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TRANSCRIPT OF PROCEEDINGS

O/N 9964

TASMANIAN INDUSTRIAL COMMISSION

DEPUTY PRESIDENT R.J. WATLING

T No 11178 of 2003

RETAIL PHARMACY AWARD

Application pursuant to the provisions of section 23(2)(b) of the Industrial Relations Act 1984 by the Association of Professional Engineers, Scientists and Managers, Australia to vary the above award re wage rates and reasonable overtime

HOBART

10.30 AM, WEDNESDAY, 3 DECEMBER 2003

HEARING COMMENCED

[10.30am]

PN1

MR D. PYRKE: I appear on behalf of the Association of Professional Engineers, Scientists and Managers, Australia.

PN2

MR R. KORN: I appear on behalf of the Pharmacy Guild of Australia.

PN3

MR P. GOURLAY: I appear on behalf of the Tasmanian Chamber of Commerce and Industry Limited.

PN4

THE DEPUTY PRESIDENT: Good, thanks, Mr Gourlay. Mr Pyrke?

PN5

MR PYRKE: Yes, thank you, Deputy President. Sir, I would like to start my submission by seeking leave to amend the application - to propose amendments captured in a revised draft order, I would like to table now, if it pleases.

PN6

THE DEPUTY PRESIDENT: Good, right. We will take that. We will make that A1, exhibit A1.

EXHIBIT #A1 PROPOSED AMENDMENTS TO APPLICATION

PN7

THE DEPUTY PRESIDENT: So this is a variation to the application, is it?

PN8

R PYRKE: It is, sir, it is only very minor, to pick up a typing error that I made. If I could ask you to turn the document over and look at the section headed - or the third part of the proposed variation. You will see there that it goes to the insertion of a new clause, reasonable overtime, a requirement to work reasonable overtime. It is subclause (a), it finishes with the reference to a subclause (d). That is actually incorrect, it should say subclause (e), right, it is that simple.

PN9

THE DEPUTY PRESIDENT: Yes, very simple. Good, thank you.

PN10

MR PYRKE: Sir, there are two broad objectives with the application that is before you. Firstly, we seek to adjust the wages prescribed for pharmacy students and trainees to reflect movement in work value, and secondly, we seek to vary the award in relation to the model clause on reasonable overtime that was determined by the Full Bench of the Tasmanian Commission in matter T10886 in July of 2003. As you can see there are four parts to the revised draft order.

PN11

Part I of the draft sets out the new wage rates proposed for pharmacy students and trainees. If you examine this part of the draft you can see that two new pay points are contemplated, namely the proposed pay points for third and fourth year students. At present the current version of the award only has reference to first and second year for pharmacy students. If you compare the draft order with what is currently applying you can also see that we contemplate increases to the base rate relativity and with the wage rates put the remaining salary points in subclause (a) of clause 1, wage rates, of Part III wages and related matters, so in other words we are proposing to increase the pay rates for students and trainees.

PN12

Now, the proposed increases mirror recent changes in the Federal Community Pharmacy Award and I would like now to table copies of relevant decisions and orders so I can take you through what has happened.

PN13

THE DEPUTY PRESIDENT: Thank you. Make this exhibit A2. We will mark the decision A2.

EXHIBIT #A2 COPIES OF DECISION

PN14

THE DEPUTY PRESIDENT: We will mark the order A3.

EXHIBIT #A3 COPIES OF ORDER

PN15

MR PYRKE: In fact, sir, there are actually two decisions and two orders there, so perhaps we could keep on going.

PN16

THE DEPUTY PRESIDENT: Right. Well, we will mark the ex tempore decision A4.

EXHIBIT #A4 EX TEMPORE DECISION

PN17

THE DEPUTY PRESIDENT: We will mark the order dated 5 June as A5 and you can deal with them in any order.

