a number of provisions in the Pasmaenco Award that are Pasmaenco specific - - -

1810 MR FITZGERALD: Yes.

PRESIDENT: - - - that would not be transferable. I understand that argument. That is not really what I am being asked to look at.

1815 MR FITZGERALD: Well, you have been asked to I think, Deputy President - and it is a little unclear with Mr Cooper's application, with respect, to declare that that reference in the Mining Award which is effectively a valid reference to the Pasmenco Award would then create some binding effect for employees in the industry at large and we would strongly refute that proposition, based on the submissions which we just put.

1820 PRESIDENT: So your position is - and I think I have already asked or asked Mr Cooper his understanding of it - is that those employees and employers who are not Pasmenco employees or the employer but in this mining, with a broad definition, industry are award free?

MR FITZGERALD: Yes, yes, most definitely. Now, whether that is a desirable situation or not is another thing.

1825 PRESIDENT: Well, that is not an issue I have to even think about.

MR FITZGERALD: It is not an issue but someone down the track will have to and it is obviously not going to be Commissioner Imlach.

PRESIDENT: Well, it will be an issue somewhere depending on the determination I guess.

1830 MR FITZGERALD: Certainly. So within the rules of the Sandy Bay Caravan Park decision, those words are very clear. There is no ambiguity attached to those. It talks about where appropriate classifications are, so there is no reason for you to go outside that in my submission - those words are clear. If you are looking at the general principle of award applying you have got firstly, within 1835 the state jurisdiction, you have got to obviously look at the scope - whether they are within the scope and then there is a parties bound clause and then there is a classification structure as to whether - so you could have possibly a situation where the award might apply and have a particular scope but the classification structure may not be broad enough to cover others within the 1840 industry.

A good example of that would be where, say, supervisory employees are outside the scope of operative employees defined in the award, just because they are within the scope of the award doesn't necessarily mean there is any binding effect. So I use that argument in a similar way here. You must apply, 1845 in accordance with the order made by Commissioner Imlach, rightly or wrongly - in my submission wrongly. It clearly sets out the proviso and a condition of that proviso is that where appropriate classifications appear they are in - and it must be read as a whole in that regard. You cannot just simply refer to a mine or a trades - it must be referred to the full definition within the 1850 award.

PRESIDENT: Commissioner Imlach also issued a decision which Mr Cooper has tendered, dated 6 March 1997, which was an application by your organisation to be named as a party with an interest in the award.

MR FITZGERALD: Yes, yes.

1855 PRESIDENT: I take it that at that time there was no discussion about the scope proviso?

MR FITZGERALD: I am just trying to find that decision. No, I was going to refer to that - a 1996 decision, is it?

PRESIDENT: 6 March 1997 - it is a two page document.

1860 MR FITZGERALD: Yes. Clearly, President, given that this award was going to progress in some way or form, it was necessary for AMA to become - have an interest in the award otherwise it would be left out in the cold.

PRESIDENT: Sure.

1865 MR FITZGERALD: There was no admission or discussion, I believe anyway - and Mr Massom appeared on that instance, and again I have had extensive discussions with both Mr Massom and Mr Knop that there was any deviation from our position which we had always maintained and that is that the Pasminco Rosebery Award, for those very reasons which I have already put to the Commission, cannot have any legal application in the industry sense. So
1870 my instructions are, clearly, that there was no discussion - just simply because, if you like, we involved ourselves in further proceedings that doesn't necessarily mean that there is an implication that we accept that there is some industry application of the award.

1875 PRESIDENT: Well, I guess one could question then why you sought to become an interested party of an award that you don't say has application - that's all.

1880 MR FITZGERALD: Well, the award potential - what we didn't accept was the proviso. We accepted that potentially down the track - and unfortunately that hasn't bought any reality, but down the track potentially there would be an award and in the making of that award clearly in the interests of our members we had to be party to it. So it is my clear instruction on this that we have consistently maintained this line and there are, if necessary, I think transcript can be obtained in respect to part 4A agreements where both Mr Massom and myself indicated that on record - that that was the position.

1885 There is in recent times - the Office of the Employment Advocate, and I will come to that later, have taken the view in some cases that they will apply that award, if you like - the Pasminco Award, as the worst case scenario just to ensure that no disadvantage tests apply. So in that process we say that there is no admission or implication in our organisation in accepting that the award

1890 applied. We accepted that there was a title and a scope but we didn't accept
that proviso and we didn't accept the legitimacy of that proviso. So I didn't
want to dwell too much on this issue but, you know, just to repeat that the
reference, if it is indeed a valid reference, must be read in its totality and, as I
said, Mr Cooper just simply didn't address that aspect in his submission
1895 because I feel that he believes that has faded.

We have raised this issue before on numerous occasions to support our position
of an award free status. Again, just to reiterate the legislative history, we
would say that the - going back to the very start, is that the Mining Lead Zinc
Award was in a defacto sense an enterprise award because it was the only
1900 award which applied. It was then converted into - - -

PRESIDENT: Well, there was only one employer.

MR FITZGERALD: One employer, sorry. It was then converted and actively
converted by only those parties involved, so there is again - AMA wasn't
involved in that process - there was involvement by Pasminco Rosebery person
1905 - they are the ones who restructured the 150 odd classifications down into four
or five, so clearly again that reinforces the enterprise specific notion of it. So
the fact that there may not have been a legislative prescription for enterprise
awards at that time does not make it in any way fatal. The same can be said for
Pasminco Hobart Smelter and Tempco who were the only employers in their
1910 particular industries as well. They effectively had defacto enterprise awards
prior to the legislative provision for an enterprise award and they have now
been properly converted into an enterprise award.

Now, if you look at the Pasminco Award, in a sense clearly it has a flavour of,
if I can call it that, being enterprise specific. The only glitch, if I could call it
1915 that, is there is a reference to employers rather than employer singular and that
I believe I have explained in terms of what the definition of an employer is. So
that does Mr Cooper no good at all to raise those issues, in my view, about
whether there was an enterprise award there or not. So prior to the changes to
the Act there was essentially a free-for-all about how you - whether there was
1920 an industry award or not and then we had some changes to the Act which
provided for industry enterprise and occupation awards and we have seen
recently the deletion of occupation awards. So in my submission that does
nothing to assist Mr Cooper's argument.

