

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No. 4726 of 1993

IN THE MATTER OF an application
by the Australian Liquor,
Hospitality and Miscellaneous
Workers Union, Tasmanian Branch
for interpretation of the
Miscellaneous Workers Award
seeking a declaration that the
award is an occupational award

PRESIDENT

HOBART, 23 February 1994

TRANSCRIPT OF PROCEEDINGS

Unedited

PRESIDENT: Appearances please.

MR K. O'BRIEN: If it please you, Mr President, I appear on behalf of the advocate organisation.

PRESIDENT: Yes, thank you, Mr O'Brien.

MR M. SERTORI: If the commission pleases, SERTORI M.C., on behalf of the Tasmanian Chamber of Commerce and Industry Limited.

PRESIDENT: Thank you, Mr Sertori.

MR O'BRIEN: Mr President, firstly I seek leave to tender a document which contains an amendment to the application. It is a letter I forwarded to Mr Sertori - a copy of it - dated 3rd February.

PRESIDENT: Very good. We'll mark this OB.1.

MR O'BRIEN: You will see, Mr President, that there, in the second paragraph, it is the commencement of an advice that I would be seeking to amend the application and then there are three points, (a), (B) and (c) - I'm not sure why I put capital 'B', but nevertheless it's - that's not significant - seeking to amend the application in the manner sought. The first - points (a) and (b) are relevant in the sense that they touch upon the original intention of the application; point (c) is the new point which relates to clause 22 of the award which -

PRESIDENT: I see.

MR O'BRIEN: - seek to insert. My understanding since that time and again confirmed this morning is that Mr Sertori has no objection to the application being amended in this form and indeed does not oppose the application.

PRESIDENT: Well I'll ask -

MR O'BRIEN: Yes, obviously.

PRESIDENT: - Mr Sertori to comment on the exhibit and the reaction of the employer to that.

MR SERTORI: If it pleases the commission, subject to the submission of Mr O'Brien, I can confirm our consent in this matter and that further the letter - or the exhibit - OB.1 in fact reflects the outcome of the discussion held prior - or on that day at least is noted in the exhibit itself and so I can confirm Mr O'Brien's account of our position.

PRESIDENT: Alright. Good. Thank you for that. Well, proceed, Mr O'Brien.

MR O'BRIEN: Mr President, this award finds itself in a very unfortunate position of having a confusion existing between Clause 2 of the award, that is the scope clause, and Clause 6 of the award - parties and persons bound and I do have extracts of those clauses if it's of assistance to tender -

PRESIDENT: It might be simpler if you were to do that, Mr O'Brien, to save going backwards and forwards.

MR O'BRIEN: Yes, I've got a few exhibits. Perhaps I'll tender the pages of the award that contain those two clauses, that is, clauses 2 and 6.

PRESIDENT: There's a - yes - so that's for the - for the interpretation in relation to parties and persons bound and scope.

MR O'BRIEN: Yes.

PRESIDENT: Yes, alright. Well do you want them marked separately?

MR O'BRIEN: Perhaps it will be - it will be easy.

PRESIDENT: Probably be easier. So the page with the clauses 1, 2 and 3 on, will be marked OB.2, and clauses - the pages with clauses 4, 5 and 6 will be OB.3.

MR O'BRIEN: If you'll just excuse me for a moment, I'll organise the other exhibits which will save your associate ferrying them constantly. It's a fairly -

PRESIDENT: Yes.

MR O'BRIEN: - simple exercise.

Mr President, I just - I'll come to those fairly quickly, but whilst we have exhibits 2 and 3 -

PRESIDENT: So all the exhibits are now here with - with us and we'll just take them as they - as we need them?

MR O'BRIEN: Yes, I thought might be convenient rather than having -

PRESIDENT: Okay, that's good.

MR O'BRIEN: Mr President, clause 2 of the award appears to exist in the form it arose in No.2 of 19 - Miscellaneous Workers Award, No.2 of 1986, and you have - and I tender an extract from that award.

PRESIDENT: Yes. We'll mark that OB.4.

MR O'BRIEN: And you will note, Mr President, that clause 6 contains in subclause (a) - this is in OB.4 -

PRESIDENT: Yes.