EXHIBIT #A5 ORDER DATED 5 JUNE

PN18

MR PYRKE: Yes, thank you, sir. If I could ask you to look at exhibit A2 you can see that changes to the pay rates for trainees were determined by Commissioner Smith. The Commissioner's decision was issued on 9 September 2002 and was given print number PR922278 and the order, which is A3, issued on 16 October 2002 and it was given print number PR923737. The changes for pharmacy students also went before Commissioner Smith. His decision here issued on 5 June 2003 and that is exhibit A4. and the order issued on the same day was given print number PR93263 and we have called that exhibit A5.

PN19

Now, if I could ask you to turn please, to exhibit A3, which is the order for the trainees? I would like to make two points. In particular, if I could ask you to turn to page 2 of that order you will see that there is a block there applying to Tasmania and it has pay rates from 1 November 2003 for the first half of the traineeship and the second half of the traineeship. You can see that the numbers proposed there are \$496.80 and \$544.60 and if you compare those numbers to the draft order you will see that the draft order contemplates higher numbers than those.

PN20

The difference in both cases is \$17 per week, which is the amount of this year's safety net adjustment so in other words the order out of the Federal Commission was done for this year's safety net adjustment and proposing that the order that you apply in this Commission would reflect this year's safety net adjustment and hence the difference. Have I managed to bamboozle you completely or - - -

PN21

THE DEPUTY PRESIDENT: No, that is right.

PN22

MR PYRKE: And the second point I would make about exhibit A3 and about this whole situation is that further increases are proposed with effect from 1 November 2004. It is the proposed intention that the further increases should also apply in this jurisdiction following a separate application to be made in the second half of 2004 and I guess what we are talking about is a phasing in.

PN23

If I could also ask you to turn briefly to exhibit A5, which is the order giving effect to the increases to pharmacy students. You can see that here too it is intended that further increases shall apply from 1 November 2004. Again we flag that we contemplate a separate application in the second half of next year. Having highlighted where we would like to go I should tell you how we would like to get there and in particular address you on how the proposed pay increases sit with the wage fixation principles.

PN24

THE DEPUTY PRESIDENT: Yes, before you do that. The Community Pharmacy Award applies to whom in the State?

PN25

MR PYRKE: Pharmacies that are named in it but also members - pharmacies which are members of the Pharmacy Guild.

PN26

THE DEPUTY PRESIDENT: So if they are members of the Pharmacy Guild and they would be bound by this Federal award, what are we doing putting the provision in the State award because it wouldn't apply to anyone?

PN27

MR PYRKE: That is one of the quirks of our system, sir. I - basically, when the Retail Pharmacy Award or its predecessor was on foot, basically the Pharmacy Guild was a - you know, had an interest in that award and that carried forward. I guess it is probably why the TCCI is also - have an interest in the award to cover the interest of people who may not be in the Pharmacy Guild. I mean, that is as best I can put it to you.

PN28

THE DEPUTY PRESIDENT: Yes. So the submissions we are hearing today and the outcome of any successful application would not have application?

PN29

MR PYRKE: That is correct, sir, yes.

PN30

THE DEPUTY PRESIDENT: So why are we putting any provision in the award? Why shouldn't the provision be deleted if it doesn't cover anyone?

PN31

MR PYRKE: Well, not relevant - the answer to that, sir, is that not every pharmacy belongs to the Pharmacy Guild. I guess Mr - Richard can tell you more about that, but that is the reason that we have a separate State award for coming pharmacists.

PN32

THE DEPUTY PRESIDENT: Yes. So - well, righto, I will leave it and I will ask the employer side a similar question. Mr Korn might be able to address me on that issue. I just wondered why we were duplicating something if the Pharmacy Guild was respondent to that Federal award then *prima facie* all those members that belong to the Pharmacy Guild are not covered by this. Even begs the question what reliance should I place on the submission of the Pharmacy Guild today because they are not covered by any outcome of this decision.

PN33

MR PYRKE: That is an observation that it is up to you to make, sir. I guess it is a matter for - you know, the system itself is out of my hands really.

PN34

THE DEPUTY PRESIDENT: Yes. No, I understand that, yes. Good, thank you.

PN35

MR PYRKE: Yes, I would like to address you now on how the proposed pay increases sit with the wage-fixation principles and to that end I have an exhibit to table.

PN36

THE DEPUTY PRESIDENT: This will be exhibit A6.