I am just going to Mr Cooper's arguments - Mr Cooper, and again it is
1925 consistent with my previous argument, argues that the Pasminco Rosebery
Award continues to be an industry award. Well, clearly, through the
submissions I have made - - -

PRESIDENT: By reference to its use in the Metalliferous Award - I think is
what he is saying rather than - - -

1930 MR FITZGERALD: Well, yes, okay. I didn't read it that way - I just made a
note that it was - - -

PRESIDENT: Well, he can clarify that anyway.

1935 MR FITZGERALD: Okay. Well, look, if that is the case then my submissions hold by that being an invalid reference, if I can call it that. I have addressed the aspects about AMA becoming parties to the award - it does no harm to our position. The history really, as I said, is useful and interesting - maybe not interesting but in terms of whether that assists interpreting those key words that I have referred to, it really doesn't do much at all in my view.

1940 PRESIDENT: I guess it begs the question then, can parties by agreement elect - and I know you say it is not by agreement but can parties elect to nominate an award that can apply in an interim period while - in this case a very long interim period, while they negotiate an industry award. I mean that is another argument I suppose.

MR FITZGERALD: That could be the case. I don't know whether that is - - -

1945 PRESIDENT: Yes. Does that award then have to be specific to the industry - can it be as contradictory as the one we are looking at?

1950 MR FITZGERALD: Right - or whether it just be simply a reference. But, you know, just to reiterate that our clear instructions are that, you know, we had no consensual part to play in that process - the proviso was made. It is clear, following the issuing of the decision - because there is no reference to it in the decision and it is one that is not a decision of the Commission so it is not appealable as such within the confines of the appeal mechanisms under this legislation. AMA - and it consulted widely with members on this at the time, took the view that we will simply continue to maintain the award free status due to this invalid award making process.

1955 PRESIDENT: Can I ask what may to be an extraordinarily dumb question?

MR FITZGERALD: I think in this award there is no such thing as a dumb question.

1960 PRESIDENT: Why do the parties go through an exercise of making a non-award by just having an award title and maybe the scope - - -

MR FITZGERALD: That is not a dumb question, Deputy President. That was - - -

PRESIDENT: I am told the legislation allows that to happen.

1965 MR FITZGERALD: Yes, yes, and that was the practise and I was involved in a few myself where to kick it off, if you like - to kick the process off the title of scope and parties bound were made as initial clauses and you have already mentioned that there are a number of awards - - -

PRESIDENT: Yes.

MR FITZGERALD: - - - still in that format.

1970 PRESIDENT: At the moment.

MR FITZGERALD: At the moment - and I understand there will be some changes in that regard. But, you know, you would have to ask the question, you know - the validity about that process.

PRESIDENT: What is the point of them, that is what I don't understand.

1975 MR FITZGERALD: Yes. Well, the intention clearly was later to complete the process - - -

PRESIDENT: Sure, yes.

MR FITZGERALD: - - - but that has not happened. But for whatever reason, and it was - - -

1980 PRESIDENT: Is it perhaps something that gives the Commission jurisdiction maybe? It is something I would have to look at.

MR FITZGERALD: Deputy President Watling is probably the best person to ask because that process was very much a step process and that is a process we went through in every instance I can recall in making awards. Now - - -

1985 PRESIDENT: It is creating more problems than it is resolving from what I can see.

MR FITZGERALD: It seems to be, yes. Certainly in this case it does leave a clear element of doubt in our view and it doesn't in any way have the clear binding effect which Mr Cooper purports it to have, in my submission. The definitions presented by Mr Cooper don't assist in any way. They key definition and the key words which I think are relevant is where the appropriate classifications apply and they are the key words and I am sure Mr Cooper will address that in his right of reply but, in my submission, there really is no way you can deny the impact of those words - they are significant.

1995 It is not just a - whether Commissioner Imlach intended to include the total definition structure and classification structure and the reference to the Pasmaico Rosebery Skills Acquisition Program is really irrelevant. The fact is they are there and that is the only way which you can interpret them in terms of, with respect to you President, in terms of those guidelines which have been
2000 adopted by you in the Sandy Bay Caravan case. The clear meaning of the Pasmaico Rosebery Award in terms of its scope, just to reiterate, President, is that, and this is always the way the Commission has interpreted how the award applies is, is it the industry of the employer, or the employee and, clearly, it must be the industry of the employer, it cannot be - it makes no sense to be the
2005 industry of the employee, so it must be the industry of the employer.

2010 The, and Mr Cooper certainly put a contrary argument, the scope within the Pasma-
minco Rosebery Award is, the award is established in respect of the industry of mining and processing of silver, lead, zinc ore. Now, that must be, in my submission, read in the context of the definition of whose industry? It is the employer's industry. And who is the employer in this instance? By definition, Pasma-
minco Mining Rosebery.

PRESIDENT: Except the Metalliferous Award, its scope has been expanded somewhat to the definition in the Pasma-
minco Award. It says:

2015 *In respect of the industry of metalliferous mining, dredging, sluicing ... (reads)... and/or the treatment of those minerals.*

MR FITZGERALD: Yes.

PRESIDENT: So it is perhaps extended, or expanded with the definition.

MR FITZGERALD: Yes.

PRESIDENT: And it is perhaps a little more clear.

2020 MR FITZGERALD: Well, yes, certainly - and, look, there was obviously a fair bit of thought put into those words. You know, there are a number of, although my knowledge of the industry is not absolute, probably I would defer to Mr Wakefield in this regard, but I have a fairly clear knowledge of the industry now, those words, which include things like sluicing, includes other
2025 possible operations like minerals sands operations which might come into play in Tasmania, and it is not just necessarily underground mining - - -

PRESIDENT: Yes.

2030 MR FITZGERALD: - - - and it was clear that the intentions of the party was to expand it outside the narrow scope of the Pasma-
minco Rosebery Award which is a, it is essentially a zinc mine, maybe some silver as well, but essentially a zinc mine. Now, I think your question, your so-called dumb question really does reveal what the intentions of the parties were and that was that there was a step process being made.

2035 PRESIDENT: Yes, I acknowledge all that and the question that I put after that was, well, if that is the case is it inappropriate, improper, illegal, impossible, impractical that, and I know you are saying there was no agreement, that there be an award nominated that applies in the interim.

MR FITZGERALD: Yes.

PRESIDENT: And that appears - it has been nominated by somebody.

2040 MR FITZGERALD: It has been nominated by someone, but it certainly was done absolutely without AMMA's knowledge and we don't accept it as a valid

process because we, you know, the decision is clear. We just accepted what was put and that was just simply title and scope, not the proviso.

