

**TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

T Nos 4837, 4838 and  
4839 of 1994

**IN THE MATTER OF** applications by the  
Tasmanian Chamber of Commerce and  
Industry Limited to vary the Licensed Clubs  
Award, the Hotels, Resorts, Hospitality and  
Motels Award and the Restaurant Keepers  
Award

re shift loadings and penalty rates

COMMISSIONER IMLACH

HOBART, 13 October 1994  
continued from 4/10/94

**TRANSCRIPT OF PROCEEDINGS**

Unedited

COMMISSIONER IMLACH: Right. No need to change appearances. Who is going to speak?

MS HUDSON: Mr Commissioner, **DARREN MATHEWSON** will be appearing as well today. I think last time he was just with me.

5 COMMISSIONER IMLACH: Right. Okay. Thank you.

MS HUDSON: Thank you.

COMMISSIONER IMLACH: Now, who is going to speak? Mr Gates?

10 MR GATES: If I could just provide the commission with an overview as to what's occurred since the last hearing before the commission. The parties have had fairly extensive discussions about the two issues based on undertakings from the last hearing before yourself that we try and tie the two issues together for the purposes of arriving at a consent position.

15 There has been substantial documents flowing between the parties and draft orders for both of the issues, including some which were sent as late as yesterday. Unfortunately, Mr Commissioner, we've been unable to arrive at a consent position for both of the matters.

20 We find ourselves today, Mr Commissioner, placed - or faced with an untenable situation. That is the union would seek to use the relativity adjustments which arose from Commissioner Merriman's decision of the federal commission as the basis for implementation of the penalty rates decision in the state arena. The facts are, Mr Commissioner, that was never part of the deal, although - and I've said it before - we are prepared to entertain the concept based on a consensual position as part of a package deal and that package to date has been unsuccessful.

25 What we would seek, Mr Commissioner, if we can't go to conciliation today and arrive at a consent position for both matters as a package, then we would seek that the matters be split and they heard individually, that the commission take the submissions put by the TCCI and both my colleagues and hand down an arbitrated decision on the penalty rates arising from this hearing, that the relativity adjustment flowing from Commissioner Merriman's decision and the application from the  
30 ALH&MWU be for mention only today as per the last listing before yourself, Mr Commissioner, which we adjourned.

35 We proposed some amended definitions - this is to give you some more of the background, Mr Commissioner, - for the relativity adjustments and the way we structured those was to provide more focus and applicability within the industry. We also came up with an implementation schedule for the substantial wage increases which would flow from those adjustments to the relativities reflecting the incapacity of the industry to pay those substantial increases the way that it was handed down in the federal decision.

40 As you may well know, Mr Commissioner, there licensed clubs in particular operate on a subscription base and they set a forward estimate for those for the coming year on the basis of the fixed and variable costs which are presented or forecast for that year and to impose any other costs would, in my opinion, drive those licensed clubs to unbearable hardships and also lead to the loss of employment within the industry.

45 Mr Commissioner, the industry has waited too long for the penalty rates decision. We've been on this now since, effectively, June of last year, although application was only made earlier this year in January. If the commission is prepared to conciliate then we may be in a position to give a consent to both the matter, although it will

require some giving by the union, or ultimately, we'll have to proceed on an arbitrated basis, Mr Commissioner. What I would like to do is just present the commission with a draft order for the penalty rates decision. There is one amendment which will need to go into that document and I will undertake to supply the commission with a copy of that amended draft order.

COMMISSIONER IMLACH: Yes. Thanks, Mr Gates. What would you recommend that the number for that be?

MR GATES: Oh, if we make it -

COMMISSIONER IMLACH: G.2?

MR GATES: Yes, that's fine.

COMMISSIONER IMLACH: Was there a G.2 the other day? It doesn't look like it to me. There was a G.1. G.2?

MR GATES: G.2, that's fine, Mr Commissioner.

COMMISSIONER IMLACH: Now where is the - I wasn't listening if you did tell me where the amendment was, Mr Gates?

MR GATES: Oh, sorry, Mr Commissioner. The draft order that you have before you is an amended draft order which flowed from the previous one which we submitted to the commission. The changes occur in each of the sections and their fairly numerous .... to say at this point of time, Mr Commissioner, they reflect almost - well they reflect the intent of the federal decision. In some cases they reflect the exact words; in others the wording has been modified to apply to the particular award concerned.