EXHIBIT #A6 WORK VALUE CHANGES SUMMARY

PN37

MR PYRKE: Sir, exhibit A6 summarises the work value changes on which we rely in making the application. My knowledge of the changes isn't direct but it is through my reading the transcript of the case and also discussing it with my colleague in our Federal office, but having done that and having taken those steps I can tell you that the following - my understanding of what has actually happened. Firstly, the length of the undergraduate course is an issue which is relevant to trainees. That course changed from a three year course to a four year course in the late 1990s and it is a well-established principle of this Commission at least that, you know, if the professional course increases in length that it is inferred that there is an increase in work value.

PN38

For example, in the case of graduates typically a three year course, 125 per cent is the base rate relativity and a four year course 130, although in the case of pharmacy graduates it is 140 but the principle is that if the length of the course changes that there is an increase in work value. Having said that, having said that the course has increased from three years to four, it is our view that subsequent graduates have a greater breadth and depth of knowledge including knowledge of patient counselling techniques.

PN39

Another change on which the parties rely in coming forward today is the introduction of the Quality Care Pharmacy Program. Now, this was introduced by the Pharmacy Guild in 1998 which was after the last time when the pay rates were looked at in terms of pharmacy students and trainees. Under this program pharmacy staff undergo accreditation against a set of industry standards and there is high quality advice and service to the community and can I also say that the program applies to pharmacy trainees.

PN40

In terms of pharmacy students there have been changes to the duties undertaken by pharmacy students I am advised. Pharmacy students increasingly undertake pharmacists tasks albeit under appropriate guidance. In previous days they would be in the pharmacy during their undergraduate years and probably selling cosmetics and things like that, but increasingly now they are actually doing the real work of the business and this is reflected in the pay rates, and these tasks include acting as dispensary assistants and again the Quality Care Pharmacy Program applies equally to pharmacy students as it does to other people in the pharmacy.

PN41

So, sir, they are the points that I am advised form the basis of these proposed increases. Sir, I submit that the changes are genuine, that they apply in Tasmania and that they constitute such a significant net addition to the work requirements as to warrant the creation of a new classification or a upgrading of a higher classification or to a higher classification. In my further submission it follows that this part of the application is consistent with principle 9, work value changes of the current principles.

PN42

I go on to a submission now on how the two extra points of pharmacy students sit with the wage-fixation principles. As you see from the draft order it is proposed that these two salary points should be at 90 and 95 per cent of the base rate. The parties believe that these relativities are appropriate as they neatly fit between the 80 per cent relativity for second year pharmacy students and the 100 per cent relativity for trainee pharmacists and in my submission it follows that this part of the application is therefore consistent with principle 11, first award and extensions to existing awards especially where it refers to the point, 11.2:

PN43

In the extension of an existing award to new work or award-free work the rates applicable to such work will be assessed by reference to the value of the work already covered by the award -

PN44

because the point is that these relativities fit with the other relativities around it. Before moving on to the other parts of the application I would like to address you on the data point for work value changes. My submission here is that the data point which pharmacy trainees should move to 20 August 2002 which is the date of the relevant hearing in the Federal Commission. Pharmacy students have opposed that the data point would be 12 May 2003 which again is the date of the relevant hearing in that Federal Commission.

PN45

Haven't had a chance to discuss this particular point with Mr Gourlay and Mr Korn, but we might be doing a discussion on that but that is my first proposal.

PN46

THE DEPUTY PRESIDENT: So normally when we do a work value case we look at the last time the classification was work valued to look at the changes in the work value from that period to the period under review. What is the period that you are suggesting that it was last reviewed?

PN47

MR PYRKE: Sir, my records aren't perfect but I do understand that when we created the Retail Pharmacy Award in 1996 that that comprehended all - it was a work value and also a structure efficiency exercise at that stage, so I guess it was - - -

PN48

THE DEPUTY PRESIDENT: So you are saying the work value is from the time the award was restructured - - -

PN49

MR PYRKE: Yes.

PN50

THE DEPUTY PRESIDENT: - - - which included at that time any work value changes - - -

PN51

MR PYRKE: Yes.