MR O'BRIEN: - a set of words which differs from those which exist in the current provision of the award as reflected in - no - sorry - that's not quite the current provision but so far as subclause (a) is concerned it is the current provision. I apologise that I - it hasn't been reflected the change in the name of the organisations party to the award - but for all intents and purposes for the purpose of this application the clause 6 subclause (a) is the only relevant part.

PRESIDENT: Yes.

MR O'BRIEN: You'll see that there has been a change and that the word - the words in exhibit OB.4 are: All private employers, whether members of a registered organisation or not, who employ persons in occupations specified in clause 2, Scope. In OB.3 it appears as who are engaged in the industry specified in Clause 2 - Scope.

PRESIDENT: Yes.

MR O'BRIEN: Now as far as I can ascertain, Mr President, that variation arose out of what appears to have been an administrative action by the commission in relation to the structure or party and persons bound clauses in awards, but that, in my submission, is not relevant to the outcome of these proceedings for reasons that I'll touch upon shortly.

I also tender the first award made in this matter - or an extract from it - that is Miscellaneous Workers Award No.1 of 1986.

PRESIDENT: Yes, we'll mark that OB.5.

MR O'BRIEN: Mr President, you will see that clause 2 - Scope, is in fact subclause (a) of the scope clause as it appeared in OB.4 and subclause (a) of the scope clause that appears in OB.2.

PRESIDENT: I'm sorry, I'm losing you there.

MR O'BRIEN: If you - sorry.

PRESIDENT: You're talking about the scope clause?

MR O'BRIEN: The scope clause in OB.5, which is Miscellaneous Workers Award No.1 of 1986.

PRESIDENT: Yes.

MR O'BRIEN: You'll see that there is only - there are not three subclauses.

PRESIDENT: No.

MR O'BRIEN: And in fact, as I see it, it is identical to the current subclause (a) in the scope clause.

PRESIDENT: Yes, yes.

MR O'BRIEN: Now the current subclauses (b) and (c) - in fact, if you go to page 3 of that extract exhibit, that is of OB.5 -

PRESIDENT: Yes.

MR O'BRIEN: - appear as (a) and (b) in a clause entitled exemptions and modifications.

PRESIDENT: Yes.

MR O'BRIEN: And I refer to that so that you can see fairly clearly - and I apologise for going backwards, but I was trying to follow that - follow the path in that direction from the present day to what was made - you can see what the commission has done is in fact taken what was then clause 5 - exemptions and modifications and inserted it into the scope clause -

PRESIDENT: Yes.

MR O'BRIEN: - in No.2 of 1986 and that was done in conjunction with an application by the Trades and Labour Council to vary awards generally in relation to the national wage decisions. So I believe it's fair to say that that was an administrative action by the commission to structure the form of the award without seeking to amend the intention of the award. And I don't believe that it - it had that effect, that is, that exhibit - that the award made in OB.4 had no material effect on the - on the interpretation of the award and created no confusion.

Mr President, I have extracted the three decisions of the then president in matter T.105 of 1985 which was the application upon which the Miscellaneous Workers Award was made and I will tender those in the correct order, that is, the decision of 14th October 1985.

PRESIDENT: Yes,, we'll mark that OB.6.

MR O'BRIEN: The decision of 24th January - sorry, I think that that's a - I think that's a misdating actually.

PRESIDENT: Yes, it looks as though it might -

MR O'BRIEN: In fact it is the second decision - I think it should have been 1986.

PRESIDENT: Yes, 24th January, '86 I think the date on the back page reads.

MR O'BRIEN: Yes. That's right. So that would be the next -

PRESIDENT: So we'll mark that OB.7.

MR O'BRIEN: And the decision of 21st - or an extract from the decision of 21st April 1986.

PRESIDENT: Yes. OB.8.

MR O'BRIEN: Mr President, exhibit OB.6 is the decision in which pursuant to section 33(1)(b), the president made a decision as required by the act, that is that existed then, that the occupations which are named in the - in clause 2 - Scope, of the award were occupations or callings in respect of which the commission on the authority of the scope of the unions registered constitution could have found sufficient jurisdiction to include in any award to be made on this application, however any award to be made embodying those classifications may need to be restricted to areas of private industry not already covered by an award that includes the same callings or classifications and in any case, any award may need to include an exemption or limitation provision excluding certain employers and industries from its operation but any such modification would be subject to the commission being satisfied that as a consequence of an agreement reached or on an argument presented by any employer or employee organisation, exemptions, limitations or variations of that kind are the scope of any new award where otherwise justified.

