

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 3313 of 1991

IN THE MATTER OF an application
by the Australian Workers' Union,
Tasmania Branch for the making of
a new award

re Shellfish Farming Award

COMMISSIONER WATLING

Hobart, 29 August 1991

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER WATLING: I'll take appearances in that matter please.

MR J. WILKINSON: If the commission pleases, WILKINSON J., for the Australian Workers' Union.

COMMISSIONER WATLING: Good, thank you.

MR G. WARN: If the commissioner pleases, WARN G., Transport Workers' Union of Australia, and we'd wish to seek leave to intervene, thank you, Mr Commissioner.

COMMISSIONER WATLING: Good, thank you. Right.

MR N. TREHARNE: If the commission pleases, TREHARNE N., Food Preservers Union of Australia (Tasmania Branch), also seeking leave to - to intervene, sir.

COMMISSIONER WATLING: Right.

MR W.J. FITZGERALD: If it pleases, I appear on behalf of the Tasmanian Confederation of Industries, FITZGERALD W.J.

COMMISSIONER WATLING: Right. Any objections to the interventions?

MR FITZGERALD: No objection.

MR WILKINSON: No objection.

COMMISSIONER WATLING: No. Right. Leave is granted. Right, Mr Wilkinson?

MR WILKINSON: Thank you, commissioner. The application we're addressing here today concerns the making of a new award, namely the Shellfish Farming Award. Mr Commissioner, you may recall that in a previous hearing on the Fish and Aquaculture and Marine Products Award the union outlined its intention and reasoning behind seeking to create this award. And for the record I might just briefly reiterate those reasons.

The principal reason that the union adopted, was outlined, revolved around the diverse and the complex nature of the fishing industry. There was a belief that the significant differences that exist between the shellfish industry and, say, the processing sector made trying to mesh or marry these two sectors into one award an extremely complex task. The AWU has held discussions with TCI and, in fact, with representatives of the shellfish industry and as I foreshadowed previously clearly the belief and intent of the parties is that a consent document be created.

Mr Commissioner, it was intended that the Shellfish Farming

Award be industry specific, and to this end the proposed scope of the award will, I believe, be meaningful and relevant to the industry. In making a new award, Mr Commissioner, I'm mindful of the responsibilities that places upon the commission, and to this end I might make a few submissions in that area.

Sir, to date persons employed in the shellfish industry have been considered basically award free. A situation I believe even - even the industry itself would consider or concede to lead to some confusion. The fact can largely be attributed to the development of the industry in recent years. It started out basically as a cottage industry, basically a husband and wife operation or family operation has developed into an industry today in its own right.

Similarly, employment within the shellfish industry itself started out basically as a part-time or second job activity. It has developed to this stage, to being a full-time activity. A large number of persons are employed full-time within the industry. So, in seeking to create a new award, sir, we have addressed, between the parties, certain questions. We've looked at the positive effects of creating a new award, and in particular an industry specific award. We believe it would stabilise and standardise the wages and conditions for employees within the industry.

And the union would contend that this may well have a further stabilising effect on employment. I believe the commission may further like to note on record the agreement that took place between the parties following our previous hearing in conference as regards to the outline of the scope, that basically the function revolves around a farming or producing operation and, as such, isn't processing, it's dealing with a live animal. The Food Preservers Union and the Australian Workers' Union, I believe, were able to reach consensus in the area; that the work performed within the scope of the award would be covered by the Australian Workers' Union. So, at this stage, Mr Commissioner, I might just propose that the title and scope for the new award -

COMMISSIONER WATLING: Right. We'll mark this Exhibit AWU.1.

MR WILKINSON: As per the document, Mr Commissioner, the title of the new award is proposed to be known as Shellfish Farming Award. The scope of the new award:

This award is established in respect of the industry of production of live shellfish and marine farming of live shellfish including oysters, mussels, clams, scallops and abalone.