2045 PRESIDENT: So if what you are saying is that the Metalliferous Award has no application because the proviso knocks most of the other employers out anyway because none of them would have classifications that are found in the Pasmenco Award.

MR FITZGERALD: That is right. That is my argument.

PRESIDENT: That is part of your argument?

2050 MR FITZGERALD: Yes, that is part of my argument, certainly, yes, and that is the only way you can read it and that is - the rules of interpretation require you to read it that way. It is not just simply by reference to the title of the classification, it is the totality and definition of that classification as well.

PRESIDENT: So a mechanical trades person who works will get - - -

2055 MR FITZGERALD: Gaspersic?

PRESIDENT: - - - Gaspersic, who was one name that was mentioned - - -

MR FITZGERALD: Yes.

PRESIDENT: - - - you are saying could not be covered by the Metalliferous Award because the classification which comes from the Pasmenco Award - - -

2060 MR FITZGERALD: Yes.

PRESIDENT: - - - doesn't apply because it has specific reference to Rosebery requirements.

MR FITZGERALD: That is right.

PRESIDENT: Is that generally what you mean?

2065 MR FITZGERALD: That is right. Well, just to clarify that, I think I can present what I have alluded to earlier, firstly, the opinion by Blakes - - -

PRESIDENT: I will mark the Blake - - -

MR FITZGERALD: The unions have been hanging out for this, President. Sorry, what was the marking again?

2070 PRESIDENT: F2.

MR FITZGERALD: F2; thank you.

EXHIBIT F2 BLAKE DOCUMENT

2075 MR FITZGERALD: And if I can just explain the exhibit; we consulted them
on behalf of Beaconsfield Mine Joint Venture. We, and the draft letter which
is there, is one which we converted and put on to our own letterhead. The
memorandum of advice - and I won't go to all of it, you can read it in your own
time, but it clearly indicates, for the reasons which I have been putting to you
relating to the need to adopt the full ambit of the Pasmenco Rosebery
2080 classification structure, that the awards cannot apply and they have reached the
conclusion that, in the case of tradespeople which these AWAs were in respect
of, that the Metals Award, for want of a better title, in the State Commission
and the Electrical Engineers Award for electricians were the relevant awards
for which to perform the no disadvantage test against.

2085 Now, that advice is very clear, in my view. That was sent to the office of the
employment advocate and I accept that it is simply an opinion only, but it is
somewhat persuasive in that they allowed employers - there have been
subsequently - subsequent to this who have been the same advice. There has
been a consistency in the advice here. So if we found through a decision in
2090 favour of Mr Cooper, there would be some inconsistency which would apply as
a result of that. I am not suggesting I hold that over your head by any means, I
just point it out - - -

PRESIDENT: It wouldn't make any difference.

2095 MR FITZGERALD: I am sure it doesn't and I am well aware of how you
operate and - but, clearly, there is - that consistency of advice has been applied
where members have sought advice from us in respect to which award applies
as a relevant award for the purpose of no disadvantage. We have continued to
advise them that these two awards for trades awards have applied in respect to
those. In respect to non-trades positions, and this is somewhat changed now
2100 because the Beaconsfield Enterprise Award - Federal Award now covers all
classifications, but in respect to non-trades awards, non-trades positions, we
always maintain the position that they are award-free.

I am aware that in the case of the employment advocate where they have to
designate an award in the case of non-trades positions they have, in fact,
2105 designated the Beaconsfield Award as the appropriate award because it has - it
is the only Federal award which has application in Tasmania. So there is that
aspect, and I will just give you the advice from the office of the employment
- - -

2110 PRESIDENT: I don't know whether you are allowed to talk about these things
on the public record, are you? Not that I am saying to stop.

MR FITZGERALD: No.

PRESIDENT: Because it is certainly helpful, but it seems to be rather difficult to get any information from the employment advocate, you know, to these sorts of things. It is certainly of interest to me.

2115 MR FITZGERALD: Well, I understand that the AWU have made inquiries of the employment advocate and advice has been provided about relevant awards, etcetera, so I don't think there is anything to hide here, and I have previously advised the unions that we have had advice from the employment advocate.

2120 PRESIDENT: Yes, I am not suggesting there is anything to hide, it is just that on a couple of occasions generally - in general terms, matters I have been dealing with that I keep being told the information and advice that comes from there that it is never allowed to be provided other than verbally.

MR FITZGERALD: Well, I am not sure - sure - - -

PRESIDENT: No.

2125 MR FITZGERALD: - - - but, certainly, we have got nothing to hide here. We have been through the proper processes. The AW - I know this is not an issue here, but the AWAs which exists in some parts of the industry in Tasmania have passed the no disadvantage test. There has been - there is some muttering going on over here. I suspect it is - there is some challenge to that, but that
2130 challenge, I understand, hasn't been formally taken up by the AWU, so in the absence of that we would say that there has been a valid exercise. The unions may scorn AWAs of what they represent but the fact is, President, as you would be well aware in your dual roles, they are legitimate instruments where there is a range of instruments which are available both Federally in this State.

2135 PRESIDENT: Sure.

MR FITZGERALD: The Act doesn't prefer one against the other, both Federal and the State, and the unions obviously, and we have had some political statement by Mr Cooper at the end and in response to that I say that employees can exercise their free rights rather than necessarily going down a
2140 mandatory collective path just simply because the unions are cut out of the equation. So there are two sides to the coin despite what appears sometimes in the media as only one side.

PRESIDENT: You have given me two copies. I only need one copy of that letter, don't I?

2145 MR FITZGERALD: Thank you; yes.

PRESIDENT: I will mark it F3.

EXHIBIT F3 COPY OF LETTER

2150 MR FITZGERALD: I think all the other exhibits I was going to present have already been presented by Mr Cooper. In summary, and it would be well before the allocated time - - -

PRESIDENT: Oh, don't feel obliged to keep talking.

2155 MR FITZGERALD: No, I won't. Others have said that is one of my characteristics that I should be working on. If could, just in summary, President, we believe, and we still hold to the view that, and there has been some discussion with the Commission on this point, that there is need for the union to prove their case in the context of a particular set of circumstances, which is guideline 1 of the rules of interpretation. We have just had, if you like, a conceptual argument. You, of course, are free to determine it either in accordance with our guidelines, or otherwise. Your powers are, certainly I
2160 I acknowledge under section 43, are unrestricted.