And that passage appears - and I apologise for not saying so earlier - on pages 5 and 6 of that decision.

The president then said:

Having found jurisdiction to this extent it will now be a matter for the applicant to pursue its claim in accordance with Principle 10 of the Guidelines.

In the event an award is made, the Commission will take the appropriate steps to have the relevant common rule declaration relating to the Insurance Award rescinded.

And that last passage related to the fact that the making of this award as an occupational award was intended to replace

common rule declarations which existed in relation to certain classifications then existing in the Insurance Award, but subsequently removed.

Mr President, the next decision, 24 January 1986, I refer to briefly in saying that it confirms that the - and I won't refer to specifically but in general - it confirms that the process continued to pursue the making of an occupational award.

It refers to the declaration I have just mentioned, and it outlines the history of the award making process as it was then, and it makes it very clear that the claim was prosecuted for a craft or occupational award.

In Exhibit OB.8, or the extract of what was a much longer decision which dealt with some of the substance of the award, I've included only that passage which relates to the initial area.

That is the status of the proceedings to that date and reference to the incidence or application of the award, which appears on pages 2, 3 and 4 of the decision - the extract exhibited in OB.8.

And if I can take the commission to page 2, 'Incidence or Application of the Award' is the heading. The president said:

In earlier proceedings the Australian Mines and Metals Association had objected to a new award applying willy-nilly in the mining industry where other awards and agreements applicable to the majority of employees already had application.

The Union and the AMMA subsequently agreed to exempt employers and employees in that industry, and in this regard it was agreed that for the purpose of identifying the industry of mining a mine should have the same meaning as that attributed to the noun 'mine' in Section 3 of the Mines Inspection Act.

On the understanding that this exemption will only apply to employers of persons in the mining industry per se and not incidental or remote from the industry the agreed exemption will be incorporated into the award in the expectation that the mining industry employees are already catered for by industry awards, Federal or State, and do not become award free.

As this is the first award of this kind to have application in the private sector it occurs to me

that I should take this opportunity to explain who shall be bound by its terms.

Except to the extent to be specified in an Exemptions and Modifications Clause to be included in the award it shall have application to and be binding upon all employees and employers of junior and adult persons in the classifications set out in the award, except:

(a) where a Federal award covering those classifications or that work applies to an employer, or

(b) where a State industry award has application to an employer of that class of employees, or

(c) where a registered agreement, Federal or State, applies to an employer of that class of labour.

To the extent that there is discovered inconsistency between awards or agreements referred to in (a), (b) and (c) above this Award shall have no application.

Notwithstanding the foregoing, having regard for informed discussions that took place during proceedings regarding the likely incidence of application of this award, leave is reserved to any organisation of employers to apply for exemption in whole or in part from its operation.

However, in all such cases the onus will rest heavily upon the applicant seeking relief to show cause why such an exemption should be granted.

Now I refer to this passage because although it was modified and the original clause 5 was incorporated in the scope clause the intention was clearly that the Clause 2 - Scope specified that the award applied to the occupations specified in subclause (a) irrespective of industry, save and accept those qualifications which are laid down in subclause (b) and clause (c) and also having regard to the president's decision of 21st of April as exhibited in OB.8.

Mr President, through an action which has taken place during the life of the award, and I must say escaped our attention until recently, clause 6 of the award has been varied to create confusion and to create a conflict, as it were, between clause 2 and clause 6 of the award.

There is no doubt it is, in our view, incontrovertible that the award was made and always was intended to be an occupational award.

Hence, in the amended application we seek a declaration that Clause 2 - Scope prescribes that the award is made in relation to the occupations specified in subclause (a) of the clause, and that Clause 6 - Parties and Persons Bound, subclause (b), must be read having regard to the clear intentions of Clause 2 - Scope, and because there is a confusion that exists, and pursuant to your powers, Mr President, in relation to the correction - and perhaps I should refer specifically to section 43 of the Act.

`That you may declare' etc., and:

... if the declaration to requires by Order vary any provision of the award to remedy any defect in it or give full effect to it.