The scope itself limits it to basically the activities that occur on the water or in the hatchery. Now, it's not intended

- we have specifically mentioned live shellfish, it's not intended that this award be crossed over or lead to some conflict with the processing sector of the Fish and Aquaculture and Marine Products where shellfish shucking is included as one of the functions. So, basically, sir, they're our submissions and we seek to create that title and scope of the new award. If the commission pleases.

COMMISSIONER WATLING: Good, thank you. No other union submissions? Mr Fitzgerald? Are there any other union submissions? No other union submissions? Mr Fitzgerald?

MR FITZGERALD: Thank you, commissioner. Commissioner, we would endorse the submissions of the AWU so far as they go to the need for the making of the new award, and given the negotiations which have occurred in respect to the fish processing and farming side generally. We thought it would be appropriate that a separate Shellfish Farming Award be made and in fact that has made our task, I think, of setting some directions in respect to the fish - Fish, Aquaculture and Marine Products Award a little easier.

However, commissioner, we believe that the scope as put to you is - and after seeking instructions on this, and this has been fairly brief in terms of seeking instructions, we did in fact receive the proposed scope clause by letter of the 19th of August, which was delivered to our organisation on the 21st.

I have sought instructions on the scope, and our view is that it could be simplified to simply read - I think it might have been traversed at the last hearing - simply to read 'the Shellfish Award', that being the title, and the scope being the award is established in respect -

COMMISSIONER WATLING: Well, have you taken this up with the union?

MR FITZGERALD: Yes, I have, Commissioner.

COMMISSIONER WATLING: Right. And there is no agreement on this?

MR FITZGERALD: There's no agreement, but I understand there is a preparedness to discuss it further. But, simply for the purpose of the record, we felt a more simplified scope embracing both the hatchery and shellfish farming side could be better put.

COMMISSIONER WATLING: Right. Well, let's look at the title. The proposition put forward in Exhibit AWU.1 is it's the Shellfish Farming Award.

MR FITZGERALD: Yes.

COMMISSIONER WATLING: Where's it appropriate or inappropriate as far as you're concerned?

MR FITZGERALD: Well, we believe it should be just simply the Shellfish Award, Commissioner, given the fact that -

COMMISSIONER WATLING: Why?

MR FITZGERALD: Because the award is intended to cover both farming and hatcheries, and we believe it is inaccurate just to restrict it to farming.

COMMISSIONER WATLING: So, isn't shellfish fairly limited as well?

MR FITZGERALD: We don't believe so.

COMMISSIONER WATLING: We're talking about the shellfish industry?

MR FITZGERALD: Well, it can be the Shellfish Industry Award, yes. Yes, we did call it the Shellfish Industry Award, I am sorry. Yes.

COMMISSIONER WATLING: Now in the scope, what are you telling me in relation to the scope?

MR FITZGERALD: We have proposed, as I think we did on the last occasion, and again we've sought instructions on this. Simply the award is established in respect of the industry of producing shellfish.

COMMISSIONER WATLING: Why aren't you spelling it out a little? Why don't you want to spell it out in terms of mussels, clams, scallops, and abalone?

MR FITZGERALD: We believe it is unnecessary, commissioner. In case other products come on stream this award would, in fact, capture them.

COMMISSIONER WATLING: Right, now what's wrong with amending the scope of the award if that does happen?

MR FITZGERALD: It's just another procedural requirement which would be unnecessary, given our proposed scope.

COMMISSIONER WATLING: Right.

MR FITZGERALD: But we would prefer, commissioner, that it not be subject to determination. I think there's some scope there for further -

COMMISSIONER WATLING: Well, it's a bit late now, isn't it?

MR FITZGERALD: Well, I don't believe so, no.

COMMISSIONER WATLING: Well, we adjourned this matter on the previous occasion for you to have discussions -

MR FITZGERALD: Yes.

COMMISSIONER WATLING: - and one would have thought that we would have been along today with an agreement, or a requirement for me to arbitrate.

