

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 2971 of 1991

IN THE MATTER OF an application by
the Federated Miscellaneous
Workers Union of Australia,
Tasmanian Branch to vary the
Boarding Schools and Student
Hostels Award

re title, scope and wage rates

COMMISSIONER IMLACH

Hobart, 12 July 1991
continued from 10/7/91

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER IMLACH: Mr O'Brien?

MR O'BRIEN: Mr Commissioner, I'll be fairly brief this morning. The first thing I'd seek to do is to tender copies of a letter which Mr Bevilacqua referred to yesterday, and that I referred to yesterday. You indicated it would be on the record. We have no problem with that. I'd tender that. Mr Fitzgerald has a copy.

COMMISSIONER IMLACH: Thanks, Mr O'Brien. What are we -

MR O'BRIEN: K.9.

COMMISSIONER IMLACH: K.9, thank you.

MR O'BRIEN: Mr Commissioner, that exhibit sets out the agreement between the two organisations which, in relation to the award coverage under the Catholic Education Award, reflects the agreement between our two organisations currently reflected by the coverage of the Catholic Education Industrial Agreement.

And, if that had been maintained as an agreement there would not be a necessity for an exemption because, by statute, the agreement would be placed outside the - would supersede the coverage of any award. However, because that agreement appears to now be converted into an award, there is a necessity to deal with that area by exclusion. We're quite happy with an appropriately worded exclusion - clause to be added to the scope clause we propose in our application to give effect to that agreement.

And, I'm in the hands of the commission as to drafting, whether you require the parties to do it or the commission would prefer to do that. But, either way, we would be happy to cooperate in relation to a simple exclusion clause which is not an uncommon type of provision.

COMMISSIONER IMLACH: Well, I think the commission can do that.

MR O'BRIEN: Thank you, Mr Commissioner. There are a few tidying up matters I need to deal with this morning. Firstly, on the 28 May, Mr Fitzgerald said - made a number of comments on record that I think I should go to. On page 5 of the transcript he said: Our main concern there - and I just simply make it in terms of the initial comments - obviously we will reserve our right to put further submissions later is it is appropriate. Our main concern is in respect of the classification structure which is generic in its thrust, which we don't oppose that concept but it does include a whole range of occupations and callings within a non-teaching area, particularly in independent schools, particularly functions which, I believe, does infringe on some existing membership by

other unions.

So, for that, in that regard, we have some difficulties in divorcing or separating out the application in terms of the scope, the title and the scope of the award and the actual classification structure because, we believe, it's an integrated document. And, there was discussion about whether I wish to comment - and the conciliation process.

Mr Commissioner, the first point we would make is that, given that at this stage we've reserved the position of the clerical employees, which we would concede is an area in which the Federated Clerks Union may have some interest and which we've advised the commission that we'll be having discussions with that organisation to clarify that position before proceeding further with that matter. That, in fact, the application does not infringe on existing membership by other unions.

I'm not aware of the correspondence forwarded to you - I'm sorry, I'm not aware of the precise terms of the correspondence forwarded to the commission by the Tasmanian Registered Teachers' Association but, if I understand correctly, their interest is potentially futuristic dependent upon some expansion of their registered coverage. And, if that's the case, obviously, they couldn't have existing membership at this stage without expanding their coverage or not properly so, in any case.

So, we would suggest that the concern that existed then by Mr Fitzgerald is one which cannot be borne out on the facts. We would agree with Mr Fitzgerald's comments that this is an integrated document and it's an integrated process. As we argued yesterday against the separation of the proceedings into parts, we are firmly of the view that the commission ought now approve the application in terms of the extension of the scope clause, subject to the qualification in relation to the exclusion we've discussed pertaining to the Catholic Education Award.

At the same time, we believe, and in line with Mr Fitzgerald's comments on the 28 May, the commission ought to deal with the title and the - obviously, and the classification structure because it is an integrate process. We gave an outline of the some of the reasons why the changing of the scope in itself would not bring together the coverage of certainly the Miscellaneous Workers Award and the Boarding Schools Award without dealing with the classification structure at the same time.

And so we would simply stress that on that point alone there strong grounds which apparently are at least in part conceded by Mr Fitzgerald as to why this matter ought to be dealt with as a package together by the commission.

The position of the Australian Nursing Federation which has an interest in the award is one which we find some difficulty reconciling. This matter has been listed on a number of occasions, and that organisation has chosen not to appear, even though I would take it they were notified on each occasion of the hearing.

I understand that on Wednesday that organisation forwarded correspondence to you suggesting that: The organisation was unable to be present but they would seek leave at a later date to place on record their position in relation to this requested deletion, the accepted national nature of nurses rates of pay, and any matter that may prejudice any of our rights under this award. I really don't know what all of that means, other than to say their rights under the award are the rights which exist now pursuant to their interest, and our application does not seek to delete their interest in the award.

The question of the title 'Matron' being deleted is one which may be a shadow that they are tilting at, because I did indicate to Mr Heapy on the Wednesday, and he making a comment to me during the morning about the application and asking me what it was about, and I did indicate to him that we were taking the title 'Matron' out. But that maybe the shadow that he is boxing at.