The only change - well the change which has become apparent at this point in time is a cross-referencing on the Restaurant Keepers draft order and that will be a cross-reference from the part-time provisions to the shift allowances. COMMISSIONER IMLACH: So, as I understand it, you're telling me now that if I look at the draft order Restaurant Keepers Award there's something there that will need amendment.

MR GATES: There is one there which became apparent this morning, Mr Commissioner.

COMMISSIONER IMLACH: Is that amendment 4 clause 26, party -

MR GATES: No, it will be -

COMMISSIONER IMLACH: Just so I can mark it.

MR GATES: Yes, it will be an amendment in amendment 4, and there will simply be - it may possibly come in the first subsection of that subclause, and it would be a reference to overtime and penalty rates.

COMMISSIONER IMLACH: Right. And does this amended order reflect the items that were raised last time?

MR GATES: It's my understanding they do, Mr Commissioner.

COMMISSIONER IMLACH: Yes. All right. Is that all, Mr Gates, for the moment?

MR GATES: Thank you. It certainly is.

COMMISSIONER IMLACH: Thank you. Ms Hudson?

MS HUDSON: Yes, Mr Commissioner. In relation to the two matters before you today in response to Mr Gates' comments, I think the union has made it very clear for some time that we would see the penalty rates and the minimum rates cases to be considered as a package and we have maintained that for - in discussions that we have held with the TCCI and the representatives from the licensed clubs, and at this stage the proposals put us by the TCCI and their clubs representatives aren't agreeable to the union in relation to the minimum rates case flow on. The changes that have been proposed are not acceptable to us, particularly in relation to the timing of the introduction of the proposed increases and some disagreement over classification structures and we feel that it's inappropriate at this stage to look at - at this late hour to be looking at changes to those structures.

We would maintain that employers have had the federal decision and the consent order relating to the minimum rates case for some time and would feel that it's unreasonable to try and put up a long list of proposed changes this morning, and our case that we are actually prepared to put to the commission today is of course based on the federal decision and the classification structures and definitions and wage rates within that federal decision and we are in fact prepared to put that case to the commission today and we would prefer to be able to do that rather than just have the matter listed for mention today and another hearing further down the track. We're prepared with that information now and I think that the employers have had the information for long enough as well to know exactly what our case is based on, so we don't really need to delay that procedure and that's what we would maintain this morning. Thank you.

COMMISSIONER IMLACH: Thanks, Ms Hudson. We'll adjourn for a while and I'd like to speak to the union parties, please.

#### **SHORT ADJOURNMENT**

COMMISSIONER IMLACH: Right. Well I advise that I propose to proceed and deal with the matters separately and I'll take the matter of the penalty payments, T.4837, T.4838 and T.4839 and I will make a decision on those three matters and I believe I've heard adequate submissions in relation to both sides, but I will give all parties - both sides the opportunity to add anything else they wish to. Ms Hudson, anything else to say on all that?

MS HUDSON: Yes, just a couple of things, Mr Commissioner, in conclusion in relation to the penalty rates issue. I'd just like to say that I think the arguments put up by the employer representatives on penalty rates, if acceptable to the commission, serve to reinforce our arguments in relation to the finalisation of minimum rates as determined in the federal award and perhaps it's the employer's intention to take that part of the package that suits them like a small child ignoring nutritious vegetables in favour of ice-cream perhaps. This of course doesn't mean we accept that penalty rate should be reduced because we don't. We strongly believe that any decision which reduces the take home pay of a group of workers who are already on low wages is morally wrong and we also know that many employees who have been affected by this decision who are covered by the Federal Hotels, Resorts and Hospitality Industry Award are losing and have been - and have lost between \$30 and \$40 a week in some cases. I made that point at the hearing last week, and as we know the decreased penalties applied immediately to casual workers and they are the ones who have perhaps suffered the most and they are the ones who are - who in fact make up the majority of employees in the hospitality industry. So, they are the ones who are taking home less pay than they were previously, contrary to what Mr Gates was putting - was proposing last week.