MR FITZGERALD: Well, regrettably, commissioner, the document as I indicated was produced to us - my diary reads the 21st of August - which is only recently. My workload has been such that it has been difficult to have a meeting with the AWU. I have consulted with our members, and that's what they indicate. They believe that a simplified version as we have proposed is more preferable.

COMMISSIONER WATLING: And the only argument in support of that is so you don't have to amend the scope clause at some date in the future?

MR FITZGERALD: Well, that's not just the only argument. No, I've just simply said that was in response to you.

COMMISSIONER WATLING: Well, what was the other argument?

MR FITZGERALD: Well, our argument in respect to the award, the proposed title and scope, is for simplicity, and in terms of clearly spelling out, without using in our view a number of unnecessary words, what the industry is defined to include, and in that regard, as it has been agreed with the AWU, it is intended to cover both the hatchery and farming sides. So, that's the reason why we have put forward that alternative.

In fact, the alternative - if I can put it this way, commissioner - the initial scope clause was proposed by employers at the last hearing.

COMMISSIONER WATLING: Right. Now -

MR FITZGERALD: This is a new clause which has been since proposed which we really have had an inadequate opportunity to consult on.

COMMISSIONER WATLING: Oh, look, don't run this consultation past me. This whole award and this whole exercise has been before this commission for 3 years.

MR FITZGERALD: This has not, commissioner, if I could dispute that, because it only simply been on the last occasion this Shellfish Award.

COMMISSIONER WATLING: I've said the whole exercise has been before the commission for 3 years. It's only at the last moment that you've decided to split this matter off. Now, one would think that if you were going - if you asked me to adjourn the hearing on the last occasion, which you must have gleaned from my comments at the time, I was not overly happy about, one would have thought one would have gone out of one's way to make sure we didn't get into the same argument again this time.

MR FITZGERALD: Well, I don't think you can simply blame us for that, commissioner, because if I could put my view, we received this document on the 21st of August, today is the 30th I understand -

COMMISSIONER WATLING: Well -

MR FITZGERALD: I consulted with our members -

COMMISSIONER WATLING: You told me earlier the 19th.

MR FITZGERALD: The document was dated the 19th, we didn't receive it until the 21st. Now, in terms of adequate opportunity I don't believe it has been, particularly given the extraordinary workload which has occurred in between.

COMMISSIONER WATLING: Well, we all have that.

MR FITZGERALD: We do, but I'd simply put it forward that it's something which is reasonable in terms of the opportunity to consult, and I don't believe it is reasonable for us, given that time frame, and to suggest it is our fault, which I think is the case.

COMMISSIONER WATLING: Right, well let's look at the scope. Where does it not pick up the hatchery side?

MR FITZGERALD: Are we on record still at this stage?

ASSOCIATE: Yes.

MR FITZGERALD: I think given the nature of the discussion, commissioner, it may - if I could request that we go off record to see if we can pick it up - because it could be protracted in terms of defining the scope?

COMMISSIONER WATLING: Well, I'm going to tell you that I am going to decide it very quickly, if you don't.

MR FITZGERALD: In terms of the scope?

COMMISSIONER WATLING: Yes.

MR FITZGERALD: Well -

COMMISSIONER WATLING: Take me to where you believe that it doesn't cover the hatcheries.

MR FITZGERALD: It does cover the hatcheries, commissioner.

COMMISSIONER WATLING: Right, well -

MR FITZGERALD: I didn't indicate that. I just said our proposal - proposed clause - is far more simple, simplified, than the unions. There are unnecessary words utilised.

COMMISSIONER WATLING: Right, take me to the words.

MR FITZGERALD: Well, we say that it's the production of live shellfish and the marine farming. I am not sure what production of live shellfish is. If that's what the hatchery side is we are unclear about that, and certainly our instructions from my members have some real - we have some real difficulty about that -

COMMISSIONER WATLING: What do you -

MR FITZGERALD: - because production is not solely related to hatcheries.

COMMISSIONER WATLING: What are you alternative words then?

MR FITZGERALD: The words which we put forward. The - in the industry of producing shellfish.

COMMISSIONER WATLING: Where does that cover hatcheries?