But the position is that obviously our comments in relation to the work covered by that application will make it clear that the work of the matron, the title matron which is probably very Victorian, is taken up in Grade 6, in our view, and we're not taking the coverage of the work out, we are simply removing that title.

Now if Mr Heapy's organisation has a view that it ought to remain as an indicative task or duty, if you can call it that, I guess we'd be prepared to have that argument some time in the future, because that really seems to me to be about all that they wish to say, other than the question of whether they want to intrude the national nurses structure into this award, which would be very likely not only to be resisted by my organisation but to be resisted by Mr Fitzgerald's organisation as totally unnecessary.

My understanding is that the ANF has an interest in this award because they may have some people who are qualified nurses who are employed as 'Matrons', or matrons with general nursing certificates, the current classification in the award.

This application does not do any violence at all to the employment of those people within the award, so I think if the ANF wish to put submissions about the matter in the future, then they would need to initiate proceedings to do so. I don't believe that, given this is the fifth hearing day that

the matter has been on, and they have taken only a cursory interest, that it ought to be held off in any way, shape or form, because the application - specifically because the application - does not prejudice their rights in any way, and the commission can see that not only from the application but also from the submissions which are made, and I think that is a matter which the commissioner ought to rule on in his decision. A couple of -

COMMISSIONER IMLACH: Sorry, Mr O'Brien, are you saying that I should or not?

MR O'BRIEN: Well, I think you should, you should simply note that in your decision that the organisation should, if it has a concern about that matter, proceed by a subsequent application.

COMMISSIONER IMLACH: Yes. Perhaps we can go off the record for a minute please, Coral.

OFF THE RECORD

COMMISSIONER IMLACH: Now, Mr O'Brien, thank you, we'll mark that K.10, the letter from the ANF dated the 10th of July.

MR O'BRIEN: Thank you, Mr Commissioner. So in relation to the application as it now stands we're saying that it ought to be approved. There are a couple of points we should touch on. Firstly, the question of the translation from the current structure to the new structure.

There is, I think, very - there is a little to do in relation to translation in some areas - but in the main because of the use of the indicative task structure we think that it is a fairly simply process to translate the existing staff into the new structure.

We would believe that there ought to be a - effectively, a point to point translation based on those indicative tasks and that the translation could occur virtually immediately. To follow that process, we believe, that the easiest approach is simply to vary the award putting the new structure in with the initial rates as listed in K.1 in the column headed, 'Initial Rates Applying from the Date of the Variation'.

It may be helpful - and it's not a submission I would usually put, but to give a couple of weeks of the decision to allow the dissemination of the information to employers so that it can be given effect properly, having regard to pay periods that fall due and the necessary administration which would take place in these establishments.

In relation to any other aspects that arise, I think, we're in the hands of the commission. We're making submissions on the application as it stands. No other matters have been raised with us in discussions. The position is that this will be a substantial restructure of the award in terms of the classification structure, its scope and coverage and, in our view, without doubt, complies with the principles in terms of the requirement of the principles that there be a bona fide restructuring of the award.

This restructure attends to the question of coverage. It will bring together under one award coverage from, certainly two - at least two awards into one award and, given that, effectively, the Boarding School Award applies to a number of independent schools at the moment, but without certain classification coverage, it must be said that this award has met the test in relation to certain areas of employment as to being an award relevant to covering the independent school area.

The award provisions which relate to the observance of stand-down on two-thirds pay is a concession to employers in this industry, bearing in mind that under the Miscellaneous Workers Award there is no right to stand down at all. And, so employees under that award would be required to be employed for the full year on an ongoing basis subject to annual leave provisions. So, I think, it is a point which ought to be noted by the commission that, in changing to the award, the provision of the award relating to - the annual leave clause which exempts employers - for employees other than groundskeepers from the observance of the annual leave provisions provided that they allow the observance of school vacations, school vacations as a close-down period on two-thirds pay. And, that also excludes the employees from receiving the full benefit of public holidays falling within those periods.

That is a concession in terms of the employers in the operation of establishments which obviously have their key operating periods during term and during the term vacations do not have such a key operating period. And, I think -

COMMISSIONER IMLACH: Where is that found in the award?

MR O'BRIEN: It's in the annual leave clause in the award. I think it's clause 9.

COMMISSIONER IMLACH: In the Boarding Schools Award.

MR O'BRIEN: The Boarding Schools and Student Hostels Award.

COMMISSIONER IMLACH: You're saying that -

MR O'BRIEN: It doesn't appear in the Miscellaneous Workers Award. It is a provision in the annual leave clause which allows for employees other than groundskeepers the waiving of the annual leave provision entirely where the employees are given the term vacations off on two-thirds pay.

COMMISSIONER IMLACH: Where does it say that?

MR O'BRIEN: I haven't got the clause in front of me but it is in the annual leave clause.

COMMISSIONER IMLACH: And, what are you saying is going to happen to it?

MR O'BRIEN: Well, that will - for those areas not now covered by the Miscellaneous Workers Award, that will become an option that wasn't previously available. For example, let's say that the schools now employ a cleaner. The cleaner would be engaged under the terms of the Miscellaneous Workers Award because there is no cleaning classification in the Boarding Schools Award. The Miscellaneous Workers Award does not contain a similar provision so the employee is not able to be stood down in the circumstance, least of all during the term vacations.

