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TRANSCRIPT OF PROCEEDINGS

O/N 0549

TASMANIAN INDUSTRIAL COMMISSION

DEPUTY PRESIDENT P.C. SHELLEY

T No 10779 of 2003

T No 10794 of 2003

T No 10804 of 2003

T No 10840 of 2003

IMPACT FERTILISERS ENTERPRISE AWARD

Application pursuant to the provisions of section 23(2)(b) of the Industrial Relations Act 1984 lodged by the Australian Mines and Metals Association (Incorporated), the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, the Construction, Forestry, Mining and Energy Union and the Australian Workers Union, Tasmania Branch to make the above award

HOBART

9.15 AM, FRIDAY, 11 JUNE 2004

Continued from 3.5.04

This transcript was prepared from tapes recorded by the Tasmanian Industrial Commission

HEARING COMMENCED

[2.45pm]

PN252

THE DEPUTY PRESIDENT: Thank you. There are no changes to appearances?

PN253

MR FITZGERALD: No changes. I might undertake to try to bring this matter to finality, Deputy President, if I could?

PN254

THE DEPUTY PRESIDENT: Okay. Yes. But just before you begin, I indicate that we have had a letter from the CFMEU informing us that they do not wish to be a party to the award.

PN255

MR FITZGERALD: That was one of the matters I was going to raise. So I assume that that application will be formally withdrawn?

PN256

THE DEPUTY PRESIDENT: We will just close it.

PN257

MR FITZGERALD: Even though it was listed here today?

PN258

THE DEPUTY PRESIDENT: Yes.

PN259

MR FITZGERALD: Okay. Thank you. That clarifies that. It was one of the matters which I was going to clarify with you. Deputy President, I have provided you with a copy of the final award, which has had some changes, and I am sorry that we are going to have to provide it to you today, but in the main I think it reflects the - well, it does reflect the agreement between ourselves, the AWU, and the AMWU, although Mr Flanagan just wants to put some reservations in respect to that, given his time constraints.

PN260

But since the matter was last before you on 3 May, the company and the AMW met, I think, in accordance with the directions you gave. In my view, both parties displayed a great deal of good faith and agreed on some changes which have been included in the document before you. Those changes have also been made known to the AWU and, in our view, they don't materially affect the former agreement we reached with the AWU, but again I think they have some reservations about - in terms of time period, but I don't expect there will be any issues.

PN261

THE DEPUTY PRESIDENT: The document you have just handed up, we will mark that R1. So we will all know which one we are talking about.

EXHIBIT #R1 COPY OF FINAL AWARD

PN262

MR FITZGERALD: Yes. I didn't want to go and rehash all my previous submissions. I think that is unnecessary, but I would like just to add the following additional submissions. Deputy President, as you would be aware, wage fixing principles in this Commission in the making of the first award, and this is the first award. As you are aware, Impact Fertilisers is the only major producer of fertilisers in this State - manufacturing producer. There are others obviously who distribute.

PN263

Much like some of the other enterprise awards within the Commission. I talk specifically of the two Pasmincos or now Zinifex, Australian Cement, which is Goliath, and Temco. Again, they are the only - although Pasmenco, Rosebery, is not the only mine as such, but certainly those other three are the only ones making those particular products. Now, that is consistent - that is significant for a reason which I will come to later. So the existing - contemplates the existing rates and conditions is the principle which this Commission must be guided by.

PN264

That was the principle which the parties were guided by. We translated that into a more colloquial expression calling it no pain no gain, and that was the principle which the parties in fact agreed to embark on this process. So after - and I must admit I wasn't involved in the earlier days, but I am told that this process has been going on for at least a decade. So it is very pleasing to be before you today with a consent position - what we believe to be a consent position - of the document before you. It provides, in our view, a plain English, clear document for employees and the company to be able to embark on any future enterprise bargaining exercise. And it clearly encapsulates the practices and customs, rates and conditions which apply to Impact Fertilisers' Derwent Park plant.

PN265

There are certainly - and we are very pleased to also advise and Mr Baker can confirm this, that the proceedings before the Australian Industrial Relations Commission initiated by the AMWU have been withdrawn, and what this does is provide some distinct advantages, practical advantages in having the operational people - we know and I think we have already stated that clerical and managerial staff obviously aren't included in this document. But to have the major component of the production workforce and the maintenance workforce covered within one document, that is both practically sound and also provides a basis for any future negotiations, which I think is again consistent with the principles of single bargaining units and the like. I just make the point, Deputy President, that we did negotiate this as a package.