And so we say that the provision, or the order which we seek, under subparagraph (b) of the application is entirely within your power upon finding that the award be interpreted, and that there is any provision which needs to be varied to remedy a defect in the award.

We say that clearly the use of the word `industry' in an award which is an occupational award is a defect.

It does not enhance the interpretation of the award, on any fair interpretation of the award, on the history before the commission, on the fact that the scope clause has not changed in any material way since it was made and varied, and they were the first two actions on the award, that the only fair and reasonable interpretation is that Clause 2 - Scope prescribes that the award is an occupational award and must be interpreted that way.

It follows then, as we say, that a variation to clause 6 - the interpretation of clause 6 - cannot be made other than by having regard to clause 2, and that creates in our view a defect, because there appears to be a contradiction between the clauses, and you, Mr President, in our submission, are thereby empowered to remedy that defect.

PRESIDENT: You don't think the words in clause 6 can be construed to mean that in endeavouring to apply the award firstly one must discover an employee covered by the scope and then, secondly, discover whether the employer is engaged in an industry which is covered by the scope?

MR O'BRIEN: No, I don't, and I don't because Clause 2 - Scope has no reference to industry other than to exclude industries - specific industries - and having regard to the president's decision exhibited in OB.8 the intention was that it would have general application, irrespective of industry, other than those exemptions.

And so it would not, in my view, be a reasonable interpretation, being in possession of the facts, for the commission to say that that was ever the intention.

Now, you might say, Mr President, well there could be a confusion, but that in our submission, is a defect and not a reasonable interpretation.

And if there is a defect, you are empowered to rectify it, and that is the nub of our submission, Mr President.

PRESIDENT: Yes, and I follow that. And, as you have pointed out, I must declare how the provisions should be interpreted, how do I interpret the parties and persons bound clause?

MR O'BRIEN: I think, Mr President, that you are in a position where it is not possible to fairly interpret the parties and persons bound clause, having regard to the structure of the award as a whole.

You are required to have regard to the words that are there, but they make no sense, having regard to Clause 2 - Scope.

PRESIDENT: Yes, I follow you, from a practical point of view. The Act says I must declare how the provision is to be interpreted before I can vary.

I raise that because you would be aware on that very point a previous interpretation of mine has been overturned on appeal.

So, it would appear that I am constrained to declare how the provision should be interpreted before I can do anything else. So, how do I interpret clause 6?

MR O'BRIEN: Mr President, it would be my submission that you would interpret clause 6 - because it starts with the words, 'Unless otherwise specified' that gives you, in my view, the opportunity to say, well the award specifies in clause 2 that this is an occupational award, and so that is how I must read the reference to 'industry'.

Now, if I may, Mr President, and I think this is somewhat a technical argument, the definition of an industry which appeared in the Act at the time that the award was made, and appears to have been amended, was so broad that it included - industry included a craft or a calling or an occupation.

PRESIDENT: Yes, well that was removed in the March '92 amendments.

MR O'BRIEN: Yes; because it was so broad and so vague. But at the time -

PRESIDENT: Well, specifically to remove the power of the commission to make an occupational award.

MR O'BRIEN: Perhaps that's - at the time that the award was made and the time that this clause 6 changed - that remained in existence. So 'industry' was arguably a calling, a craft or an occupation.

I believe that you are empowered because of those provisions. It is otherwise specified that the award is an occupational award, and I believe that you, Mr President, are entitled to say that having regard to Clause 2 - Scope, it being otherwise specified, that the clause refers to occupations, that that's how you must interpret the award, and therefore you need to correct the defect which appears with the word 'industry'.

I mean, from a practical point of view I believe you're right.

MR O'BRIEN: Yes.

PRESIDENT: The alternative would be for me to say that I don't think a declaration is appropriate and that the parties should seek to vary it.

MR O'BRIEN: Well that is an impossibility, Mr President.

PRESIDENT: Do you want to go off the record for a short while?

MR O'BRIEN: Yes.

PRESIDENT: Yes, we'll go off the record, thank you.

OFF THE RECORD

MR O'BRIEN: Mr President, as I was saying, there would be a difficulty varying the award otherwise in any case, but our view is that that is not a necessary step because we believe your powers under section 43(1A) and (1A)(a) are clear and in our view you are able to declare, firstly, that a declaration - in a declaration that clause 2 of the award must be interpreted as meaning that the award is made in relation to the occupations specified in clauses (a) - that's points 1 to 10.