COMMISSIONER IMLACH: I just want to get this clear. As I understand it, what your saying is, is pointing out that a cleaner who was previously covered by the Miscellaneous Workers Award is now going to be covered by this award, and he or she will be subject to that stand-down because of the nature of the operation?

MR O'BRIEN: Yes, that's right, and those other classifications that aren't covered by any award at the moment, I guess it's the provision which will also apply to them, but would not be extended to groundskeepers who now are not covered by that provision.

It should also be noted that the span of hours in the Boarding Schools and Student Hostels Award is a greater span than that which exists under the Miscellaneous Workers Award, so there is for certain employees an extension of the span of hours. In other respects the conditions of the two awards are similar.

The position with regard to Tasmanian registered teachers, I haven't seen the copy of the letter which apparently Mr Fitzgerald intends to table, so I'll obviously have to reserve my comments on that matter to the point of reply.

MR FITZGERALD: I'm happy to make that available now, if that assists, commissioner, because I do intend -

MR O'BRIEN: I think it is a bit late now.

COMMISSIONER IMLACH: Yes, well I mean Mr O'Brien can, well, as far as I am concerned, as he makes the point he hasn't got it, let him have it and then include it in his right of reply, and if there is anything -

MR FITZGERALD: Well, whatever, I just thought I might be assisting by making it available now.

MR O'BRIEN: No, I understand that. I am only saying that it is a bit hard, on your feet, to think it through.

MR FITZGERALD: Right. Fair enough.

COMMISSIONER IMLACH: Yes, you need time to look at it.

MR O'BRIEN: If the commission pleases, that's our argument. We would be seeking the operative date consistent with our submissions on translation, and that the award be varied in accordance with the application as amended. If the commission pleases.

COMMISSIONER IMLACH: Thank you, Mr O'Brien. Oh, I am sorry, one question. The translation to the rates - just to get it clear - you are seeking the rates called the initial rate in K.1?

MR O'BRIEN: That's right.

COMMISSIONER IMLACH: Put against the grades in the award.

MR O'BRIEN: That's right.

COMMISSIONER IMLACH: Thanks, Mr O'Brien. Yes, well we will go off the record for a minute, Coral.

OFF THE RECORD

COMMISSIONER IMLACH: Yes, Mr Fitzgerald?

MR FITZGERALD: Thank you, commissioner. I'd like to address my submissions principally to matters of procedure and the progress of this matter, and then rather than replying in depth to every aspect of Mr O'Brien's submission, particularly in respect to the classification structure, which we'll seek to do later.

But we were rather surprised, in fact my organisation as a whole, commissioner, was rather surprised how this matter proceeded in terms of it proceeding as an integrated matter, that being the scope, title, and the substance of the

application - that being the new classification structure. Be that as it may, you so ruled.

My colleagues particularly were concerned about the practice which this commission has seemed to have set by other commissioners and we were expecting the same practice would be followed in this instance but, nevertheless, commissioner, we would seek that in terms of determining this matter rather than rule on the classification structure, even though we have proceeded in an integrated fashion, which even though I have indicated that in my earlier submissions which Mr O'Brien quite rightly pointed to page 5, we don't accept that that is the way it should proceed.

It is an integrated document, and it is quite clearly because it deals with matters relating to scope, title, and classification structure, but we don't believe that is the right way to proceed.

In terms of determining this matter we believe, we'd strongly submit, commissioner, that you should in fact first determine the issue of scope prior to any consideration of the classification structure which Mr O'Brien has put to you both today and at the earlier hearing. Commissioner, we don't accept the view, and we strongly reject the view that what Mr O'Brien seeks to do is in fact rationalise two awards.

If that were the case, then clearly the classification structure which appears before you today would simply reflect those classifications currently existing in the Miscellaneous Workers Award and the Boarding Schools and Student Hostels Award. Now clearly -

COMMISSIONER IMLACH: I'm sorry to interrupt, Mr Fitzgerald, rationalising two awards, you are referring to the Boarding Schools Award and the Miscellaneous Workers Award?

MR FITZGERALD: That's right, yes. Now if it were a rationalisation it would set the - the classification structure would simply reflect at least those existing classifications within the Miscellaneous Workers Award and the Boarding Schools and Student Hostels Award.

Now, clearly, I would take you to Mr O'Brien's application, and particularly Grade 4 which refers to - the second last line - laboratory assistant and clerical assistant. Now I understand that's reserved. Now all matters relating to clerical assistants are reserved, but I am not certain what that means.

I understand there are going to be further discussions, but it could be, as a result of those discussions, that they in fact stay in there. So, if that is the case, then clearly it is not a rationalisation it is an extension. Now in respect to -

COMMISSIONER IMLACH: I'm sorry, again, I just want to get this clear in my mind: it is not a rationalisation, it is an extension.

MR FITZGERALD: I believe so and I'll quite clearly show that, commissioner.

COMMISSIONER IMLACH: Extension of the coverage.

MR FITZGERALD: Extension of the current awards. It's not simply as Mr O'Brien indicates a rationalisation of the Miscellaneous Workers Award and the Boarding Schools and Student Hostels Award. It's an attempt to extend those awards and I'll go to my submissions later in respect to the current effect of the Boarding Schools Award. It's an attempt to extend those awards into areas which are currently not covered. And I also refer to the reference to teacher aide, which I'm having some -

MR O'BRIEN: Four.