PN266

Our preference is that the Commission - and there is one reservation obviously which I will refer to in a minute. Our preference is that the Commission endorses the package - the complete package. It may provide some practical difficulties if parts of the package aren't ratified by the Commission. But I would like to address you particularly on the stand-down clause, which I know has been raised by the union in earlier proceedings.

PN267

THE DEPUTY PRESIDENT: Yes. Now, which clause number is it?

PN268

MR FITZGERALD: It is in the contract of employment clause, Terms of Engagement, which is - - -

PN269

THE DEPUTY PRESIDENT: Part II, clause 6?

PN270

MR FITZGERALD: Where are we? Sorry, I am a bit slow this morning. It is under 6.10, page 4. And you will note, Deputy President, that there is a major condition placed on this clause and that is the second paragraph, which I quote:

PN271

Prior to the application of this clause by Impact, the parties to this award will meet to examine practicable alternative outcomes other than the standing down of employees. Where such outcomes cannot be agreed, the matter shall be referred to the Tasmanian Industrial Commission for settlement.

PN272

So we think that provides, you know, a very clear - and this is one which the AMWU raised - and I think that was always our intent anyway. It was never our intent that we would use this capriciously or unjustifiably. It was always our intent that it is very much a last resort, and that waiver I think in fact covers that situation.

PN273

THE DEPUTY PRESIDENT: So when you are talking about any day? So does that mean that there must be a breakdown for a whole day before the clause kicks in?

PN274

MR FITZGERALD: That is I think the normal practice with stand-down clauses, and the stand-down clause of other awards of this Commission, Deputy President. Just prior to going aside - just keeping in sequence - there are a couple of things which I just wanted to put on record, which I think we have already indicated the union would be doing that. And that is the issue of the safety net adjustment, and it - I think I just want to acknowledge the submissions made by Mr Flanagan on the last occasion - sorry, not the last occasion, the occasion prior to that.

PN275

At paragraph number 102 and confirmed that even - the safety net decisions of this Commission, Impact acknowledges the wage rates and allowances may be adjusted in accordance with safety net adjustments decisions of this Commission and the obligation is to either pass any adjustment made to wage rates and allowances as a consequence of the respective future safety net decisions or perhaps all of those, and I think that is a major - it all goes against any over-award amounts. And that is a basic principle which Mr Flanagan has already put on transcript and we just simply want to acknowledge that, that that is our position as well. That certainly in the event of the most recent safety net adjustment which is I think yet to come before the Commission, I haven't seen that yet, but - - -

PN276

THE DEPUTY PRESIDENT: There is no application as yet.

PN277

MR FITZGERALD: But certainly, you know, if there is any annual adjustment made prior to that, then certainly we would see that as fully absorbable. Equally, with allowances, you know, any adjustment made as a result of that wage increase, the same would apply with allowances, but we don't see any facility to be able to bring allowances up to - if I could call it - rates which apply in other awards. That would have to be through a process of future discussions, I would suggest. Just moving back - in the other clause. I just want to put on record and again I think it is something which the unions - we did indicate the unions would put on record. Clause 16.4 is somewhat of an odd one, but again we acknowledge the principle of no gain no pain. Impact have - for whatever reasons - it appears an administrative oversight - have, if you like, double-counted the leave loading by applying the shift loading plus 17-and-a-half per cent and as you would be aware, Deputy President, it is something which usually either or.

PN278

We have maintained that process that we - we just want to put on record that in fact that is something which, in our view, is an anomaly and at the earliest opportunity we would see that that matter be rectified without any requirement to have, if you like, to have some sort of monetary compensation because of that, because the fact that it is in fact an anomaly and employees have been receiving the benefit of that anomaly for some years now. So that is in the other matter I wanted to put on record.

PN279

In respect to - going back to the stand-down clause, and the Commission has suggested in the first hearing, that it may be ultra vires the Act. In our submission, as I indicated, there are a number of reasons we, respectfully, do not agree with that and we would seek to persuade you to our view. Clearly, the stand-down clause as you have just looked at addresses circumstances far different to those which are provided by section 50(a), and to some extent maybe we have partly got it wrong in terms of title. We have talked about power to stand down without pay. In my view, it is almost stand aside without pay. And those are circumstances where the employee refuses to carry out all or some of the duties, and that is very different circumstances to ones which have been addressed by clause 12.4 - not clause 12.4 - the clause we just read - sorry.