We would also maintain that in structural efficiency hearings that took place in 1990 and 1991 in the state hospitality awards, it's perhaps worth pointing out that the TCCI and employers that they benefited from the amendment of conditions of employment to allow for a more flexible work force. I don't think it's probably relevant to revisit those amendments today, but they did reflect changes in the federal award and the employers agreed with those changes and have benefited from them since. And having received those flexibilities they now wish to reap the benefits of a reduction in penalty rates while continuing to accept savings from the fact they have not been paying the appropriate wage rates based on accepted relativities for a number of years not.

10 And that is what our argument in relation to the flow on of the minimum rates case from the federal decision will be based on and I'd just reiterate that we are in fact prepared to run that today, but I guess that's up to you, Mr Commissioner, to decide how we handle that. Thank you.

COMMISSIONER IMLACH: Thanks, Ms Hudson. Mr Gates.

15 MR GATES: Yes. Thank you, Mr Commissioner. We are pleased to hear, Mr Commissioner, that matters 4837, 4838 and 4839 are to be determined by the commission so that we may once and for all clear up this issue of penalty rates in the State of Tasmania and seek to flow on those benefits which have flowed to federal award employees for a substantial period of time.

20 Whilst we have worked close with the union on this particular matter in coming to a form of package deal, that has been unsuccessful and it was our preferred position to come to a mutually agreed arrangement. However, that was not to be the case.

The union would seek to say they're a low paid industry and that we're reducing the take home pay and in particular they alluded to casual employees suffering the most. I mean, the simple facts of the matter are that they are offered a separate contract of employment for each engagement and that they are under no obligation to accept or they can reject it if they wish, so I mean, it's founded in law as to why that applied that way and I'm a bit lost for words for that particular case.

The union may also - well would also believe that the reduction in penalty rates is not the best, but we simply say that it has been held that penalty rates of this magnitude are a significant impost to the industry, that it is a deterrent to businesses, particularly - and I'll give you the examples of restaurants to open on a Sunday. I mean, what tourist has ever come to the State of Tasmania late on a Sunday afternoon or even at 8 o'clock and then sought to find a restaurant which is open and I'll guarantee they will be struggling, or even a hotel for that particular matter, so I think that this decision by the commission will benefit everyone - will benefit the State of Tasmania, it will increase tourism, it will increase employment and generally the community will be much more satisfied because they will be able to go out when they want, they will be able to receive the service that has been denied because the employer has not been able to afford to put more people on and I firmly believe that more establishments will open and this is certainly in the interests of the hospitality industry as a whole.

As to the argument that it be a package deal, the fact is that the union said they would cop penalty rates sight unseen. There is no similar undertaking from the employers that they will cop the adjustments to relativities sight unseen. For the purposes and only for the purposes of arriving at a package deal, we're prepared to entertain both submissions together, however if pinch comes to the crunch, Mr Commissioner, which I understand it now is, then we'd seek that the matter for adjustment to the relativities as per the federal decision of Commissioner Merriman, that that case be adjourned -

50 COMMISSIONER IMLACH: We haven't reached that yet, Mr Gates.

MR GATES: Oh, I'm sorry, I was getting ahead of myself, Mr Commissioner.

COMMISSIONER IMLACH: Yes.

MR GATES: Well in that case I'd conclude my submissions there. Thank you.

5 COMMISSIONER IMLACH: Thanks, Mr Gates. Well I'll reserve my decision and issue it as soon as I can on those three matters.

Now we turn now to the other three applications by the union, T.5188, T.5189, T.5190. Now, how do you wish to proceed with that, Ms Hudson?

10 MS HUDSON: Well, Mr Commissioner, as you are probably aware we have not been able to reach agreement with the TCCI and the - and Mr Johnstone and Mr Crossin representing the licensed clubs at this stage. As I mentioned previously, we are prepared today to run the case, but if - I understand that will be opposed by the employer representatives. If that is your decision that it be adjourned, we are prepared to try and sit down to further talk with employer representatives on this matter. Thank you.

15 COMMISSIONER IMLACH: Yes. Thanks, Ms Hudson. So, I'm putting here you're actually - you're seeking to proceed.

MS HUDSON: Yes.

COMMISSIONER IMLACH: Yes. What about you, Mr Gates?

20 MR GATES: Yes, Mr Commissioner. The - both matters being on today was more for the purposes of reporting back to the commission and to give the parties the opportunity, at the request of the TCCI, to enter into private discussions with the view of coming up with a package deal for both of the matters.