PN52

THE DEPUTY PRESIDENT: - - - so from 1996 until when?

PN53

MR PYRKE: Look, the matters that I put before you in exhibit A6 were all in place as at the dates that I mentioned previously, it was August 2002 in the case of the trainees and May of this year in the case of the students, but I mean, I haven't actually done a work value application before you previously, and if the date has to be the date of today's hearing you know, I understand.

PN54

THE DEPUTY PRESIDENT: No, no, I am just interested because if the work value case is done at some future date you are going to have to pick up these points.

PN55

MR PYRKE: Yes, yes.

PN56

THE DEPUTY PRESIDENT: Because to do otherwise would mean double counting so I take it for students you are saying from the making of the award in 1996 to 20 August 2002?

PN57

MR PYRKE: Sir, for the trainees, sir, that is.

PN58

THE DEPUTY PRESIDENT: That is for trainees, I mean?

PN59

MR PYRKE: Yes.

PN60

THE DEPUTY PRESIDENT: And for students it is from 1996 until May?

PN61

MR PYRKE: That is right. That is what I put to you, sir, yes.

PN62

THE DEPUTY PRESIDENT: Of 2003?

PN63

MR PYRKE: Yes.

PN64

THE DEPUTY PRESIDENT: Right. Now, given the Federal Commission has made a decision that will affect the bulk of the people in this area in the State, and your draft order seems to indicate an increase and you have foreshadowed that you are coming back for another go at this at a later date, how does that fit with the work value case?

PN65

MR PYRKE: I guess - - -

PN66

THE DEPUTY PRESIDENT: Or are you suggesting that a decision needs to be made on the quantum, the total - the quantum of the increase with a phased arrangement?

PN67

MR PYRKE: Well, I think it is - my understanding of what has happened elsewhere is that people - the industry is comfortable with the rates which are applicable - sorry, ultimately moving to those rates showing from 1 November 2004, but that they wanted the phasing in of the increases so the 1 November 2004 rates are what, I suppose, is judged to be the work value increase but that they want to phase in - you know, the impact of it.

PN68

THE DEPUTY PRESIDENT: Yes, so if you are going to leave this to a separate application are you not going to get into the argument next time about what are you work valuing?

PN69

MR PYRKE: Well, I hear what you are saying, sir. If it is open to us to do it another way I would be happy to do that. Well, I guess I might draw, I suppose, an analogy with the minimum rates adjustment process, so basically when we did structural efficiency exercises we recognised that agreed outcomes, final outcomes were reflective of the totality of work value movements but at that stage we didn't agree - we also phased in the proposed increases.

PN70

THE DEPUTY PRESIDENT: Yes. Well, that is not what this does though, is it? Your analogy is a good analogy and I don't think this application does that. I think this application awards an increase, doesn't it, and being the increase for the 1st of the eleventh '03 and then you are telling me you are coming back with another application to have another go in 2004?

PN71

MR PYRKE: Sir, it was always - in my experience in a few other awards was that that was the way the system works, you know, that you had to phase in the increases - - -

PN72

THE DEPUTY PRESIDENT: Well, I am not - maybe we will go off the record and have this discussion.

OFF THE RECORD

[10.55am]

RESUMED

[11.45am]

PN73

THE DEPUTY PRESIDENT: Let the record show that the parties have had some discussions off the record about the precise nature and standing of exhibit A1. It is my understanding that arising out of the national decision, a decision arising out of the Australian Commission, the parties have agreed on an increase in the relativities for students at the first year and the second year, and they have agreed that two new classifications should be included for students and they be titled the third year and the fourth year.

PN74

It is also my understanding that the relativities have been established for trainees for the first half of the traineeship and the second half of the traineeship, and they are in - those relativities are in line with the relativities expressed in exhibit A1 tendered by Mr Pyrke. Now, it is also my understanding that the parties to this application have agreed to phase in the increases arising out of the agreed relativities that have been established and exhibit A1 is the first step in phasing in the agreement or the relativities arrived at out of the national decision. Now, is that your understanding, Mr Pyrke?