I guess, secondly, that clause 6 - Parties and Persons Bound, must be read with regard to its preamble, that is unless otherwise specified the award has application as outlined. And because there is a specification in clause 2, which I suggest you would find, that the award applies to those occupations, that clause 6 - Parties and Persons Bound, would

apply to all employers and employees and the organisations in relation to those occupations.

Now you would be faced then with the dilemma of giving a meaning to the words which exist in - I now find subclauses (a), (b) and (c) of that clause where there is reference to industry rather than occupation. Now as I think outlined earlier the act, when the award was made, had a very broad definition for industry but be that as it may that would not be easily understood in rationalising the meaning of the award, having regard to a finding which I suggest you are quite entitled to make in relation to clause 2 - Scope.

For example, Mr President, if you declare that clause 2 - Scope must be interpreted to mean that the award is an occupational award, there remains a question as to what happens with clause 6 - Parties and Persons Bound, whether that remains an area of confusion and whether that remains an area for argument. And I wonder what the situation would be, Mr President, if you made a declaration in relation to clause 2 and a prosecution commenced and my organisation or an individual employee sought to pursue a claim, would a magistrate be entitled to override that finding having regard to that court's interpretation of clause 6 in the absence of a declaration as to its meaning also.

So it's our view, Mr President, that you are able to make a declaration in relation to both matters. It would be only partially attending to the problem if you did not. And because of the preamble to clause 6 - Parties and Persons Bound, you must have regard to clause 2 in interpreting it. And when you do have that regard you would therefore find that there is a defect and you would, in my submission, Mr President, remedy that defect. And for completeness I would seek to, at this point, amend (b) in those three points by reference to - sorry, (a) and (b) -

PRESIDENT: That's in OB.1?

MR O'BRIEN: Yes. Sorry, in OB.1, where there is reference to clause 6 - Parties and Persons Bound, subclause (b), it should be referenced to clause 6 - Parties and Persons Bound, subclauses (a), (b) and (c). That's both in (a) and in (b).

PRESIDENT: Yes. You've got no objection to that, Mr Sertori?

MR SERTORI: No objection, sir.

PRESIDENT: Thank you.

MR O'BRIEN: Mr President, we would therefore believe that your authority fully vests with you to do that. As I say, I don't believe that we are proceeding otherwise than would be

required by the principles of interpretation, having regard to the clauses which exist in this matter, and we would ask that that order be made.

The third - the other area that we refer to is to an interpretation which relates to clause 22 - Payment of Wages, and that deals with payment of wages into a bank account by the employer.

And I apologise, I didn't bring a clause 22 exhibit.

PRESIDENT: Well we'll soon find it.

MR O'BRIEN: And I hope I've got the right clause number.

PRESIDENT: Payment of wages clause. Is it the payment of wages clause?

MR O'BRIEN: Is it 22? Yes. You will see that in the third paragraph and in the fourth paragraph, the word 'bank' appears in reference to the term 'by direct bank deposit' in the third, and in the fourth paragraph 'or direct bank deposit'.

An issue has been raised with us by our legal advisers as to whether that would enable the enforcement of the award or indeed - sorry - perhaps I will rephrase that - whether that term enables the use of accounts otherwise than in a bank which is a bank under the Commonwealth Banking Act and including institutions - financial institutions such as credit unions. There are circumstances where employees are having accounts in credit unions in state banks, for example, credited with their pay. There is an argument to say that that would not be permitted. There is also an argument to say, well if there's any irregularity in relation to that payment, this provision is unenforceable.

We are seeking to correct any such - or to forestall any such argument by an - a declaration, that the word 'bank' wherever appearing is interpreted in the broadest possible way to include the Commonwealth Banking Act, banks who are - fall within the definition of the Commonwealth Banking Act, a state bank, a credit union, a friendly society or any other financial institution.

It is our view that that was the intent however we're in your hands Mr President as to the appropriate course of action. We believe an interpretation would be sufficient, but if you felt that to remedy any defect there was a need to vary the award by including in the definitions clause a definition of bank in this same form we would not object to that course of action.

Mr President, in relation to all of these applications, we would be seeking retrospective operation of any orders.

