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TRANSCRIPT OF PROCEEDINGS

O/N 0341

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

9.00 AM, WEDNESDAY, 21 APRIL 2004

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

HEARING COMMENCED

[9.00am]

PN1

MR W.J. FITZGERALD: If I could be so bold, Deputy President, may I congratulate you on your appointment, this is the first time I think I have appeared before you and indicate that I appear on behalf of Impact Fertilisers and with me is MR D. FOX and MR J. PEARCE.

PN2

MR R. FLANAGAN: I appear for the Australian Workers Union, Tasmanian Branch and with me is MR I. WAKEFIELD and MR CROSSEN and likewise, Deputy President, we congratulate you on your appointment.

PN3

MR P. BAKER: I appear in all matters on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and with me is MR D. HAMISCH and likewise, Deputy President, congratulations from this applicant organisation.

PN4

THE DEPUTY PRESIDENT: Thank you. Now, who is going to begin? Mr FitzGerald, yes?

PN5

MR FITZGERALD: That is the reason why I got up so I will have the carriage of it, Commissioner - sorry, mistaken already, old habits die hard, Deputy President. Deputy President, you - and I apologise for the lateness but the documents had been circulated I understand between the parties and certainly the union who were principally dealing with the AWU including some circulation, but the documents have also I understand, some three weeks ago been circulated to the AMWU. But we in fact presented a final copy to the Commission late last - well, late yesterday afternoon and I understand you were coming back from Launceston so you have probably had limited opportunity to have a look at that.

PN6

It is the document which we intend to seek your endorsement of today. The basis of the presentation because I suppose of the last minute documentation coming to you, is that the parties are prepared to present that to you on an errors and omissions - minor errors and omissions basis so if there are any matters which through drafting principally the parties have overlooked - of a procedure nature principally - then it is open for either of the parties to actually come back before you. It will be our intention to seek your endorsement of the document here today and as you have probably realised it is somewhat of a momentous occasion, we have got representatives of the company and also representatives of the employees including Mr Crossen who has arrived here today.

PN7

There has been considerable effort put in by the parties, particularly in recent times. The process was somewhat bogged down, but the parties made their best efforts to put some considerable effort to put the whole thing behind us and we had what we call the Rydges Meetings, a bit like the Camp David Accord which occurred at the Rydges Hotel where the parties spent three days locked away

which has produced a successful outcome. So it is somewhat of a momentous day for the impact fertilisers. I have been told that it is some 10 years in the making. It is a bit like the Mining and Mineral Processing Award, but at least today we have a document - - -

PN8

THE DEPUTY PRESIDENT: The first application was in 1995.

PN9

MR FITZGERALD: Right 1995, thank you for that, but I have been told by others who were involved earlier and I think Mr Pearce is about the only one who has that sort of ongoing involvement that it even goes back further. In any event we are here today with a document before you. So I have on behalf of Impact Fertilisers the carriage of these submissions. We are certainly pleased to make these submissions to the Commission and we have presented a draft consent award which as I said was forwarded to you yesterday.

PN10

The document represents an agreed position with the AWU to effectively mirror the existing rates and conditions for all employees engaged by Impact Fertiliser at the Derwent Park site.

PN11

THE DEPUTY PRESIDENT: Is it all employees?

PN12

MR FITZGERALD: Yes, it is.

PN13

THE DEPUTY PRESIDENT: Including clerical and admin?

PN14

MR FITZGERALD: Clerical - sorry, with the exception of clerical and managerial at the Derwent Park site. Those employees have been effectively award-free I suppose - - -

PN15

MR: Bullshit.

PN16

MR FITZGERALD: - - - I am not sure what that comment was about, but no doubt there will be further elaboration about that later - since Impact came into being. But the old terms as we have seen by the AMWU application which is T10794 of 2003 were effectively transferred by the old Electrolytic Zinc Award and if I can just quote from clause 2 of the AMWU application and we did have some question about that at the time, but it does indicate I think, you know, some strong intent on behalf of the AMWU and obviously there will be further submissions in this regard later once the AMWU put their submissions. But the AMWU say in their application and I quote at clause 2 of their application:

PN17

As part of the transfer arrangements and offer of employment by Impact Fertiliser ...(reads)... until such arrangements might be put into place.

PN18

So effectively what that has happened is that those conditions have been strictly an award-free, I maintain that position, but from a contractual point of view those terms of the old EZ Award because it was born out of EZ continued to - and that was reflected in I think letters which were handed to the employees who transferred across at the time. Those conditions continued to occur as reflected by the AMWU application until something else was put into place and that is what we are seeking to do, is put these conditions into place. So I will be interested to see what the AMWU have to say about that given their application later on.