PN280

THE DEPUTY PRESIDENT: Six ten.

PN281

MR FITZGERALD: Six ten - sorry. I don't know why I had 12.4 in my mind? Where circumstances which are clearly beyond the control of the company as a result of any breakdown or any stoppage which the employer cannot reasonably be held responsible. So we see those as quite different. We believe that there are precedents within this Commission and a - I haven't done a fully exhaustive check, Deputy President, but I checked just in alphabetical order the first five awards of this Commission and I will present them as an exhibit.

PN282

I just copied the particular clause and titled them in my own hand writing. But four out of the five awards - first awards of this Commission, in alphabetical order, in fact have a stand-down clause, not precisely the same as this, but the impact is, or the outcome is exactly the same. In fact, Temco have quite an innovative stand-down clause, which I think Mr Flanagan and Mr Baker would be

aware of, that you can actually stand down in case of misconduct, which is quite a different circumstance, but nevertheless there is a stand-down clause there. Significantly, and I think I am right in this, all the other enterprise awards of this Commission, being Temco, Australian Cement, Pasminco, which is now Zinifex at Rosebery and Hobart, all contain stand-down clauses. So we say, Deputy President, that - and those clauses have been and those awards have been subject to scrutiny by the Commission on a number of occasions.

PN283

We say that there is sufficient precedent within the Commission itself to endorse it on this occasion. We also say that it is an agreed position by the two unions. As you would be aware, Deputy President, the AWU application was effectively, as Mr Flanagan calls it, the Dead Sea Scrolls, basically just a take of the old EZ award which contained the stand-down provision. Mr Baker's application was briefer than that, but effectively the same and he indicated that it was in exactly the same terms which again endorses - well, includes that stand-down provision.

PN284

So for that reason, we certainly see that this agreement, you know, clearly that was the intent of the applications. It is reflective of a no pain no gain principle. As I indicated, it is a package which we are agreed to, and our preferred position is that the package be endorsed by the Commission as a whole. The additional condition which has been placed following the discussions with the AMWU, I believe, clearly in the case of dispute, which I suppose is always there anyway, but it specifically spells it out that the Commission can endorse and control supervision over that if it is used capriciously.

PN285

But it is certainly not Impact's intention to do that, and that is why we have readily agreed to the additional clause. And as I said it was very much reflective of the no pain no gain principle. So for all those reasons, Deputy President, we would seek that the package - the award package before you be ratified as a whole. It is consistent with the public interest provisions in our view, subject to section 36 of the Act. We have been waiting a long time to get this point.

PN286

Despite the slight hiccup we had on the first occasion, we have managed to be able to resolve that and I acknowledge the role Mr Baker and Mr Hamisch took in that in a constructive way, and I think now I am very pleased to be able to put this document to you and seek the endorsement as the first enterprise award which will apply to Impact Fertilisers. If it pleases.

PN287

THE DEPUTY PRESIDENT: Thank you. Mr Flanagan?

PN288

MR FLANAGAN: Thank you, Deputy President. Deputy President, on the last occasion that I appeared in this matter, the AWU indicated its consent insofar as the application applied to production workers. That remains the position. I understand that since that occasion there have been discussions with the AMWU and arising from that there have been a number of changes which have been accommodated. I understand from the advice that I have been provided with in relation to those discussions that the effect of those changes were not to the detriment of the AWU members employed at the site. I have been provided by the company with an e mail on Friday of last week identifying these changes and

this morning a copy of R1. The AWU in consenting to R1 requests the opportunity to advise the Commission of any concerns that we have within 14 days of today's date and in the event that no concerns are identified, the AWU supports the making of an award in the terms of R1.

PN289

Insofar as the stand-down clause is concerned, we do not ask the Commission to rule on the submissions of Mr FitzGerald. The position that we are in is that the parties to the award have consented to a stand-down clause. If at some point in time in the future there is a view by any party to any award, or any party to all awards that there is an issue about whether or not the stand-down clause contained in this award or any other award of the Commission is ultra vires the Act, then it would be open to such a party to make application to the Commission and put detailed submissions to the Commission so it can give a proper and considered view on that matter.