But in terms of section 43 it must be, in my submission, an exercise, and it is a discretion you have, of course, to declare retrospectively, or prospectively, how
2165 the provision of the award is to be interpreted and in that respect it must be confined to the Mining Award. And in terms of the rules of interpretation there is no ambiguity associated with the words. They can only be interpreted in the way which I have put to the Commission before, so we would urge the Commission to reject the application made by Mr Cooper.

2170 We don't know what Mr Jepson does, or did, at Gaspersic Contract and we don't know what his colleagues did. We don't know whether it is within the context of even the base level classification structure described in the Pasmenco Rosebery Mining Award. Those are issues, and I know they are issues which - could be issues which, following the determination of this matter are better left
2175 for the underpayment matter which is before the Commission, but to be able to properly interpret this matter there needs to be some, in my submission, some context from which this claim is made and there has been nothing put to the Commission.

We believe, for better, or for worse, there has been an invalid award-making
2180 process by Commissioner Imlach. We took the collective industry view that we weren't going to challenge that in another jurisdiction because of the costs involved and, in our view, we believed it was not necessarily up to us. We maintain, and we have consistently stated this to the unions that the employees are award-free.

2185 PRESIDENT: Is there no, and I have to show my ignorance of not every provision in the State legislation, is there a provision there to seek a revocation, or is that only a Federal provision?

MR FITZGERALD: There is a provision within section 43 - - -

PRESIDENT: It is just that Mr - - -

2190 MR FITZGERALD: - - - rather than interpret it, that was, yes, something I was going to touch on - - -

PRESIDENT: Right.

MR FITZGERALD: - - - is to, effectively hand it back to the parties, if I could put it that way, which is something which I think I would urge you to do.
2195 So that is section 43(1)(a)(b), which says:

If satisfied with the declaration ...(reads)... in respect of which the application is made.

I assume that is the provision you are talking about?

PRESIDENT: No, it is just in Mr, was it Mr Knop's letter, he said that:

2200 *AMMA reserved its rights to seek a revocation -*

I think it said.

MR FITZGERALD: Probably a standard sort of letter. I have got - - -

PRESIDENT:

...to argue for revocation and variation of any determination made.

2205 MR FITZGERALD: Yes, well, as I indicated, the decision which would have come first had no inkling - showed no inkling at all that there would be a proviso as the one which is in dispute. That is something which, I suppose, could have been exercised by AMMA at the time. We made a decision - our organisation made a decision and in consultation with our members not to do
2210 that.

PRESIDENT: We sometimes have to lose - sometimes have to live with our decisions, don't we?

MR FITZGERALD: Certainly, but I would suggest that simply because AMMA chose not to challenge that and argue for a revocation, that doesn't, in
2215 any way, lead to the implication that we, in any way, were happy with that proviso.

PRESIDENT: I have got that message.

MR FITZGERALD: Yes, I won't repeat that any further. There is, as I indicated, a very clear case, in our view. It is as simple as saying - and this is
2220 just in summary and I won't be much longer - in summary, clearly, there are no appropriate classifications unless you adopt - employers adopt exactly the same classification structure as Pasmenco Rosebery.

2225 PRESIDENT: When putting aside all of your arguments about the history and your dissatisfaction with the process, etcetera, etcetera, I mean, could in the end result. Basically, what you are putting is that the award as it stands, and that is being the Metalliferous Mining Award, can't apply to anybody else but Pasminco because of the classification and the definitions therein. Is that in general terms - - -

2230 MR FITZGERALD: Are you talking Pasminco Rosebery Mining Award or the Mining Award?

PRESIDENT: Well, no, the Metalliferous Mining Award - - -

MR FITZGERALD: Yes.

PRESIDENT: - - - refers to the Pasminco Award.

MR FITZGERALD: Right.

2235 PRESIDENT: But those classifications - - -

MR FITZGERALD: Yes.

PRESIDENT: - - - cannot apply to employees other than Pasminco employees - - -

MR FITZGERALD: That is right.

2240 PRESIDENT: - - - because of their own definitions.

MR FITZGERALD: That is right; exactly.

PRESIDENT: That is basically what you are putting?

MR FITZGERALD: That is exactly right.

PRESIDENT: In effect - - -

2245 MR FITZGERALD: Yes, that is right.

PRESIDENT: - - - the proviso cancels itself out almost, unless somebody not working for Pasminco can satisfy the definition of the classification.

MR FITZGERALD: That is right.

PRESIDENT: In general terms, that is what - yes, what you are saying.

2250 MR FITZGERALD: That is right, yes, thank you. The supporting evidence from the officers in Employment Advocate and Workplace Standards Authority, because they also supported the interpretation that the Award couldn't apply as Mr Cooper is seeking for it to apply, is indeed persuasive. It should be highly regarded. It is also supported by eminent legal opinion from

2255 Blake Waldron, and even though they are opinions only, it is one which has been consistently applied in the industry. The AMWU in my view, by simply rehashing the history of enterprise awards and the Pasmenco Rosebery Award, have not addressed the real issues, and they are ones which I have addressed, and for those reasons they haven't proved their case.

2260 The onus is clearly on the applicant to prove their case. No evidence at all in any form has been provided, apart from this history lesson, if I could put it that way, which has been informative to all of us, but not very helpful in the overall determination of this issue. I would encourage the Commission, rather than accept the application of the AMWU, is to take the other action, which I
2265 alluded to earlier under section 43, and direct the parties back to the award making process. Now, there have been a number of reasons, and I don't absolve myself from blame, or my former colleagues at all necessarily as to why these delays have occurred with the Award.

But I suppose there is a - I could at least describe it as a jostling of positions from both the unions and the employers. If there firmer direction by the
2270 Commission, and there has been some recommendations and urging. I am not suggesting that Commissioner Imlach has done nothing. He certainly has urged the parties to settle the Award. If there was a firmer direction by the Commission through conference and direction to pursue that course that would
2275 be a much more appropriate course than you declaring in the terms of the application sought by Mr Cooper.

PRESIDENT: Can I just ask you is it still depending what happens in this, of course, but your organisation is still of the view that there can be an award that covers people of this industry anyway - - -

2280 MR FITZGERALD: Absolutely, yes. Yes.

PRESIDENT: - - - regardless of what comes out of this, because at some stage there obviously has to be a proper award made.