PN75

MR PYRKE: Yes, thank you, Deputy President, that is precisely the situation and thank you for the adjournment and the opportunity to clarify the points that we are putting before you today. I guess what I can add to what you have just put by way of summary another point which is that exhibit A1 sets out the pay rates that we would like to apply now but we are flagging that in moving to the base rate relativities which are shown in exhibit A1 that we need to make a further application next year along the lines of a minimum rates adjustment process.

PN76

THE DEPUTY PRESIDENT: Yes, to fully exhaust those relativities?

PN77

MR PYRKE: That is right, sir, yes.

PN78

THE DEPUTY PRESIDENT: Right.

PN79

MR PYRKE: I think that is all I propose to say in relation to this part of the application, that is the part going to the changes to pay increases. Are there any further questions - - -

PN80

THE DEPUTY PRESIDENT: No, no, I am clear in my mind.

PN81

MR PYRKE: Thank you. I will move on to Part II of the application. In this part we seek to delete subclause (a) of clause 2, overtime, in Part V, hours of work, penalty rates and overtime which is currently in the following terms. Subclause (a) an employer may require an employee to work reasonable overtime outside the rostered ordinary hours as prescribed by Part V clause 1, hours of work. Sir, if I proceed again as proposed we ensure that there is no conflict between this subclause as it currently exists and the reasonable overtime provisions that are the subject of Part III of the application. And, Part III, we seek to insert a slightly modified version of the relevant clause determined by the Full Bench in matter T10886.

PN82

This modification is the inclusion of a cross-reference to the relevant clause dealing with time off in lieu of overtime. In my submission the proposed modification is important as it preserves the effectiveness of a flexibility and it potentially benefits both employer and employee alike. Sir, as the application deals with the model clause we know that the rationale and substantive arguments underpinning it have been fully canvassed by others at another time, accordingly I say no more about this part of the application but than to note for the record that pharmacy employees face all of the pressures referred to by the Unions Tasmania advocate when the matter was before the Full Bench. In my submission it follows that the draft order is appropriate.

PN83

Part IV of the draft seeks to insert a reference to the model clause in clause 2 index at Part I, application and operation of the award. The purpose of this part is simply to signpost what we have done in Part III of the application. I can tell you that I have discussed the application with the Pharmacy Guild, the TCCI and the SDAEA. Having taken this step I understand that the application is proceeding by consent. In relation to the public interest I note that the effect of the proposed variation would be to unify pay rates across the industry in Tasmania.

PN84

In my submission this would be a good outcome and consistent with the public interest. On the basis of this submission I believe that it is open to you to make an order in the terms set out in the application. If you agree I propose that the order would have effect from the first pay period commencing on or after today's date. If the Commission pleases.

PN85

THE DEPUTY PRESIDENT: Good, thank you. Mr Gourlay, have you any submission?

PN86

MR GOURLAY: Thank you, Mr Deputy President. The Chamber is guided in this matter to some extent by the Pharmacy Guild in terms of the application,

with the exception of the reasonable overtime clause which as all the parties here are aware, is becoming a standard variation at the moment and I can confirm for the record that I had brief discussions this morning with Mr Pyrke in regard to that slight change and from my point of view I think it reads more effectively than previous applications to vary the overtime clause because it does take into account the time off in lieu component which you may remember was a matter that I raised briefly at a previous variation.

PN87

In respect to the other submissions made with the variation and the phasing in of the increases I support the submissions made and the assistance guidance off the record provided by yourself, Deputy President, and I thank you for that and I don't believe I have anything more to add to that part of the application. I can - although I will go on and - I think there was a matter in initial submissions that you were raising in respect of whether this is appropriate or relevant to the State award vis-a-vis the Federal circumstance.

PN88

THE DEPUTY PRESIDENT: Yes.

PN89

MR GOURLAY: As I said off the record I have been a bit remiss and I didn't bring my Federal award with me but my understanding of the situation is two-fold in that the State award, when it was originally created, catered for both pharmacists and pharmacy assistants. Since that time the Federal award has been made and that primarily caters for pharmacists.