MR FITZGERALD: It - producing is a term which includes it from the very hatchery stage to the farming stage - an all-embracing term.

COMMISSIONER WATLING: So producing shellfish is okay, but the industry of production of live shellfish isn't?

MR FITZGERALD: Well, we think it's unnecessary, commissioner.

COMMISSIONER WATLING: Well maybe there might be a very good reason for that and it might be to clearly indicate to the parties and the interveners the demarcing of the work - now do you see any value in that?

MR FITZGERALD: I don't believe so in this industry, commissioner, because you see I don't -

COMMISSIONER WATLING: Well do you think that -

MR FITZGERALD: - I think the interveners have now shown any interest in this particular industry if the award is -

COMMISSIONER WATLING: Well, it may be, and Mr Wilkinson will - in his right of reply will obviously be able to tell me, but I would think reading it, it's very carefully worded - I would think to save any demarcation problems, because it could be argued if it wasn't as clearly defined that the Food Preservers Union would have an interest in this award.

MR FITZGERALD: Well, I can't see, in terms of our scope, where falls down in that regard either.

COMMISSIONER WATLING: Well I think there's a difference between the words 'live' -

MR FITZGERALD: Well we use 'live' in both cases. I'm sorry, I have - I have deleted that. It should have been live shellfish in our case as well.

COMMISSIONER WATLING: Oh, dear oh dear.

MR FITZGERALD: Well, commissioner -

COMMISSIONER WATLING: Now - now tell me where - now tell me what your view is.

MR FITZGERALD: Well I-

COMMISSIONER WATLING: What you - you've now changed it to 'live' have you? Live shellfish?

MR FITZGERALD: No, I did - I apologise, commissioner. I left that word out.

COMMISSIONER WATLING: Well it's fairly significant isn't it?

MR FITZGERALD: Well, it may be. I apologise for leaving that word out.

COMMISSIONER WATLING: Right.

MR FITZGERALD: I think it's unfair, commissioner, to blame employers solely for this position, given this -

COMMISSIONER WATLING: I haven't - I haven't blamed anyone.

MR FITZGERALD: Well it seems, given your comments, that you are.

COMMISSIONER WATLING: Well, look, if you settle down we'll soon allocate blame.

MR FITZGERALD: Well -

COMMISSIONER WATLING: Right?

MR FITZGERALD: - it seems - I take it, commissioner, that we're at blame - at fault.

COMMISSIONER WATLING: Well if you don't settle down and use the decorum of this place in the proper manner, we'll soon start allocating blame if that's what you want. Now I'm trying to get to the bottom of your submission and I put to you a question, and that was, take me to the words. Now when I ask you a question in relation to those words you then get a bit uppity about it. Now I don't really require that.

MR FITZGERALD: Well I apologise for that, commissioner.

COMMISSIONER WATLING: I tried to be patient with you to find out what words you want and you've got no idea how patient I'm being. Now take me to the words that you don't like and why.

MR FITZGERALD: Well if I could just reaffirm our scope for a start -

COMMISSIONER WATLING: Right.

MR FITZGERALD: - because that would help.

COMMISSIONER WATLING: Well it certainly would.

MR FITZGERALD: The - we - and I did - and I did apologise for deleting that word - it was not intended.

COMMISSIONER WATLING: Right - well take me to your scope.

MR FITZGERALD: The award is established in respect of the industry of producing live shellfish.

COMMISSIONER WATLING: All right.

MR FITZGERALD: Now, commissioner, in terms of the words utilised by the AWU, we have some problem about the distinction between production of live shellfish and the marine farming and we're not certain what that means. Now it seems from the brief discussion we've had with the union, that production of live shellfish is referring to the hatchery and the marine farming is referring to shellfish farming. Now we don't believe that's an accurate description and I have sought instructions in that regard.

COMMISSIONER WATLING: Right, well what is your accurate description?

MR FITZGERALD: As - as I've indicated to the commission.

COMMISSIONER WATLING: Production of live shellfish?