MR FITZGERALD: Oh, look, we certainly would reaffirm the need to have a proper industry award. We believe it should - - -

2285 PRESIDENT: That goes for more than two pages.

MR FITZGERALD: That is right, certainly, a comprehensive award. We have always maintained the view that it should be a proper safety minimum rates award, and for that reason the Pasmenco Rosebery Mining Award, which is specific to that enterprise, is not one which should form the base of the
2290 making of the award. That is essentially which has caused the stopper in those negotiations.

PRESIDENT: Yes.

MR FITZGERALD: But with the Commission's assistance, and instruction indeed, that may be able to be resolved.

2295 PRESIDENT: So are you saying that negotiations have stalled on that issue because this award exists in its current terms?

MR FITZGERALD: Well, that is right. The unions will approach you on the basis that we should be using the Pasmaenco Mining Award as an award on which to base the making of a new award.

2300 PRESIDENT: I understand.

MR FITZGERALD: We believe that because it doesn't legally apply for the reasons I have put to you, that it is not the award, and it should be made on the proper basis of minimum rates award to allow the proper bargaining process. If we set the bar too high, which we believe it is in terms of the Pasmaenco Rosebery Mining Award and rates - - -

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PRESIDENT: Are you saying that is a paid rates award, the Pasmaenco Award?

MR FITZGERALD: Well, the status is a little bit unclear at present. The relevance of it in terms of Pasmaenco Rosebery Mining is dubious. That award is - - -

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PRESIDENT: Other than as a safety net award.

MR FITZGERALD: Other than as a safety net award. They have their own agreement, which is currently in dispute, but they have their own agreement, which is still, not the interpretation of it - - -

2315 PRESIDENT: No.

MR FITZGERALD: - - - it is the re-negotiation of it.

PRESIDENT: Yes. Safety net awards are very important of course. I am not trying to say that they not, but you are saying that other than as a safety net award the Pasmaenco Award may not have the import that it had - - -

2320 MR FITZGERALD: That is right.

PRESIDENT: - - - or the importance that it had previously.

MR FITZGERALD: That is right. I mean, it is essentially a Monday to Friday award - - -

PRESIDENT: Is it?

2325 MR FITZGERALD: - - - and I now, of course, like most in the industry am working 12 hours shifts seven days a week.

PRESIDENT: By agreement.

2330 MR FITZGERALD: By agreement. So we believe that that is a much more appropriate remedy to be applied than to - which will have some industry implication, because there may be some operators out there who we have advised, rightly or wrongly, that they are award free. This, if you interpret in favour of the AMWUs application, then clearly that is going to catch others as well, not just Joe Gaspersic, despite what Mr Cooper said. And we believe that is not in the interest - - -

2335 PRESIDENT: But possibly as a safety net test, rather than a breach of an award, or could there be some of those as well?

MR FITZGERALD: Oh, no, there could be a breach.

PRESIDENT: I mean - - -

2340 MR FITZGERALD: I mean, if you say that the Mining Award applies by virtue of reference to the Pasma Award that will have an implication which would allow others to bring forward applications which Mr Cooper has done in respect to Mr Gaspersic.

PRESIDENT: All right. Maybe.

MR FITZGERALD: It may be, yes.

2345 PRESIDENT: We don't know that at the moment.

MR FITZGERALD: If it pleases.

PRESIDENT: All right. Thank you. Mr Cooper?

2350 MR COOPER: President, with respect to the submissions of Mr Fitzgerald, I don't know that he has hit the mark. I mean there were several points that I put forward as principles to be followed, and he has relied on the point one construction, and in relation to specific facts, and the specific facts that we have put up, rather than there was a case before Commissioner Imlach that was adjourned on the basis of determining the application of the award. The specific facts are what are the words in the award, and, in any event, 2355 throughout his submissions he hasn't gone to the other points, and it is very, it is very straightforward at point four:

An award must be interpreted according to the words actually used.

2360 Now, what we have, is we have compelling - I think were the words - an office of the Employment Advocate, which we have got our own labels for, but it is something we can't access, so there are a lot of secrets about that, and all we have is a letter from a lawyer, Blake Dawson Waldron, that has put his own interpretation on the award.

PRESIDENT: Well, that is an opinion - - -

MR COOPER: It is an opinion.

2365 PRESIDENT: - - - from a legal firm.

MR COOPER: Absolutely. An opinion.

PRESIDENT: It is a pretty common practice.

MR COOPER: Pretty common practice, yes. The thing that disappoints though - - -

2370 PRESIDENT: Lawyers are known for giving opinions.

MR COOPER: The thing that disappoints me as an advocate in the system is that that has been sitting around since 1999. It is three years old. Now, if that was such a compelling decision, share it, let us move forward, but no, we wait until we get here when three years later they have had this decision. They are running around saying award free. I have never heard that actually mentioned in that context that everybody other Pasminco Rosebery is award free, and I don't agree with that. But what has happened is it has now come to a head. So they have made a decision.

2380 Now, what they are saying is, based on that decision, "You have got to ignore this award." Now, let us just have a look at the construction of that award in exhibit C3. I think we provided the Commission, amongst other things, with a little bit of a history and a little bit of a decision there and a copy of the final award, and that was towards the back four or five pages of that exhibit, where it says:

2385 *This award shall be known as a Pasminco Rosebery Mining Award and the scope is the award established in respect of the industry of mining and processing of silver, lead, zinc, ore.*

2390 And Mr Fitzgerald's interpretation of those words are that they just repeat themselves. Well, at Rosebery, for instance, mining does go to all of those things, but they also mine copper, gold and silver.

PRESIDENT: As well?

MR COOPER: Yes. So silver is mentioned there, right?

PRESIDENT: Yes.

2395 MR COOPER: They do zinc, there is no doubt about that, but there is also copper and gold mined there as well, and there is also recovery from the tailings stand, which recovers those other minerals that have been excised before if you like from the process.

PRESIDENT: All right.

2400 MR COOPER: So the award in its scope is important, because ore does go to
other metallic, and definitions of ore in the dictionary that I provided go to gold
specifically, they mentioned specifically gold. So to say that that is repeating
itself is not true, and to say that it only applies to silver, lead and zinc is not
2405 true either, because Pasminco itself does do those other things. So we have got
to read what the words say, and ore does cover a whole range of things. Now,
let us have a look also in terms of the application of the definitions, because
you have to read what the words say, I believe. The principles seem pretty
clear. Can I just deal with the tradesmen, mechanical tradesmen, which is a
definition that is attached to that and that:

2410 *Mechanical tradesman shall mean an employee appointed as such
...(reads)... mining equipment, treatment plant and associated facilities
covered by the Award.*

That is the first part of that definition which is contained in that decision, and
who may, who may be required to perform any such work within their
classification of competency. Now, I think it is important to dwell on that,
2415 because each one of the classifications that are contained in the definitions in
that decision of Commissioner Gozzi, and that was August 1990, I think. I will
just go back and check that. I don't want to have the wrong information on the
record.