PRESIDENT: And retrospective in respect of the bank -

MR O'BRIEN: To the date of making of the award.

PRESIDENT: The date goes right back to the making of the award.

MR O'BRIEN: Yes.

PRESIDENT: Original making of the award does it?

MR O'BRIEN: Yes.

PRESIDENT: I see.

MR O'BRIEN: I think this may have an effect on other awards, but -

PRESIDENT: Yes.

MR O'BRIEN: - but -

PRESIDENT: I'm sure it would.

MR O'BRIEN: Yes.

PRESIDENT: I suspect it's not been defined anywhere in any other award. Do you know what the Acts Interpretation Act says about the word 'bank'?

MR O'BRIEN: No, I don't. I proceed this way because I was advised by our legal advisers that this was the appropriate course. It may be that their view that it would be deemed to be a bank under the federal or Commonwealth Parliamentary Banking Act - may have some reference to that but I couldn't say that for sure.

PRESIDENT: Do you think I ought to have all that information before me and before I make an interpretation on it?

MR O'BRIEN: Well perhaps in the sense before - before any decision is made I can undertake to inquire, and if it is - if there is a - an interpretation of the term 'bank' then I will advise you and Mr Sertori, and if need be the matter could be called on for further hearing if that -

PRESIDENT: Yes, I think that would be the safer course of action given the potential for any action taken on this matter to have a fairly wide ranging - wide ranging impact.

MR O'BRIEN: Well of course, Mr President, your powers are limited. I think certain - in relation to - or the commission's powers are limited in relation to certain other acts.

PRESIDENT: Oh certainly.

MR O'BRIEN: Yes.

PRESIDENT: Yes. No - no question about that. Yes, thanks, Mr O'Brien. Mr Sertori?

MR SERTORI: If the commission pleases, Mr President, these are consent matters and I confirm as such. In respect to the second matter which relates to the declaration in respect of clause 22, I appreciated in these interpreted matters that it was certainly never the intention of the parties in agreeing to what were then offsets and 38-hour week that the term 'bank' would have some limitation on its meaning and in fact part of the - part of the saving incurred by the employer was in fact that the term had its widest application and that's been the practice. The term is perhaps unusual to this award and most award use the term 'electronic fund transfer' rather than 'bank deposit', but in dealing with the matter as far as the principles of interpretation were concerned, the term 'bank' notably in small 'b' has its dictionary sense which quite clearly the dictionary would be an action of placing - an action of placing money into - to something else which in this case is a direct action of depositing money into something else.

PRESIDENT: No, I think the bank refers to where it goes rather than the action. I think -

MR SERTORI: The bank is simply in the dictionary sense no more than a holding bay or holding thing, if you like. In this case it's a holding thing for a direct deposit of money which is the employee's wages. So in the dictionary sense in our view that term has its broadest application and it's the - and it's - and in its common usage and under the principles of interpretation are open to interpret the provision in that manner and we - we accept Mr O'Brien's submission that the term 'bank' can derive certain meaning by application or by consultation to other acts and therefore we're able to consent to his application in (c) and agree that it would be appropriate in those circumstances about prejudice proceedings elsewhere that retrospective application should take place due to the disadvantage that may be opposed on either party by any other outcome.

PRESIDENT: Are you aware of any practice involved in - or carried on by employers where the bank has been given a very strict -

MR SERTORI: Not at all.

PRESIDENT: - meaning?

MR SERTORI: And certainly it would be contrary to the advice and counselling that has come from our organisation.

And in fact it's my understanding of our membership in this area that the term, where the direct deposit system is used, the term is used in its broadest sense. It certainly would not be our desire as an organisation to encourage some exclusive use of one particular aspect of the financial system and whilst there may be incidences not known to me, and I accept the concerns that Mr O'Brien raised with me, and its ramifications for both of us from the different angles that we represent, I don't think it's useful for me to make a further submission given the consent nature and it would be appropriate that Mr O'Brien seek the information in order to help these proceedings and if there was a problem I would concur they should be relisted.