PN290

As Mr FitzGerald has indicated, there is a package before the Commission. We simply seek that that package goes forward. But we are not able to make detailed submissions in relation to whether or not the stand-down clause is ultra vires the Act this morning, and we don't believe it is necessary for the Commission to rule on that issue in isolation. If it pleases the Commission.

PN291

THE DEPUTY PRESIDENT: Thank you. So you are saying that you want 14 days in which to check R1 and you will then notify the Commission?

PN292

MR FLANAGAN: That is correct. If there were any problems, if you do not hear from us, then the award should be made.

PN293

THE DEPUTY PRESIDENT: Okay. But the operative date would that be from then, or from today?

PN294

MR FLANAGAN: From today.

PN295

MR FITZGERALD: It is a good question. We hadn't addressed that, Deputy President.

PN296

MR FLANAGAN: I would think it is from today.

PN297

MR FITZGERALD: Yes, I would have thought so.

PN298

MR FLANAGAN: No, I mean, it really - it is probably academic, Deputy President, because it has been complied with anyway, so we would see from today would be the operative date.

PN299

THE DEPUTY PRESIDENT: Okay. But the decision obviously won't be issued until after - 14 days after today once you have notified us.

PN300

MR FLANAGAN: Can I just say that we are happy with that course of the 14 days.

PN301

THE DEPUTY PRESIDENT: Thank you.

PN302

MR FLANAGAN: Thank you, Deputy President.

PN303

THE DEPUTY PRESIDENT: Now, Mr Baker? On the last occasion, we were here you had quite a number of concerns in the matter.

PN304

MR BAKER: Issues.

PN305

THE DEPUTY PRESIDENT: Issues, yes.

PN306

MR BAKER: Well, as has been pointed out, since we were last before you, we have had the opportunity of having some very fruitful discussions with the employer and also with Mr FitzGerald concerning the structure of the award. And there were several matters which we were concerned about. One of those was the classification structure. And you will note at that particular clause that we have inserted a provision - - -

PN307

THE DEPUTY PRESIDENT: What is the clause number?

PN308

MR BAKER: At Part III, Wages and Related Matters. That there is a new - that there is an additional paragraph that has been inserted to indicate that the parties to this award, that the trade/technical classification structure may not adequately reflect the competency outcomes as prescribed by the national metals and engineering package. To this end, the parties are committed to a review of the structure prescribed herein and an assessment of the skills held and utilised by the trades technical group will be undertaken.

PN309

And, we view that, Deputy President, it is part of the structure as far as the basis for the discussions which will occur for the enterprise award - sorry the enterprise agreement, which will grow out of the enterprise award. And that because we really are still unclear as to how in fact the current competency structure lines up against the national standards. So it is our view that there will be a review to be undertaken and in fact there has been a letter sent to the AMWU by the company in respect to that issue. That has been indicated - - -

PN310

THE DEPUTY PRESIDENT: Okay. So is that exchange of letter is clear, is it, about outcomes and what happens as the result of the review? This Commission as currently constituted is a little bit nervous about references to reviews and consent documents that don't specify exactly what the outcome of the review might be.

PN311

MR BAKER: Well, we are - we don't know what the outcome will be.

PN312

THE DEPUTY PRESIDENT: What will flow from any review?

PN313

MR BAKER: Well, that I - - -

PN314

THE DEPUTY PRESIDENT: What the intention of the review is? What is anticipated to happen as the result of the review?

PN315

MR BAKER: What is anticipated will happen as a result of the review is that trades people/technical people will be reclassified against the national competency standards. Those competency standards are - - -

PN316

THE DEPUTY PRESIDENT: So that is the intention and that is agreed between the parties?

PN317

MR BAKER: Yes.

PN318

THE DEPUTY PRESIDENT: And that is in the letter?

PN319

MR BAKER: And that is in the letter.

PN320

THE DEPUTY PRESIDENT: And it is now on the record.

PN321

MR BAKER: And that is what will be done. Now, whether - where - how that all lines up at the end of the day, we don't know. Well, there is agreement between the parties that there will - - -

PN322

THE DEPUTY PRESIDENT: But after the review, there will be reclassifications against the national benchmark?