MR FITZGERALD: Four, thank you. I'm still having trouble picking it up. Oh, yes, I'm sorry. I've got it underlined. It's obvious. Sometimes it's often the case, the ones you want to find you can't find.

Yes, just prior to that the reference to teacher aides. Now, clearly that's an extension because that provision is not contained within - that classification is not contained anywhere within the Boarding Schools and Student Hostels Award or the Miscellaneous Workers Award.

So, we'd reject that assertion by Mr O'Brien and I simply say that that's an attempt to extend the scope by utilising the classification structure. So, in that regard, we believe it's necessary that the scope be considered as a first matter. Now, in terms of our membership that's the aspect which we've concentrated on. We have seen that it's not just a rationalisation. It is, in fact, an extension so we haven't responded specifically, as Mr O'Brien has indicated, in respect to the classification structure.

So, in that regard, I would urge you in terms of determining this matter that it, in fact, should be determined first by determination of the scope and then, following that, we are able to put submissions relating to the classification structure. In other words, logically, commissioner, our members haven't been able to respond specifically in respect to the proposed classification structure if it doesn't know what the award is going to cover. And, that's the point I was making previously, probably not so well on the last occasion but I hope better on this occasion.

Now, in terms of supporting that submission, commissioner - and I would just take you to the Boarding Schools and Student Hostels Award. And, I think it has been misrepresented and, certainly, I don't indicate deliberately by Mr O'Brien. The scope of the award is, and I quote:

1. Title

This award shall be known as the "Boarding Schools and Student Hostels Award".

2. Scope

This award is established in respect of:

(a) Boarding Schools; and

(b) Hostels associated with boarding schools and other educational establishments, other than hostels within the jurisdiction of the Welfare and Voluntary Agencies Award.

Now, what, I think, is sought to be done is that boarding schools in this instance is taken - if a school is taking - if a school - and I heard Mr O'Brien quote Hutchins and Friends and some others which, in some instances, we would obviously have to verify in terms of evidence whether there is a boarding school. But the boarding school in that instance is, in fact, that establishment. The boarding house is probably a better way to describe it.

Now, simply because a school has a boarding school doesn't mean to say that the award applies to the organisation as a whole. In other words, the educational aspects rather than the residential aspects. Now, clearly that's also backed up in terms of the extension of the scope to hostels. And, from a legal point of view it is necessary that the scope be read in similarity with words also contained within the scope. Then, if that's the case then hostels - then boarding schools, if I refer to it as a boarding house - is in the nature of a hostel.

Now, it's also supported, commissioner, by the range of classifications within the award at the moment. And, they include matron, matron, housekeeper, chief cook, assistant matron, yardman, groundsman, other cook, laundryhand, pantryhand, kitchenmaid, housemaid, water or waitress or seamstress. Now, all of those, with the possible exception of yardman and groundsman, are directly pertaining to a boarding house, not a boarding school.

Now, I would submit that the yardman and groundsman, in any event, are those engaged in or about the boarding house. So, if that is the case then the attempt by Mr O'Brien to extend

the award into independent schools generally is one which is, in my view, not valid because the award at the moment doesn't apply. It only applies to boarding houses. Now, if that's the case then surely the correct process, commissioner, is to proceed with a determination of the scope in the first instance.

And, I'd urge you in terms of the processing of this matter hand down a decision in respect to scope only, make no comment whatsoever in respect to the proposed classification structure and then following that determination of scope we would proceed. Now, if that is the case, given my submissions, there is a need, quite clearly, for Mr O'Brien to establish that there is a need - sorry, there is a need for an extension of the award into schools generally. And, that, I believe, hasn't been substantiated before the commission.

So, I make those submissions from a preliminary point of view. Clearly, just in summary, commissioner, our members haven't addressed the classification structure in any detail whatsoever. We have rejected it out of hand because of the extension of this award into an area which is currently, in our view not specifically covered in respect to educational establishments.

Now I also mention in support of that, commissioner, that those schools which don't have a boarding house, again if the application were allowed to proceed as it is, again the award would simply apply without proper justification that it would need to apply in independent schools generally, and that is why I put that procedure, and I think that is why your fellow commissioners have, in fact, followed that in the past. That is has some logic in terms of establishing the need for a new scope, which clearly this is. It is not a rationalisation, it is an extension, and it does refer to teaching type of positions, the provision of educational services, and in that regard, commissioner, if I could seek to produce the letter which you referred to by Mr McFarlane which a copy was provided. I only received it this morning, and if I can produce that as an exhibit.

COMMISSIONER IMLACH: Is that your first exhibit, Mr Fitzgerald?

MR FITZGERALD: I believe so.

COMMISSIONER IMLACH: Exhibit F.1.

MR FITZGERALD: I may not have as many as Mr O'Brien, I doubt it at this stage - depending on how this matter proceeds. And if I could read into the record the complete letter, because I believe in terms - of quite a critical area in terms of the provision of educational services - there is obviously a new trend emerging, not only in this state but also in other

states, and I'd seek to produce a further letter proving that, commissioner; and it is addressed to the Industrial Commission, attention yourself, commissioner, dated the 10th of July:

In regard to T2791, application by the F.M.W.U. of Australia, Tasmania Branch to vary the Boarding Schools and Student Hostels Award.