25 The issue of adjustments to relativities was previously for mention only. It was my understanding that if we're unable to reach agreement as to the package - and I'll say on record that the package is, in our opinion, very reasonable - that the matter would then be adjourned from today's hearing and relisted for determination at a later time whereby we, as an organisation, and with the AHA, provided we can't reach an agreement and come before the commission with a consent position, then we proceed to arbitration on the matter at which time we will put lengthy submissions which may  
30 involve site inspections throughout the industry.

COMMISSIONER IMLACH: Yes. Mr Gates, whether or not you thought that was the way it was going to, is that the way you want it to go?

MR GATES: Yes, it is, Mr Commissioner. If we could adjourn the proceedings today for a date to be listed.

35 COMMISSIONER IMLACH: Yes. Thanks, Mr Gates. Well, I will adjourn these three applications on the basis that I was hoping and expecting that the parties would have come today with agreement on all matters before the commission today and unfortunately that's not been able to be arrived at. I've indicated that I'll decide the matter of the penalty applications and I say now that in agreeing to the adjournment I  
40 do so on the basis that the parties will meet forthwith, with the definite aim of reaching a settlement in relation to the final three matters, 5188, et cetera, because I think - and I expect - that that would be the better way for the matters to be concluded, but if the parties are not able to reach a settlement, I advise you now that I  
45 will arbitrate them next time we meet, and I just remind you that - all parties - that I did say during the course of last - the last proceedings, that it seemed to me that a

decision in one virtually automatically meant another decision in the other which you - I'm sure you know what I'm saying.

5 I do take the point as to the local conditions. If it can be demonstrated to me that they are relevant, I will certainly take notice of that, but - and this is the final point that I make - I'm an outsider to a large extent in these industries or this industry, so that if these matters come to me for arbitration it may be that both sides would be a bit put out about the result - it may be one side will win and one side will lose. In that context, it's better if you agree amongst yourselves, and so I'm putting that on you as heavily as I can, that I expect and I am of the opinion that you ought to reach  
10 agreement, but if not, we will proceed, hear submissions, and have it arbitrated. Now are we all clear on that? Ms Hudson?

MS HUDSON: Yes, Mr Commissioner.

COMMISSIONER IMLACH: Mr Gates?

MR GATES: Yes, Mr Commissioner.

15 COMMISSIONER IMLACH: Right. Well we'll adjourn now just for a minute while we settle the date for the reconvened hearing.

#### **SHORT ADJOURNMENT**

COMMISSIONER IMLACH: Thanks, Jenny. All right. Well, we'll adjourn these three matters and will resume at 10.30 am on Wednesday the 26th of October - Wednesday  
20 the 26th of October at 10.30 am and I have advised the parties off the record as to my views on what should occur on that day. We'll certainly proceed and hear submissions if necessary.

Now I've just been reminded, thankfully, I didn't hear submissions as to operative date for the T.4837 and so on. Do you want a minute just to assess your thoughts?

25 MS HUDSON: That's for penalty rates?

COMMISSIONER IMLACH: Yes, operative date.

MS HUDSON: 1999?

MR GATES: Sorry, I -

MR CROSSIN: Should - it should start right now. You'd have 4 months.

30 MR GATES: Well, I mean, we'd obviously seek that it be the date of the application.

MR CROSSIN: .... can it be - well you can't ask anybody back for any wages back after you've paid them overtime -

COMMISSIONER IMLACH: We're off the record, are we?

#### **OFF THE RECORD**

35 COMMISSIONER IMLACH: Mr Gates?

MR GATES: Certainly, Mr Commissioner. The applicant and my fellow colleagues are agreed on a position of operative date, that being first full pay period to commence on after today's date, that being the 13th of October 1994. If the commission pleases.

COMMISSIONER IMLACH: Thanks, Mr Gates. Ms Hudson?

MS HUDSON: Yes, Mr Commissioner, our preferred position would be that it be from the date of your decision rather than today's date.

COMMISSIONER IMLACH: The first full pay period?

5 MS HUDSON: Yes.

COMMISSIONER IMLACH: Thanks, Ms Hudson. Right. Well I confirm that we've adjourned matters T.5188 and consequent applications. I'll issue a decision on matters T.4837 and consequent applications and I'll also decide the operative date the parties having put to me the operative dates they feel are appropriate. Is there anything else?  
10 Thank you. We'll resume again in those final three matters in a couple of weeks' time.

**HEARING ADJOURNED**