PN323

MR BAKER: Yes, yes. And how that lines up at the end of the day, we don't know. So that is our intention. Now, it is true to say that there are some other things in the document which may or may not be consistent with the generality of the Commission's awards and the safety net. But in this instance, we say to you that this is an award which reflects the current conditions and of employment and the current wage rates. We see this as a first-off instalment in the development of both this award and the enterprise agreement which may flow from it. We see this as a stepping stone in the formation of proper and effective wage and condition determination as far as Impact is concerned.

PN324

It is certainly acknowledged by the parties that this has been a long time coming. From the handshake days when it was parted from EZ till today. But the parties are committed to finalising the outstanding bits and pieces and it is clearly our

intention to be back before the Commission in the not too distant future with an updated document, or documents plural. So therefore, Deputy President, consistent with the comments that have been made previously, we would ask you to endorse the document as we would submit to you that it does not offend the section 36, which is the public interest test, and secondly that it conforms with the wage fixing principles as determined by the Commission.

PN325

THE DEPUTY PRESIDENT: Okay. Now, have you also had a - have you had a chance to check R1 carefully? Do you also require time to - - -

PN326

MR BAKER: I haven't - unless there has been any change to the document that was submitted to us some days ago?

PN327

MR FITZGERALD: No, it is exactly the same document.

PN328

MR BAKER: Then we are content.

PN329

THE DEPUTY PRESIDENT: Okay.

PN330

MR BAKER: We have actually - the document as I am advised has been circulated to our members and they have raised no issue with us in relation to it.

PN331

THE DEPUTY PRESIDENT: Thank you.

PN332

MR FITZGERALD: Deputy President, could I just - actually there was just one literary thing and I am sure it will be picked up when the Commission examines it, but there is a - in clause 10 after C, we inadvertently - - -

PN333

THE DEPUTY PRESIDENT: Okay, page number?

PN334

MR FITZGERALD: Page 11. After clause 10C, there is just a - it was added there for clarification when we were negotiating, if we could just delete that - those words "accommodated for clarification"?

PN335

THE DEPUTY PRESIDENT: Yes.

PN336

MR FITZGERALD: And the only other thing I had, if I could say, in respect to the submission by Mr Baker was the translation process which is referred to - - -

PN337

THE DEPUTY PRESIDENT: Well, can you just submit to us just a new page 11?

PN338

MR FITZGERALD: A new page? I can do that, certainly. Yes, I can certainly do that. I will do that. But the only other process - the only other submission I

wanted to comment on was the one - and we probably should have commented on that in the first instance, but now Mr Baker has raised it, the issue of the national metals and engineering package and the benchmarking required from that.

PN339

There was agreement and Mr Baker can confirm this, if he wishes, that there was out of that process, it wasn't a process of necessarily with the translation process of resulting in increased rates and conditions as a result of that. That was certainly the agreed process. I don't know whether Mr Baker would like to - just to confirm that?

PN340

MR BAKER: Well, as I indicated earlier, I am not - unaware of what will come out of it. It is clearly - was never - it is not our intention to simply use it - use the exercise to jack up the rates, If that is what Mr FitzGerald is referring to?

PN341

MR FITZGERALD: That is right, yes.

PN342

MR BAKER: But at the end of the day, if the people at Impact are found to be undervalued by way of the application of the national policy standards then clearly that will need to be negotiated between the parties.

PN343

MR FITZGERALD: Yes, I suppose the contrary would apply whether someone is overvalued as well? So we place the same sort of condition.

PN344

MR BAKER: No such thing.

PN345

THE DEPUTY PRESIDENT: I think you would be looking at things like absorption if that were the case.

PN346

MR BAKER: There is a provision for such an event occurring in the translation documents as per the national competency standards, which is also actually reflected in the State Metals Award as well.

PN347

THE DEPUTY PRESIDENT: Okay. Well, there is a review going to take place that is referred to in the agreement. There seems to be in the award - there seems to be a slight difference in terms of what the outcomes of that may be. Anyway, perhaps, we are just buying trouble? It may be that it won't present a problem when it happens. I have heard the submissions from the parties and I will be reserving the decision at this stage and will be waiting to hear from Mr Flanagan, but I do indicate that there will be an award and the operative date will be from today's date.

ADJOURNED INDEFINITELY

[9.55am]

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LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #R1 COPY OF FINAL AWARD.....PN262