2420 That decision was 2487 of 1990, order by consent number 1 of 1990, and it
came down 8 August 1990. So definitions. And you will read - I just took
mechanical tradesmen, and if you read mill operator, surface operator, mining,
miner underground, they all start off with the basic definition of what the work
is, because there is only five of them, and then it says:

2425 *...and who may be required to perform any such work within their
classification and competency determined by -*

And who may be required to, who may be required to, and it is right
throughout, right. Now, electrical trades persons is the same. The point that I
would assume Mr Wakefield makes submissions in respect of that, that exhibit
2430 of Mr Fitzgerald's, with respect to the Pasminco Mining Rosebery F1 summary
of Rosebery Skills, actually provided modules, and if you look at the award, as
it was then made, it contains on the last page a wage rate. And the wage rate in
terms of a miner, for instance, was \$755.70 a week. Well, I can assure this
Commission that it was possibly three times that they were receiving, due to
2435 the fact that they had the skills acquisition program and the subsequent
agreement that went over the top.

And we are not asking for that. We are saying perform functions in with the
award wage rates and it shall mean this. Now, the words are very clear, so to
try and then say to you because the words "and who may be required to
perform work in accordance with the skills acquisition program" are there, you

2440 must dismiss the classification structure as not being relevant is a nonsense. We say that is a nonsense. The words are very clear and you must interpret the words to what they mean, so there are a number of things, and I think we need to just spend a couple of minutes on rebutting this. You have an award that is made in title, and yes, the title is misleading. There is no doubt about that.

2445 Pasminco Rosebery Mining Award Industry Award, misleading title. The scope is what we are asking the Commission to interpret and the scope is an industry scope. There is no doubt it is an industry scope. It says industry. Now, we have taken the Commission to the definition of industry, and we have said the words must - and this is what the principles of interpretation say:

2450 *It is not permitted or important in an award by implication provision which the language does not express, the award being a document which is read and understood by a person not skilled in law.*

And it also says it is not to bring to the interpretation a meaning that you would otherwise prefer. You can't do that. The principles - and I have taken the
2455 Commission to decisions that say that. You can't import into the words a meaning which you would otherwise prefer. So I say it is an industry award, by virtue of those words. The definitions are there, and it is interesting to note too that in clause 5, which is the parties and persons bound clause, all employers, members of registered organisations or not, are covered. Everyone
2460 engaged in the industry specified in clause 2 scope.

So let us go to the parties and persons bound. All employers, all employers. That is what it says. It then goes over and says all employees, whether members of the union or not, or a registered organisation are the words, and that lists them. It lists a heap of unions and a number of those unions have now
2465 amalgamated and so that has become three. And then it goes over the following organisations of employers and, well, who is there? Australian Mines and Metals top of the list. And all officers of that organisation and their members are engaged in the industry specified in clause 2 scope and the TCCI.

They are there in the book. And then you go to the definitions, and you have
2470 got this decision from this legal snoozer that says these definitions preclude anybody out there. But these definitions don't, because I say they are and who may, so there is a discretion there. So you can read all those definitions down to "and who" and they are quite clear. They are quite specific. So I am no lawyer, but I say that this great Waldron people - - -

2475 MR FITZGERALD: You said snoozer.

MR COOPER: Sorry. I withdraw that. The great - - -

PRESIDENT: Blake Dawson and Waldron.

MR COOPER: Yes. Blake Dawson and Waldron have applied their own opinion and I reject that. I say that opinion is in error, and I would be happy to

2480 have a talk to the author of the letter and discuss that with them, but I haven't,
because it has been presented three years old and it has been presented today.
And then obviously this employment office has sought - well, that is - I will
pick that up. He has picked up that reading. Now, I don't know where the
employee inputs through a union or anybody else has been provided there, but -
2485 so I say that is a one-sided thing and I don't say that is persuasive at all. I say it
is interesting.

And if it was so relevant and so compelling, so powerful, share it with us three
years ago and we might have had the award made and finished, but it wasn't.
So I would say it is not open to Mr Fitzgerald to do that. And let us just deal
2490 with some of the other constructions. Mr Fitzgerald said that he has given you
a construction of this award, that in effect is better than the one I have given
you, because mine was flawed, I didn't go a specific fact. I say I didn't have to
do that. We are doing a general application. What Mr Fitzgerald has done he
hasn't gone to any of the words. He simply said, "There is an award here that
2495 has been made. It has been made in error and the classification structure
precludes anybody. And we didn't do anything about it, because it was too
expensive."

Well, let us have a look at what they could have done. The construction of
those words that go to the making of the new award were very carefully
2500 drafted, and they were drafted out of a Federal award by a Mr Ian Cambridge,
who was the Secretary of the AWU at the time, and those words were
discussed with Mr Massom by myself, as a then employee of the AWU. And
we discussed those words, and there was no argument with the words. Let us
have a look. Mr Fitzgerald said that he couldn't do anything about it. He said,
2505 "We haven't challenged, because it is not appealable."

*Appeals are available by virtue of section 70 of the Act. ...(reads)... an
organisation granted or deemed under part 5 to have an interest in the
award or the minister.*

Now, what was this? 2 May 1996, reasons for decision. Attached to that is an
2510 order. Now, the order was to make or vary an award and Mr Fitzgerald is
saying you can't make an appeal - and I say you can - it was open to them.
And a Full Bench is not to uphold an appeal unless, and this is where he is
probably going to, the Commission has made a legal error or done something
wrong, right? But they never went there - never tested it. It was their option;
2515 they could have exercised it; did they - no. Six years later they are now saying
we didn't agree with it but we didn't do anything about it and we have in fact -
he said on the record today, they have told industry you don't have to worry
about this - award free - you are award free.

Well, that is their advice. Just because they have done that shouldn't be
2520 anything that should compel this Commission to say, "Well, gee, the industry
has adopted that view and if I make a decision that supports what the union is
saying. It may have implications out there." If there is a big 80 sign goes up
and we drive down the street and an 80 sign is there, we observe the 80 sign. If

2525 someone changes it to 60, we don't just say we don't agree with the 60 sign, we will just keep doing 80 - it is okay until you get caught. Now, I don't think it is open to AMA and I think it is irresponsible of them to take that decision. They have done that though and we all have to reap what we sow.

