



TASMANIA

Tasmanian Industrial Commission

Industrial Relations Act 1984

T No. **9823 of 2001**

IN THE MATTER OF an application by
The Australian Workers' Union,
Tasmania Branch to vary the Quarrying
and Lime Processing Award

Re: to vary Part II - Employment
Relationship and Associated Matters,
Clause 1 - Contract of Employment,
subclause (e)

COMMISSIONER SHELLEY

HOBART, 31 October 2001

TRANSCRIPT OF PROCEEDINGS

Unedited

**(WOULD PARTIES PLEASE READ THIS TRANSCRIPT CAREFULLY)
(ANY QUERIES SHOULD BE DIRECTED TO THE COMMISSION WITHIN 14 DAYS)**

HEARING COMMENCED 9.35am

COMMISSIONER: I'll take appearances please.

MR R. FLANAGAN: If it pleases the commission, FLANAGAN R., for the Australian Workers' Union, Tasmania Branch.

5 COMMISSIONER: Thank you.

MR P. MAZENGARB: PAUL MAZENGARB from the Tasmanian Chamber of Commerce and Industry Limited. If it pleases the commission.

10 COMMISSIONER: Thank you. Well, I don't imagine this will take very long.

MR FLANAGAN: No, it's actually a very straightforward application -

COMMISSIONER: A consent matter.

15 MR FLANAGAN: - by consent, commissioner. If I can just give you some brief background to it. The union received a query from a member of the public regarding the interpretation of subclause (e) Clause 1 of Part II - Contract of Employment, and on reading that provision it became apparent to the union that its current wording could lead to some confusion and I'd seek to tender an extract of that provision - of Clause 1 - Contract of Employment - together with an
20 extract of Clause 1 - Rates of Pay - of Part III.

COMMISSIONER: Thank you. **EXHIBIT F.1.**

25 MR FLANAGAN: Commissioner, if I can take you to subclause (e) of F.1, you'll see that the second sentence commencing on the first line says: *A casual employee for working ordinary time shall be paid per hour 1/40th of the weekly base rate of wage prescribed for the work which he performs plus 20 per cent.*

30 If I can then take you to page 2 of that exhibit, you'll see under the heading Wage Rates, 1. Adults, there is a column headed up, Base Rate, followed by a Safety Net Adjustment Rate with a Weekly Wage Rate. So it's possible that with the reference in subclause (e) to base rate, that an employer or employee might unwittingly work off the rate under the heading, Base Rate, not being aware of the role of the safety net adjustments which has been endorsed by a consecutive number of full bench decisions since 1991.

35 So in those circumstances, what the union is seeking is simply to delete the reference to Base so it is clear that a casual employee will be paid the rate of pay which is prescribed and that simply removes any ambiguity.

40 I think if it was in fact tested by way of interpretation, even with the wording the way it is at the moment, that it would be found that the relevant rate is the weekly wage rate but we seek to remove that ambiguity so that there is no confusion at all, and as I've indicated it is by consent.

45 I do need to indicate to you though, commissioner, and we won't be pursuing it today, but in preparing for the matter it struck us as odd that there's a reference there to 1/40th of the weekly rate rather than 1/38th.

COMMISSIONER: Rather than the 1/38th.

50 MR FLANAGAN: I've checked the award. It is in fact a 38-hour week award so we simply flag our intention to both the commission and the TCCI to make further application to change the reference to 1/40th to 1/38th.

COMMISSIONER: Why could that not be done today? Is that because there's not consent to make that change

55 MR FLANAGAN: We haven't discussed it at all, commissioner, that's all.

60 COMMISSIONER: It seems like a fairly simple matter. I mean it's obvious that this particular subclause wasn't amended to make it consistent with the changes that were made to the award over the years.

MR FLANAGAN: Yes.

COMMISSIONER: And it's simply a matter of fixing up that omission at this stage. Perhaps we can just briefly go off the record.

OFF RECORD 9.40am

65 **ON RECORD 9.45am**

70 MR FLANAGAN: Thank you, commissioner. Commissioner, the union would seek leave to amend the application which is presently before you to include a further variation that the reference in Part II, clause 2, subclause (e), to 1/40th be deleted and in lieu thereof a reference of 1/38th be inserted.

Now, commissioner, we've had the opportunity to discuss that with the TCCI and they have indicated their consent to that amendment to the application.

75 COMMISSIONER: If I could just get that consent on the record I'll then grant leave to amend the application.

Mr Mazengarb, do you agree to that application being amended in the way just described?

80 MR MAZENGARB: Yes, I have no objection from the TCCI's perspective to that amendment, so in addressing both matters put by the union this morning, we agree that there has been some ambiguity with regard to the reference to the weekly base rate as it is reflected in the casual employment clause at the moment. So firstly, we have no objection to that application by the union, and secondly, as I've indicated, in relation to changing the reference to the 1/40th divisor under that clause to 1/38th, again we have no objection to the application to amend the application by the union and subsequent to that agreeing to the submissions they've put relative to that subsequent change to the award. If the commission pleases.

90 COMMISSIONER: Thank you. Mr Flanagan, do you wish to add anything?

MR FLANAGAN: We'd simply like to draw the attention of the commission to Part V - Hours of Work, Penalty Payments and Overtime of the award and in particular clause 1 and it will be clear to the commission when you read subclause (a) there's a reference to day workers working a 38-hour week, shift workers working a 38-hour week and in subclause (c) it deals with the method of implementation of a 38-hour week and if you continue through the rest of those provisions, it's clear that the ordinary hours of work in the award are 38 and it appears to have been a referencing oversight at some time in the past that makes it necessary for us to seek today to change that reference.

105 So in those circumstances, commissioner, we would submit that the application is by consent; that as it simply seeks to clarify and provide for the removal of ambiguity in relation to the base rate and provide for consistency of expression in changing the reference 1/40th to 1/38th, it is consistent with the Wage Fixing Principles, particularly the requirement of the parties to modernise and update awards. Clearly this application is consistent with that principle and we'd further submit that the application does not offend the public interest. It's unlikely that we'll see a rush of other variations flowing from this matter and in those circumstances we'd seek the approval of the commission of the variation sought. If it pleases the commission.

COMMISSIONER: Thank you. Mr Mazengarb, do you want to say anything more?

115 MR MAZENGARB: No, there's nothing else I'd need to add thank you, commissioner.

COMMISSIONER: Well, I indicate to the parties that the award will be varied in the manner sought. It's probably not necessary to state an operative date because really it's just an omission; it has always been

120 the weekly wage rate that should have applied and probably has
always been the 38-hour divisor that should have applied, so it's really
simply tidying up the award.

MR FLANAGAN: Yes, that's right.

COMMISSIONER: So that will be done and the matter is adjourned.

125 **HEARING ADJOURNED 9.50am**