In the other matter which goes to the question of the status of this award as an occupational award, our position in this matter is without prejudice to proceedings that may have taken place elsewhere or that may take place elsewhere and our position is adopted on the basis that this award uniquely I personally have had involvement in it through its history. It is by - well it is created as a consent award and largely progressed with the odd occasion otherwise in that fashion. Certainly in the - to the question that is now before you today, it was unquestionably always our - our understanding and our - and the nature of the consent reached that this award was in fact an occupational award and should be observed that way and it's for those reasons that it is important in our view that we support the application in this - on this occasion.

We do recognise the difficulties that are before the commission with those provisions but we believe in supporting Mr O'Brien's submission that it is possible for the commission today to make the - to grant the application as sought and effect the variation that is being sought. In our view, clause 2 - Scope - which we note is different to other occupational awards in this commission provides in clause, sub, 2(b), the exclusion of industries that contain classifications that are mentioned in 2(a) and either by -

PRESIDENT: Where an award or agreement exists.

MR SERTORI: - where an award or agreement applies, therefore clearly the only interpretation we believe that is opened by - reading the words of clause 2(a) is that those classifications specified through 1 to 10 are in fact a set of occupations and - and could not be described to be industries in their own right. If that were the case then clause 2(b) would have no meaning.

In our view and in concurring with Mr O'Brien's submission therefore, clause 2 in this award quite clearly describes scope in respect of a set of occupations.

Given that is the case, we support therefore that clause 6 - Parties and Persons Bound - which gives primacy to clause 2 by its opening paragraph unless otherwise specified quite clearly recognises that parties and persons bound can be bound to - within the meaning of clause 2(a) - Scope, which is of course a set of occupations. The problem we have is subclauses (a) to (c) use a term 'industry' which is undefined in this award and if we go to clause 2 itself, the only sense of the word 'industry' is those industries excluded by the award. In that sense we believe that as in Mr O'Brien's submission, that if you are to agree that clause 2 - Scope, should in fact incur a declaration that - in the manner sought by the applicant, it follows that there are - that there are by virtue of clause 6, employers and employees who could be bound to this award against clause 2 - Scope, and that those subclauses (a), (b) and (c) which use a different term are in fact unintelligent in that form - are defective - for want of a better description - and therefore should be - should be corrected.

If they stand as they stand, they have no meaning and - however the award would remain enforceable against employers and employees by virtue of our previous argument. It's on that basis that we would - we consent to the application and would seek its retrospective application given the significance, and we would suggest that if the commission is of the view there may be some difficulty in making the declaration in the manner sought, that if this matter was to be relisted in respect of matter (c), that perhaps further submission could be invited by the parties in respect of items (a) and (b).

That concludes the submission, sir.

PRESIDENT: Yes, thanks. Do you want to add anything, Mr O'Brien?

MR O'BRIEN: Very, very briefly. The questions raised are, I suppose, that if you share our view as to meaning - the meaning - of subclause - of clause 2 - that the award is an occupational award, then the question is, does the preamble to clause 6 allow you to have regard to clause 2? Our view is that it does. If it does, does that create an imperfection? If it does, in our view, you are able to correct it and that complies with the seventh principle of interpretation.

In the case that you have some difficulty with our view clause 2 on its face, we say that there clearly is some - there would have to be, in your view, some ambiguity in that clause and if there were you would have regard to the decisions of the president relating to the making of those clauses and that

would be in compliance with the sixth principle of interpretation. And we would say that in that alternative circumstance you would come to the same view about clause 6 and would be entitled to proceed as we have outlined earlier. So I just say that for completeness. I know Mr Sertori perhaps hasn't fully referred to that, but I thought it might be necessary to put that on the record just in case.

PRESIDENT: That's very helpful. Yes, thanks, Mr O'Brien. You don't want to react to that, Mr Sertori?

MR SERTORI: No, I've got nothing further to add, sir.

PRESIDENT: Yes. Good. Alright, well thank you for your submissions. I should put on the record for you that I agree with the practical solutions that you're putting forward. I'll need to consider the technical and legal impact of whatever might flow from that and - and work up an appropriate interpretation. In the meantime we'll hear from you, Mr O'Brien, as to the clause - the meaning of the word 'bank' and whether there's any reference to it in the Acts Interpretation Act and/or any other legislation which might be helpful and I'll consider that at the same time. You'll provide copies to Mr Sertori?

MR O'BRIEN: Yes.

PRESIDENT: Very good. We'll adjourn these proceedings.

HEARING ADJOURNED