The Tasmanian Registered Teachers Association, (TRTA), represents teachers in non-Catholic independent schools in Tasmania. It is currently considering amending its rules to allow all employees who provide educational services in these schools to seek membership of the Association.

This move reflects the current trend towards industry unions and it is my understanding that the equivalent organisations to TRTA in other states already have or are seeking this broader coverage of employees in the independent school sector, both Catholic and non-Catholic.

It is also my understanding that the Tasmanian Catholic Education Employees Association has coverage of most employees (the exceptions being cleaners and groundspersons) in their schools.

I respectfully request that the application to vary the scope be delayed to allow my Association to argue that it is the appropriate body to provide Award coverage for employees in non-Catholic independent schools.

I apologise for this later submission, but I was until today unaware of the full significance of the application and regret that I am unable to appear personally because I am leaving for Darwin this afternoon and will not be returning until the 16th July.

I interpose there, commissioner. It just reinforces the submissions which I made in that regard. It was only late that Mr McFarlane, I understand, after discussions I had with him that he became aware of this application.

On the face of it, without knowledge of the classification structure, there would be no way he would have a knowledge unless Mr O'Brien's union made him aware of it, and obviously that didn't occur.

I continue quoting:

TRTA's office holders are all full-time teachers and it was not possible to obtain the release of any of them as a substitute for me.

I regret the inconvenience this late submission causes, but I believe it is important enough to justify a deferral of the issue by the Commission.

Now, I did have some discussions, commissioner, with Mr McFarlane's federal branch, and they also voiced some severe concern regarding the application and the implications relating - particularly relating to teacher aides - and as a result, only yesterday they corresponded with my organisation - in fact, in my absence with Mr Abey in my absence yesterday - and I'd like to present that letter to the commission as an exhibit.

COMMISSIONER IMLACH: Exhibit F.2.

MR FITZGERALD: Commissioner, I won't read every aspect of it into transcript, but the thrust of it clearly is that in terms of existing award coverage and union coverage of those involved in the provision of educational services, and I contrast that with those not directly provided in provisions like such as groundsmen, but those actually involved in the classroom situation.

The picture in Australia is very clear. I think on the last occasion Mr O'Brien represented that his union had extensive coverage in other states, and this clearly dispels that.

MR O'BRIEN: Well, it doesn't. Sorry. Go on.

MR FITZGERALD: It's alright, Mr O'Brien will have an opportunity to respond, commissioner.

I understand that the only areas where Mr O'Brien has - his union - has in other states coverage are particularly in the Victorian Government and the Queensland Government sector.

Now there has been - in fact, it was quite a timely conversation on the 10th - and if I take you to page 2 of the letter in respect to New South Wales, and I quote that aspect:

The relevant union is the N.S.W. Independent Teachers Association (ITA) which has signed a Memorandum of Agreement with the F.M.W.U. which gives the ITA coverage of teacher aides in non-government schools in N.S.W.

The ITA rule changed to this effect was registered in the Commission yesterday 10th July 1991.

And, it is understood that the item will now have carriage of the award.

And, if you look at the - Mr O'Brien's quite able to respond to it but if you look at the rest of Australia clearly the teaching unions regard teacher aides as directly involved in the provision services and, therefore, have coverage. In fact, in New South Wales, as I just indicated, that has changed to the extent that the FMWU in that state have agreed.

Now, I have some concern, commissioner. are proceeding headlong into a case when clearly they're against the trend of what is occurring in the rest of Australia. And, from that regard, I believe, that the commission should exercise some caution.

Clearly, the teaching unions not only in this state but in other states, regard those positions more allied to teachers than non teachers. And, it would be wrong, I believe, to proceed headlong without proper consideration of that position.

Now, commissioner, as a secondary submission if you're not prepared to accept my submission that the matter should proceed, firstly, by you ruling in respect to the extended scope - and it clearly is an extended scope not just a rationalisation. Then, if that's not accepted, commissioner, what Mr O'Brien has put to you is quite an extensive restructure of the award which needs to be fully supported. We don't accept, necessarily, the structure or range of definitions or relativities which has been proposed. Given that opposition, commissioner, we will obviously require some time and some significant time to not only peruse transcript but also to present evidence which, we believe, in opposition to the claim made and to conduct inspections.

That being the case, commissioner, we would seek that the matter be adjourned, as a first course, for you to hand down a decision in respect of the extended scope sought or, secondly, to allow us time to arrange the relevant inspections and evidence. That concludes my submission, commissioner.

COMMISSIONER IMLACH: Yes, thanks, Mr Fitzgerald. Just a minute, Mr O'Brien, while I gather my thoughts. Mr Fitzgerald, I'm afraid I've got a couple of questions. When a party seeks to extend an award by including new classifications, that's simply a matter for applying to amend the award, isn't it?

MR FITZGERALD: It is, provided there is scope currently within the award for that to occur. And, we would contend that there is no scope there for that to occur. The award at the moment is restricted to only those - to boarding schools, to boarding houses in other words, not to those involved in

the direct provision of teaching services or educational services.