MR FITZGERALD: On advice.

MR COOPER: On advice.

2530 MR FITZGERALD: Yes.

MR COOPER: Quite right. Now, the other thing then - that is one, I say that was open to them to appeal it - they didn't and I say it was open for them to appeal it here first before they went to the Supreme Court. But they could have done both and yes, expense is a thing - when part 4A first came in my union exercised its right to appeal and spent 20 grand - lost - but we still exercised our right because we didn't agree with the provision. Section 43, interpretation of award - it was open to them to do that too. Why haven't they done that for six years? Because under that provision as well there are a lot of things that can be done via the precedent of the Commission. And they can change things, revoke things, send people back but they make the award clear to remove ambiguity and uncertainty.

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But is there ambiguity and uncertainty here? Let us have a look at the words - the words are very clear. We are talking about the Pasminco Rosebery Award that was made by consent to which AMA was a party in the first making. Day one - AMA is there - a party - so it was a party that not only had - considered to have an interest - it was there, it was in the book. So it could have fixed that but it didn't choose to do that. Some six years later we made a Metalliferous Award, the words of which are very clear and I think the construction of those words is so clear there is no ambiguity or uncertainty with respect to them. We now have into the pool to muddy the waters some legal opinion that says the classification structure doesn't apply. We say rubbish to that - we say it does apply because it can be read in two parts.

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PRESIDENT: That is another legal opinion, is it?

MR COOPER: We say it can be read in two parts - but in any event if it can't be read in two parts and we can find that there is someone out there mining and they are subject to the skills module, then they are on 90 grand if they are a miner, they are on 70 grand if they are a fitter and so on - not 700. I don't think we need to go there and I don't think that is the intention - it is not the intention of my application. So in considering the principles, I don't say that Mr Fitzgerald has addressed them. What he has come up here with is an argument that suggests link classification structures and the like - means that the award in itself doesn't exist. So here we have it now. We have an award that is the Pasminco Rosebery Award that is an industry award that doesn't apply to anybody than Rosebery. And we heard the construction of arguments around a number of other awards.

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I think it is appropriate to have a look at those awards, Deputy President, and I know the Commission can exercise and research its own matters but at the time that the Act was changed and we could deal with enterprise awards there were a number of things that happened. The Cement Makers Award was an award which was called the Cement Makers Award, it applied the industry of cement making but it really only applied to Goliath at the time, which is now Australian Cement Holdings. The Award was subsequently varied to change the name to the Goliath Enterprise Award and to change the scope through the enterprise of the employer.

2575 PRESIDENT: To make it enterprise specific.

MR COOPER: Absolutely. There was no ambiguity in the words, because the title was changed and the scope was changed. Tempco was a Ferro Manganese Award, I think it was, but the name - the history - - -

MR FITZGERALD: Ferro Alloys.

2580 MR COOPER: Ferro Alloys Award and it applied to the industry of making of that manganese. That was changed to the Tempco Enterprise Award and the scope was subsequently amended to make it enterprise specific - so that was two awards that were done. The third award that I have knowledge of is the Electrolytic Zinc Award which applied to the industry of making of zinc and associated products which included fertiliser which was a by-product from the acid. So that award was then changed to become the Hobart Smelter Award and it had its scope subsequently amended as well. So those applications were made.

2590 I think at the time the unions took the initiative in doing that and the reasons behind that don't really matter here but I understand the principles only applied for minimum rate awards - enterprise awards didn't have the same restrictions so you could actually put in your enterprise award the relevant conditions of the site. So you actually update the award to every agreement effectively, so there was some benefit in doing that. But what it also did was let out people that applied at the sites. Rosebery didn't do that and it didn't do it because we were in the context of making a new industry award because there was only one Tempco, there was only one Goliath and there was only one EZ. So in that context you can the logic - it does make sense to make them an enterprise award.

2600 Was there only one mine in Tasmania? No, there wasn't. Was there only one person operating the mine? No, there wasn't. There was generally Pasminco that was operating at the time but there were other people involved and most of the other sites, as I said, were regulated by their own awards - so there was a history of that. But notwithstanding any of that, there has been nothing - there is nothing given by Mr Fitzgerald, I submit, that has taken away anything. The words construct on their own understanding are very clear. You have an industry award that had a misleading title, you had a subsequent award made

that if that award was misleading in title certainly clarified it in any event and then we had it made.

2610 Now, for AMA to say they agreed to the draft but had no knowledge of the proviso is one thing but to then subsequently become aware of the proviso and do nothing about it for six years - in fact put out advice on the basis of their evidence that was given three years later - so for three years I don't know what happened - and then come here and say look, because of that you can't interpret
2615 this award to mean what the unions say because it is against the advice we have given, is absolute nonsense. I reject all of that. And in terms of that award that I provided to the Commission from Pasmenco in exhibit 33, it does as I said go to all employers, it does go to a number of unions and it does go to all employees and it goes to those organisations - and I say it can be read quite
2620 reasonably to mean what it says.

PRESIDENT: In your submission the next test then would be, if the award applies, is that the individuals, whoever they work for, fall under the appropriate classifications as stated in the proviso.

MR COOPER: What we are seeking today is that the award be interpreted as
2625 an industry award - that the words meaning is applicable to industry, right? Now, I don't know that I necessarily have to give you a test case in that regard because if that is the case then what we have to do is to take Gaspersic Contracting and apply the test. If, for instance, the Commission is of a mind to support the application, to declare the Metalliferous Mining and Processing
2630 Award as an industry award that incorporates the Pasmenco provisions until the making of this award is complete and it will apply to anybody in the industry - if the unions have an underpayment in the nature of the Gaspersic Contracting or any other contractor for instance, they have to come to the Commission and demonstrate first of all the industry of the employer - they have to demonstrate
2635 that.

Now, I don't think that is the test today. I think the test today is what do the words mean. The subsequent test comes after we understand what the words mean. We have to prove what the industry of the employer is and then we have to prove what the classification of the employee is and the functions they
2640 perform and to that extent we do have, from several Gaspersic employees, sworn affidavits and the like confirming the functions. Now, I didn't think it was appropriate to run the Commission through that today because that wasn't the test - that is a subsequent test.