MR FITZGERALD: Yes. Producing of live - the industry of producing live shellfish.

COMMISSIONER WATLING: So they don't farm oysters?

MR FITZGERALD: I'm sorry?

COMMISSIONER WATLING: They don't farm oysters?

MR FITZGERALD: Yes.

COMMISSIONER WATLING: Well, the farming, it talks here in the proposal put forward by the AWU - the marine farming of live shellfish.

MR FITZGERALD: Yes.

COMMISSIONER WATLING: Well is that not accurate?

MR FITZGERALD: Well in - when coupled with the words 'production of live shellfish' we think it's confusing. How do the two interrelate? Commissioner, as I've indicated earlier, there was, I think some preparedness to go off record and discuss between the parties to try to find some compromise.

COMMISSIONER WATLING: Well, I think you've had plenty of time to do that right up to the hearing.

MR FITZGERALD: Well, I repeat the time frame, commissioner. We received it on the 21st -

COMMISSIONER WATLING: Well I - I have heard the submission you've presented on this issue.

MR FITZGERALD: Well the time has been very difficult for us and given circumstances and other cases which I think you appreciate.

COMMISSIONER WATLING: Right, well you put your submission to me and then I'll hear what the AWU have to say.

MR FITZGERALD: Fine, well that's the completion of my submission.

COMMISSIONER WATLING: Right, Mr Wilkinson?

MR WILKINSON: Yes, thank you, commissioner. The intended scope - I don't have a big problem in this area. After the

hearing - the previous hearing, the Food Preservers, the union - the AWU rather, and TCI and in fact a representative of the industry sat down very carefully I thought to determine exactly what would be the scope of the new award.

You're quite correct in - in that the Food Preservers Union and the Australian Workers Union both being within the area of the fishing industry, it's created some problems in the past, but the Food Preservers Union and the Australian Workers Union have been able to work those out. Now I would submit that part of the reasoning that there have been problems is that it is hasn't been clearly spelt out where one's demarc ends and where another one's begins.

The scope of the award - there's no trick in the scope for the award. Quite clearly the union did see the production of live shellfish as being the hatchery operation and the marine farming of live fish being what happens on a lease.

I would have thought that was fairly descriptive of the industry. At the end of the day, I mean that's - that's what the scope - is one of the most important clauses in the award and it's got to be relevant. So we don't limit it to oysters, muscles, clams, scallops and abalone. We said 'including' because we've noted on various occasions it was a bit of luck and a fair breeze an employer might actually have a copy of an award. Well if the employer can pick up an award and he's an oyster farmer or he's a muscle farmer and he sees it mentioned in that award, I would have - I would have surmised that that would make the thing more relevant.

I don't have a big hang-up about it. In fact I don't think the TCI and the AWU are at polarised positions on the scope. I would argue that if we're going to create a title and scope it had better be relevant otherwise the man in the field, when he picks up the award won't know what he's dealing with.

COMMISSIONER WATLING: Well what's your view then in relation to the submission put by Mr Fitzgerald, that it's more appropriately called the industry of producing live shellfish?

MR WILKINSON: It's an alternative and I did understand - Mr Fitzgerald's quite right, and he did indicate to the AWU, albeit relatively recently, that there was another view in this area. I would contend that the industry is known as - currently as - in areas as the oyster farming industry, the mussel farming industry, so all we've done is to link those together, they're shellfish. And call, okay, it's the Shellfish Farming Award which covers all those species.

The activity is - in known as a farming activity, so it's - we're quite specific in saying it's live for the benefit of the Food Preservers Union and the Australian Workers' Union.

COMMISSIONER WATLING: Well, Mr Fitzgerald is saying it should be - including live as well now.

MR WILKINSON: I thought they - so, it's actually - Mr Fitzgerald's proposal is the Live Shellfish Industry Award?

COMMISSIONER WATLING: No, he's saying that the - that title should be Shellfish Industry Award, as I take it or, either the Shellfish Award. I raised the word 'industry', which Mr Fitzgerald didn't object to, and so the title would be known as the Shellfish Industry Award.