COMMISSIONER IMLACH: I think I understand what you're saying. And, it's not for me to interrupt the award but, I must say, I find it hard to accept that the scope clause of the award as it stands - it says simply boarding schools and then it says hostels associated with boarding schools. It seems to me that they're the boarding houses and that the boarding school in subclause (a), or whatever you like to call it, means the whole area embraced by boarding school.

MR FITZGERALD: I wouldn't accept that, commissioner, in any respect. The reference to boarding schools, clearly, is the same reference as in subclause 2(a) and that would be an annex or an offshoot to a boarding school. Now, boarding school, in my view, is a misnomer. It is, in fact, a boarding house which should properly be better referred to.

COMMISSIONER IMLACH: If it was a boarding house, wouldn't that then apply - you'd remove the word hostel and have boarding house, associated with a boarding school.

MR FITZGERALD: No, I think - and it does go on further, commissioner, and other educational establishments other than hostels. So, in that respect, clearly, that supports my view, commissioner.

COMMISSIONER IMLACH: Yes, I do take the point, Mr Fitzgerald, that the type of employee mentioned, particularly the teacher aide, if that's the word, that's the classification - I believe it is mentioned - seems to be completely different from the list of classifications currently in the award. But I don't know whether, therefore, I would go so far as this stage as to say that those classifications, therefore, need to be treated as an expansion of scope under a new award - the concept of a new award. Go back again. You made the point that the commission has been in the habit or the practice of making the - fixing the title, then adjourning while that was digested, shall we say -

MR FITZGERALD: Yes.

COMMISSIONER IMLACH: - for the period we all know, then making the scope and then adjourning for that to be tested, as it were.

MR FITZGERALD: Yes.

COMMISSIONER IMLACH: Well, my understanding is that that's been in the case of new awards and if we just come back to this particular award it could be said and it may be the case that the Miscellaneous Workers Union is seeking to add classifications to this award, which is simply an amendment.

MR FITZGERALD: It could be said, but I don't think it's validly said, commissioner. Look, in the first instance, we're creating a new award by creating a new title. It's no longer the Boarding Schools and Students Hostels, it's now the Independent Schools (Non-Teaching) Staff Award. Now - and also the scope is sought to be covered to include independent schools. Now, at the moment, quite clearly, if you don't accept my argument about boarding schools rather than - being boarding houses rather than boarding schools, any educational establishment - private educational establishment which hasn't got a boarding house is, in fact, not covered by this award. So, clearly, it's not a rationalisation; it's an extension to an area specifically to cover that particular educational establishment.

COMMISSIONER IMLACH: Yes. Yes, it's seeking - and I agree with you, and we're going a bit further on. It's seeking to extend the scope of this award.

MR FITZGERALD: Yes.

COMMISSIONER IMLACH: Again, is that not within the ambit of the system that's - the union can apply to extend the scope in the same way as an amendment - any other amendment to the award?

MR FITZGERALD: Well, certainly, but if it's going to make a material saying such as this where currently education - private education - private schools which haven't got a boarding house are not covered by this award and are going to be covered by a new award, certainly, if that is the case, then it's effectively a new award and the process which the commission has followed which indeed are logical in my view, should be followed in this instance.

COMMISSIONER IMLACH: Yes. And can I put it to you - put aside this business about the classifications and so on that that is the nub of your argument that it is in effect, creating a new award or even if it's expanding the coverage of this award into a new area - in other words, non-boarding schools, what you're saying is that's the equivalent of a new award and it would be advisable to delay or adjourn so that it can be tested if necessary if somebody wants to test it.

MR FITZGERALD: I believe so. In any event, commissioner, if you don't accept that view, then clearly what Mr O'Brien has put to you requires time to respond adequately and given the far-reaching changes to the classification structure, without supported evidence and inspections, it's difficult to validate and if that is the case, we'd seek to validate it by the calling of inspections and witnesses.

COMMISSIONER IMLACH: Yes, I understand that part, yes. Now, just - I know we're going - well, it seems to me that we're going over it again, but the different word was used. I want to go over that with you. As I understand it you said that the union said it was rationalising the award, but in reality it was extending the coverage of the scope.

MR FITZGERALD: Yes. Well, the union on record are indicating it's a simple rationalisation and we'd reject that. Clearly, it's an extension, both in terms of my own interpretation of where the current award applies or if you reject that, into establishments where they currently have not, on site, a boarding house.

COMMISSIONER IMLACH: Yes.

MR FITZGERALD: And that is also supported quite clearly by the framing of the classification structure which includes classifications which are not currently contained within the Boarding Schools and Student Hostels Award or the Miscellaneous Workers Award.

COMMISSIONER IMLACH: Yes.

MR FITZGERALD: So, I strongly submit, commissioner, that you should reject that misrepresentation of what is actually the case. It's not just a rationalisation; it's wrong to say that. It's, in fact, an extension.

COMMISSIONER IMLACH: Yes. And also are you saying that application seeks really to take part of one award and put it into another.

MR FITZGERALD: That's part of it, but I say it seeks to go further than that. In fact, it goes into an area which is currently not covered by a specific award.

COMMISSIONER IMLACH: Yes. All right. Thanks, Mr Fitzgerald. Now, Mr O'Brien, you heard all that.