PRESIDENT: So it is another step process?

2645 MR COOPER: Another step. You have got to get the foundation right. All we want to do is lay the slab and then we know where we go, what sort of walls we can put up, whether they go up or whether they don't. Now, to come here and say to the Commission that you can go and find transcript and that would be useful in swaying your view because AMA got up and said on
2650 transcript in part 4A applications - we say you can't use that because we don't

2655 have access to it. We can't rebut it and there is no fair go all around there if you can go and access transcript to have a look at and we can't access it. And in any event it is their submissions - it doesn't mean they are factually correct, so we say you don't accept that because it was AMA. By their own submissions here today that chose to ignore Commissioner Imlach's decision and they advised the members accordingly.

MR FITZGERALD: President, they are all matters relating to merit, not the interpretation which is the rules of interpretation - I just point out. And what we did or didn't do is just simply matters of merit.

2660 MR COOPER: Well, President, if that is the case I am simply rebutting the submissions so obviously Mr Fitzgerald's - - -

PRESIDENT: I gathered that.

2665 MR COOPER: - - - submissions were on merit as well. Key words in the classification structure are there and the classification structure in the Metalliferous Mining Award, by virtue of its reference to Rosebery, are very clear - four functions, five functions. You have a miner, you have a surface worker which is a process worker, you have mill operator - surface operator, sorry. You have a mill operator and two trades - mechanical and electrical trades. The classifications are very straight forward, very simple. They
2670 provided at the time of the making of the award extreme flexibility and removed a heap of demarcations which were of benefit to the industry.

Mr Fitzgerald said there was no claim put to the Commission and I say the claim is very clear. We want to understand what the words mean and we would like a ruling on that. That the award is invalid or not is not something
2675 that you have to determine here today because the award has been made, it hasn't been appealed, it stands today and there is still no attempt to appeal it. Didn't challenge it because of costs or whatever - well, that is their issue and AMA have said several times they are not happy with the proviso but they did nothing about it. Well, now what we here to do is to work out what it means
2680 and we encourage the Commission to dismiss the submissions of Mr Fitzgerald that the award should be revoked, that the award has no application and the industry is award free.

We urge the Commission to rule in accordance with what the union is saying and that is to make a determination on the scope of the Metalliferous Mining
2685 and Processing Award and what that incorporates and we say those words on their own understanding are very straight forward, very clear, very easy to read. There is obviously consideration to be given to just what it actually covers in terms of dredging, sluicing or other means. We are not asking all of that. We are asking you to advise us what the industry of that - is this an
2690 industry award or not and by virtue of the fact that it is an industry award - very clearly the Metalliferous Mining Award is. The proviso then picks up Rosebery. Does that award apply or not? We say it does.

2695 We say on the construction of all the evidence we have given you today it does
and we say that the history in that regard is important because it provides you
with the complete picture. So in that regard, President, I urge you to dismiss
those opinions - certainly have a look at them but dismiss them on the basis
that they are, I believe, flawed. They are reinforced by the employment
2700 advocate who has one opinion to make a decision on. I don't know whether he
has gone and sought other opinions - he certainly never came and saw the
unions about that, as he probably wouldn't want to but we would have certainly
provided advice to him.

And in concluding I would say there are seven principles that have been set
out. Construction of the award can only be made by considering their meaning
in relation to facts. We are saying that the facts are that there is an industry
2705 award there, that you can do that. It must be understood that we are talking
about the construction of the award - very straight forward. The words in their
general context - we have provided definitions of all those words. Now, what
the words say as opposed to what someone thinks they should say or what
someone thinks doesn't matter - it is what they actually say. A drafting mistake
2710 was made - fix it by varying it - it hasn't been done. Ambiguity exists by how
the award was made - apply its true meanings - it is pretty straight forward in
this thing. And then don't - - -

MR FITZGERALD: These aren't actually in response to my submissions, I
have to say. These are all new submissions.

2715 PRESIDENT: Well, he is repeating his primary submission - - -

MR COOPER: So I say in all of that - - -

PRESIDENT: Which is not necessary.

MR COOPER: - - - all of that we have covered those points and Mr Fitzgerald
hasn't rebutted too many of them. So I say it is open for you to interpret the
2720 award as we see and hopefully that will happen sooner rather than later. If the
Commission pleases.

PRESIDENT: All right, thank you. I will reserve a decision. Sorry, Mr
Wakefield, you don't have a right of reply but you can speak - quickly.

MR WAKEFIELD: I just want to clarify something.

2725 PRESIDENT: Yes.

MR WAKEFIELD: Like Mr Cooper I am no lawyer and even worse I am not
even an industrial officer so my submission will lack the polish that these two
had but I just want to clarify something in relation to the classification structure
and the Rosebery Skills Acquisition Program. I was actually working at
2730 Rosebery at the time that this was done and there is no relationship between the
rates of pay in those classification structures and the Rosebery Skills

Acquisition Program - none at all. Those rates are not the base rates that we used in conjunction with the Skills Acquisition Program. I think at the time there was a Mr Skinner who was there - I think - we used to play up a little big in those days and I think - - -

MR FITZGERALD: Not now?

MR WAKEFIELD: I think there might have been something sinister in mind and what they had in mind to actually take people off - we were actually contract workers at the time - - -

2740 PRESIDENT: I see.

MR WAKEFIELD: Take us off the contract rate and drop us back to the award rate. So they actually moved the award rate up from about \$300 a week to \$600 - whatever it is. But there is no relationship between those rates and those classifications at the Rosebery Skill Acquisition Program.

2745 PRESIDENT: So the rates in the award are not based on the Skills Acquisition Program?

MR WAKEFIELD: No, there is no relationship whatsoever.

PRESIDENT: All right.

2750 MR WAKEFIELD: The only people who were paid those rates were contractors who came on site to work on site.

PRESIDENT: The award rates?

MR WAKEFIELD: The award rates, yes.

2755 PRESIDENT: Right, thank you. That clarifies that. Mr Becker hasn't returned and I don't know whether he wants to put any submission at all but in light of the importance of this matter what I would ask is that he give me something within seven days that he either supports the union or wants to put something else. If he wants to put something else, Mr Fitzgerald will have an opportunity to respond to that.

MR FITZGERALD: Thank you.

2760 PRESIDENT: On that basis I will adjourn the proceedings and as I have indicated the decision will be reserved. Thank you.

ADJOURNED INDEFINITELY [1.15pm]