PN90

THE DEPUTY PRESIDENT: Yes.

PN91

MR GOURLAY: So the State award is primarily used for pharmacy assistants in the State and the Federal award is used for pharmacists. The application before you today seeks to vary the overall classifications and wage relativities for that of a student and of a trainee which in my understanding relates just to pharmacists, not to pharmacy students, so from that point of view yes, the Federal award would prevail rather than the State. The only thing I can say to the Commission is that the Federal award does have an appendix to it of some length which actually individually lists each pharmacy in the various States and Territories of Australia, including Tasmania, and it is a fairly extensive - - -

PN92

THE DEPUTY PRESIDENT: But is the Pharmacy Guild listed?

PN93

MR GOURLAY: I can't say off hand, Deputy President, but it does list individual pharmacies, be they in Hobart, Launceston, Smithton, wherever in Tasmania. If there has been a new pharmacy that has come on board, so to speak, I am not sure whether that is automatically picked up as part of that and therefore by default may fall back to the State award. I can't say that with any confidence but that is the only explanation I can give you.

PN94

THE DEPUTY PRESIDENT: Well, what would normally happen is if the Pharmacy Guild is the respondent to the Federal award then all members of the Pharmacy Guild would be roped in.

PN95

MR GOURLAY: That is right. I am sure they are. All I am saying to you by way of clarification is there is to the Federal award a rather large appendix which lists each individual pharmacy in every State and Territory of Australia. Whether that has an impact on what you are talking about here with the variation of the State award, vis-a-vis the student and trainee classifications, I am not sure. I just thought you should be aware of that.

PN96

THE DEPUTY PRESIDENT: Because the student and trainee classifications would be picked up by the Federal award if the employer was a respondent or the employer was a member of the Pharmacy Guild and the Pharmacy Guild was the respondent to that award.

PN97

MR GOURLAY: I think it is the latter, the Pharmacy Guild is a respondent to the Federal award but the individual agents or pharmacies are listed.

PN98

THE DEPUTY PRESIDENT: As well, right.

PN99

MR PYRKE: That is certainly correct, sir. I guess the purpose of having this common law award would be that not every new pharmacy would be either listed in the Federal award or in the Pharmacy Guild, not every pharmacy is in the guild, some choose not to be, and it is those - that small number of pharmacies who would be affected by this application.

PN100

THE DEPUTY PRESIDENT: Yes.

PN101

MR PYRKE: If the Commission pleases.

PN102

MR GOURLAY: Yes, Deputy President, so I don't have any more to add on that. I don't know whether that helps clarify the situation but - - -

PN103

THE DEPUTY PRESIDENT: No. Well, I was interested because any submissions that were going to be made on this issue by the Pharmacy Guild, and if they were a respondent to the Federal award, you would have to ask who would they be representing here today.

PN104

MR GOURLAY: I think I will leave that to you, Deputy President. If the Commission pleases.

PN105

THE DEPUTY PRESIDENT: Right. Mr Korn, have you got anything to add?

PN106

MR KORN: Just that the Pharmacy Guild has viewed the submission and we are in agreeance with it, that is all.

PN107

THE DEPUTY PRESIDENT: Okay. Well, my earlier comment might be an interesting discussion point after you leave here, Mr Gourlay.

PN108

MR GOURLAY: Yes, it may.

PN109

THE DEPUTY PRESIDENT: Only for this part of the award.

PN110

MR GOURLAY: Yes.

PN111

THE DEPUTY PRESIDENT: Right. Well, I can indicate to the parties I will hand down a written decision in due course. I take it the parties have made no comment in opposition to the operative date suggested by the applicant that if I award in favour that it should be operative from the first full pay period on or after today?

PN112

MR GOURLAY: No, there is no objection from the chamber, Deputy President. As I think I said at the start, we are guided to - we are guided really fully by the Pharmacy Guild.

PN113

THE DEPUTY PRESIDENT: Yes, right. Well, nothing further then I will adjourn these proceedings and hand down a written decision in due course. Thanks for your time.

ADJOURNED INDEFINITELY

[11.58am]

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