MR O'BRIEN: I've heard all that. I must say that I find it amazing that it's suggested that we're on record as saying this is a simple rationalisation when in the beginning of 1990 we discussed the entire concept that's before the commission now with Mr Sertori and it's been - our position in relation to this matter has been known to the TCI for 18 months. So I reject entirely the suggestion that this is some new thing.

The concept thrust upon the employer organisation which it hasn't had a chance to consult with its members with or it needs an extensive period of time to respond on - Mr Fitzgerald wasn't here at the first hearing but the transcript of the first hearing - the 19th of March this year - sets out what our intentions were and it's very clear we were saying

then what we're saying now about the extension of the award coverage. We have never said this is simply a rationalisation of a couple of awards. We have been very clear in saying it's been pulling together the coverage of areas that are covered by those awards. We were talking about the clerical people up front from day one, which we preserved. We were talking about the teachers aides up front from day one, which we are proceeding with.

We were talking about other classifications that might be covered, for example, in part, say, by the Carriers Award or the Public Vehicles Award. We've been up front with that and I reject entirely the suggestion that we've been in some way deliberately or otherwise trying to mislead the commission that there was some very notional change to things taking place. We've been up front in talking about the changes that have been involved here and up front for a considerable period to time. So we reject that entirely.

In relation to Mr Fitzgerald's attempt to read down the scope of the Boarding Schools Award, well it is an argument that you can mount if you change the word 'school' to 'house', and that's how he mounted his argument. If you go over the transcript you'll see that that's exactly how he tried to read the word 'school' down to 'house'. That's the only way you can interpret the award as narrowly as Mr Fitzgerald puts it, no other way. The award applies to boarding schools.

Now, if we simply said: Let's proceed with that scope and put in the classification structure we'd proposed, then that would be, in effect, the new classification structure for Scotch Oakburn, Grammar, Hutchins, Collegiate, I suggest probably Friends School and a couple of other schools which run boarding houses around the state. And, if we did that we wouldn't have to be talking about the scope or the title of the award. But, we've been up front from day one. We're talking about also bringing together those schools that don't have a boarding house under one award that are now covered by the Miscellaneous Workers Award, for example, as one of the other awards that apply. And, we've been up front with that. So, I reject entirely the suggestion that there's something new or surprising in our application.

And, Mr Fitzgerald said that the attitude of his organisation has been to consult his members about only the issue of the scope. They've been concentrating on that. Well, I can say that we had discussions earlier this week at Scotch Oakburn and the executive officer there told us that he thought what we were doing was a good idea.

MR FITZGERALD: Look, I reject those sort of comments, commissioner.

MR O'BRIEN: And, Mr Fitzgerald is able to say - Mr Fitzgerald asked to be heard in quiet.

MR FITZGERALD: It's with submissions from the bar table. I have raised an objection which should be answered, commissioner.

COMMISSIONER IMLACH: Yes, just a minute, Mr O'Brien. Now, what's the objection, Mr Fitzgerald?

MR FITZGERALD: Commissioner, off-record discussions with our members - submissions by the bar table - submissions from the bar table to that extent, clearly, are not admissible and it's wrong for, simply, Mr O'Brien to say what discussions he had with some of our members. I could say anything which is not substantiated. And, I just ask you to reject that submission.

COMMISSIONER IMLACH: Well, Mr Fitzgerald, I will receive the submission. I take the point that you make, that it's not substantiated but I don't think it's out of order, first of all, for Mr O'Brien to say it nor for me to receive it. It's how I interpret it that's the important thing.

MR FITZGERALD: Well, it may be that when I'm talking to one of Mr O'Brien's members next time I might be quoting what they think about what he's doing.

COMMISSIONER IMLACH: Precisely, precisely and I venture to suggest it wouldn't be the first time either.

MR FITZGERALD: Let me say, it's not the way to play the game, commissioner, and I reject that sort of approach by Mr O'Brien.

COMMISSIONER IMLACH: Well, I overrule the objection. Mr O'Brien?

MR O'BRIEN: Commissioner, I didn't have conversations with other organisations to seek to put them on the record before this day. Mr Fitzgerald said he's had conversations with various organisations and put submissions effectively on their behalf to support his own. And, I didn't think that was the way to play the game either. So, one really has to live by your own rules.

In relation to the submissions that have been put, we've been through the argument about dealing with the matter and severing the matter in two different ways. The reason that I make that submission is that what Mr Fitzgerald said for the first time today, the first time that I've heard it, is that he's been concentrating in talking to his members about the scope only.

Now, considering that on 28 May he made that submission that I referred to about this being an integrated application and that was the way that it was to be dealt with, I find it incredible that he now says that he's only consulted his members or concentrated in consulting with his members on the scope clause. So, I really think Mr Fitzgerald ought to have a good look at himself in relation to how he's conducting himself and not cast aspersions.

MR FITZGERALD: What are you suggesting there?

MR O'BRIEN: Well, I'm making the submission, Mr Fitzgerald.

MR FITZGERALD: Some dishonesty? I'd like to - I don't know, commissioner, whether there's some dishonesty suggested there because I'll certainly respond to it if that is the case.

MR O'BRIEN: Well, Mr Fitzgerald, you respond how you see fit at the appropriate time.