MR WILKINSON: I, in the interests of getting this matter dealt with, I wouldn't have a big hang up in changing the word 'farming' to 'industry', providing - I mean, the man in the field has got to be able to appreciate what - he looks for the award, it's the Shellfish Industry Award, okay, I wouldn't have a problem with that. I would be prepared to change the word 'farming'.

COMMISSIONER WATLING: Right. Now, Mr Fitzgerald has taken the view that the extra words should be removed from the scope, and I take that he's - Mr Fitzgerald's saying that the scope should read:

This award is established in respect of the industry of producing live shellfish.

MR WILKINSON: I would contend that I think it's over simplistic. The - the definition - oh, sorry, the scope as the AWU have outlined it I think is very clear in its intent; it's done with a specific purpose in mind, that is to - to assist the unions in this area to make it relevant to the industry. If they can pick up this award and see exactly what it's intended to cover, I think at the end of the day it's more relevant than just saying: the production of live shellfish.

I mean, let's not get tangled up in an argument about whether you're talking about a crayfish, you know. That's not true anyway, it's a rock lobster. You know, is that a shellfish? I mean, we're saying here quite clearly by spelling out that the area that we're looking at is oysters, mussels, clams, scallops and abalone. Including - we're not it limiting to that at all. I don't see if a new shellfish comes along we'll need to come back to change the scope.

COMMISSIONER WATLING: Well, if that was the case, then if you were to pick up Mr Fitzgerald's point where it said the industry of producing live shellfish could - where you've got it in your document, including oysters, could you change then the words to say 'including the farming of' those things; oysters, mussels, scallops?

MR WILKINSON: Yes, I wouldn't have a big difficulty with that. The only - the only thing that concerns me is that marine farming is quite a specific operation. It's a title given to a function that's performed, it's not a dreamt up one. It's known right throughout the aquaculture industry as marine farming. We didn't specify there the production of aquacultural products, we said marine farming. Because it represents an activity rather than, I would view it, as the production of. But -

COMMISSIONER WATLING: Right.

MR WILKINSON: - I'm not overly burdened with it. I mean, I could live with it.

COMMISSIONER WATLING: No, well - but you're saying that marine farming is there for a purpose.

MR WILKINSON: It's there for a specific reason.

COMMISSIONER WATLING: Right.

MR WILKINSON: But I don't think just 'the production of' covers it, but, you know, the AWU would - in the interest of getting the matter resolved -

COMMISSIONER WATLING: Right. Well, if that's your submission, in the interest of getting it resolved, do you see any mileage in having any further discussions with Mr Fitzgerald?

MR WILKINSON: I don't think we'd change our opinion, no. But I would be prepared to change the words as you outlined there to say, if that was agreeable to Mr Fitzgerald, to say: including the marine farming of. I don't think that loses its intent then.

COMMISSIONER WATLING: Right. We'll have a 5-minute adjournment. You talk to Mr Fitzgerald, and we'll be back.

SHORT ADJOURNMENT

COMMISSIONER WATLING: Mr Wilkinson, I understand that there's something to report.

MR WILKINSON: Yes, commissioner, the parties have held some discussions in the intervening period and we've reached agreement on what the proposed scope of the Shellfish Industry Award should be, namely, I'll read that:

This award is established in respect of the industry of producing live shellfish and includes

the marine farming of oysters, mussels, clams,
scallops and abalone.

COMMISSIONER WATLING: Right, thank you. Mr Fitzgerald?

MR FITZGERALD: Well, yes, commissioner, I can indicate
agreement to that title as stated on record by Mr Wilkinson,
and also the scope clause as stated.

COMMISSIONER WATLING: Right. So we have agreement on the
matter. Thank you. Right. No further submissions?

MR WILKINSON: No, commissioner.

COMMISSIONER WATLING: Right. Well, that concludes this
matter and I'll hand down a written decision in due course on
this application.

HEARING CONCLUDED