The position is that this matter has been ruled on. We had this argument on Wednesday as to how the matter would proceed and it was determined that the matter would proceed in toto. We put our submissions. Mr Fitzgerald has now put another procedural submission. The procedural submission is a recast of his earlier submission which has been rejected. And, we suggest that that is where the matter lies. It has been rejected and the matter is proceeding. We put our submissions based on that ruling and the matter must go on.

In relation to the question of the further processing of this matter, I again express dismay that there's some suggestion that we now ought to further delay the matter so that Mr Fitzgerald can do certain things about his case.

Now, this matter was listed some time ago for 2 days for the purpose of proceeding with this hearing, and we would have thought that if Mr Fitzgerald has a process ready to go he should tell us, but I don't believe we should be adjourning for the purpose of Mr Fitzgerald deciding what his case is going to be, and I reject entirely that the matters that we have put are such that it warrants some extended delay to look at the transcript, bearing in mind that there have been discussions on a number of occasions.

We have made it very clear what we are seeking to do. The application has been with Mr Fitzgerald's organisation formally since March - I think, actually February. The application has not changed in substance except that certain areas are not being proceeded with at present, which makes it simpler and, I mean, if Mr Fitzgerald isn't ready to go now, well, I mean, I feel that that really is his problem. He's had ample time to proceed, and I believe that we ought to be proceeding now to hear his submissions, to hear his case.

If he is actually saying: I don't have a case because I haven't consulted my members, well, frankly, that's his problem. If that's what the record discloses, then I am very concerned about it because I do say it is a position which differs from the position which one can conclude from that passage in page 5 of the transcript on the 28th of May, and I really am concerned that, you know, we are dealing with the question of the further delaying of this matter on grounds which, in my view, are quite specious.

When we come to the question of the Tasmanian Registered Teachers Association's letter I really would have to say that if I came to this commission in a matter which Mr Fitzgerald was taking part and I said: Look, I would like you to delay this matter because I want to change my rules so I can intervene, I can imagine the submission that Mr Fitzgerald would put. But in this matter he is suggesting that the matter ought to be delayed, and he has suggested in earlier submissions that it ought to be delayed so that the Tasmanian Registered Teachers Association can go and change their rules.

I think that that's outrageous, to be frank. It's not a position that his organisation has ever taken in other proceedings, that I am aware of, and I really think it is outrageous to ask the commission and the parties who are proceeding, and the applicant, to wait while an organisation which hitherto has expressed no interest in changing its rules now writes a letter on the 10th of July saying, oh, well, this is what we would like to do, and then there is a conversation with the Independent Teachers' Federation in a letter facsimiled through on the day to Mr Abey setting out what purports to be the position in that area.

Now I haven't had the opportunity to test all of those matters, but let me say that if you read the letter the position is not all that clear as to where these organisations do or don't cover teachers aides. For example, in Western Australia there is no teachers aide coverage mentioned. This is Exhibit F.2.

It is true that there has been an agreement reached in New South Wales, but that's a matter between those organisations based upon their state registration, and subject to considerations that aren't mentioned in the letter, and I am aware of those discussions. There has been an intention to rationalisation of existing coverage.

Now to suggest that we ought to delay these proceedings so that someone who doesn't have coverage can get it, that's not rationalisation. I really think that, you know, if there is a game being played about who is going to be in this area in the future, it's a pretty transparent one.

We would suggest that the matter proceed. The question of the determination of scope has been delaying - approach has been ruled on - and in relation to the other carriage of the matter, that's for Mr Fitzgerald. If he's got something he wishes to put he should put it now.

If he's got a program which he has mapped out, he should put it now. If he hasn't, well I am afraid the matter - it's reached the point where it ought to proceed. He's got the opportunity, he's got the knowledge, he's had the information long enough to prepare a case.

COMMISSIONER IMLACH: Yes, thanks, Mr O'Brien. The matter of Mr Fitzgerald's arguments as to the scope, which I do accept is a second attempt on that matter, I will - I believe it is not out of order for me to review that - but, I'm going to adjourn in any case - I'm just going on now, Mr O'Brien - I'm going to adjourn in any case on the basis of the federation's request to prepare their response, which I think is not an unusual request and it is usually granted. Also, if the confederation wishes to take us on inspections, again I think that's fair enough, so I do grant an adjournment on that basis.

I wish also to comment your point, Mr O'Brien, as to a game being played. You may well be right and as far as I am concerned, if they went to do that they'll have to catch up, but - and I think I've already indicated I'm anxious to proceed with this matter, but it is a legitimate request by the confederation to prepare their response and I think it is proper, in these circumstances, if the confederation seeks to do it, to go on inspections. So that's my position at the moment.

MR O'BRIEN: Well that's - obviously the discretion of the commission is exercised properly in those circumstances. I would have to say that we would be anxious that the matter proceed. We've - as I said, we've been going through the process for some time and I really - I guess I'm a bit annoyed that - you know, we've had two arguments about the threshold matter and - well I've made my position clear on the record anyway, but I would -

COMMISSIONER IMLACH: Yes, I understand that, Mr O'Brien.

MR O'BRIEN: - hoping that we could set some reasonably early days. I don't there's need for an undue delay.

COMMISSIONER IMLACH: I'm ready to assist with that now, so can we go off the record and do that?

MR O'BRIEN: Yes.

OFF THE RECORD

NO FURTHER PROCEEDINGS RECORDED

HEARING ADJOURNED