PN19

So what we are doing is effectively putting into place those conditions which have been reflected if you like on a contractual basis since those employees came across from the old EZ company. And what we are seeking to do also is to reflect and encapsulate not only the employment conditions, but the work practices which constituted the contract of employment. Now, there was one issue which we had with the AWU and we put our position on record here and I understand the AWU have a contrary position to put on record.

PN20

It will not affect the document before you, but originally we had in our draft - and we simply put on the record for future purposes, as I said it doesn't impact on the document which is before you, but in our original documentation we had a draft clause which read - and it was clause 3(iv) and you will see there is no longer 3(iv) in the documentation before you, but the clause 3(iv) read:

PN21

The parties embrace the principle of continuous improvement/flexible work practices in accordance with existing custom and practice and acknowledge these principles/existing flexible working practices in the making of this award.

PN22

Now, the AWU felt that that was a matter for the, if you like, the next round of following the making of this award. Impact felt very strongly that - and I will put some submissions on record in relation to that in a moment - but Impact felt that that was because the award was agreed to be made by all parties. When I include all parties including the CFMEU who are obviously not here today, on the basis
- - -

PN23

THE DEPUTY PRESIDENT: They are not listed as a party in the - - -

PN24

MR FITZGERALD: I thought that one of their matters was an application by them, but - - -

PN25

THE DEPUTY PRESIDENT: Well, at 4.4 they are not - - -

PN26

MR FITZGERALD: They are not listed, no, that is right, but I think they were originally here I think in these proceedings.

PN27

THE DEPUTY PRESIDENT: Yes, they were. They had an application in, yes.

PN28

MR FITZGERALD: But it was agreed, Deputy President, that the award would be made on the basis of no pain no gain which was reflecting those conditions. It is Impact's view and we believe that was represented by Mr Wakefield in a meeting with Mr Fox back in 2002, where it was acknowledged that the no pain no gain principle meant encapsulating all the current employment terms and conditions as well as the work practices. Now, we have proceeded on the basis of that and there has been nothing to in any way discount that view up until recently when we came to make the award and we had some argument about clause 3(iv) which didn't eventuate.

PN29

It has always been Impact's view as represented by Mr Wakefield to Mr Fox back in 2002 that there should be some recognition of both employment conditions and existing work practices for the purposes of any future bargaining exercises which the company may embark on. What we say, just so you have some better history of this, Commissioner - Deputy President, is over the past decade particularly in recent years the late Steve Balkham who was general manager of Impact Fertiliser effectively in lieu of discussions with unions or employees direct, effectively awarded unilaterally annual increases to ensure employees actually kept pace with the rest of the community.

PN30

What Mr Balkham did in those days was to take into account what the community increases were including safety net increases and he in consultation with his team and that involved Mr Pearce as well at the time as production manager, he effectively came up with a figure which was in excess of that. It was the intention although no not specifically stated that that increase would take into account both the community wage increases via the safety net or any other means as well as any ongoing flexibilities which existed or also the impact of any increases on allowances.

PN31

It was - what actually happened is that the allowances which applied weren't also increased. So the additional surplus if I can call it that was intended to cover existing work practice flexibilities as well as the allowances. Now, the AWU I understand have a different position. We are somewhat cautious about that position because what we think that means is that the existing flexibilities may be used by the AWU in terms of any future bargaining exercise and the existing flexibilities and the benefit of those would be used to justify any future increases.

PN32

Now, we say that that is contrary to the wage fixing principles and the approaches of the Commission in that the only way any future bargaining exercise can proceed is by taking into account future flexibilities and not past flexibilities, but we put that position on record clearly for the future. And we have indicated to the AWU that we will be writing to them and making that clear for the purposes of the record as well. We see very much that it has been an eleventh hour stand by the AWU to take this position.

PN33

It is somewhat regrettable in our view, but rather than hold the process up today, we have agreed to delete 3(iv) and not proceed with it and proceed in the way which I have just done by putting that statement on record and also writing to the union, to the AWU and not it seems the AMWU to effectively put that position. The document before you represents as I said an encapsulating of all those circumstances that were negotiated between the parties and principally as you know the AWU endorsing the principle of no pain no gain.

PN34

Now, it is a term which we came up with, if you like, we branded - use that as our brand name and I think it was a term which was bandied around quite a bit, but as I said it was always Impact's view that no pain no gain meant encapsulating everything including work practices. It appears that that is not the approach of the AWU, but I will allow them the opportunity to put their position on record. As part of the approach Impact have identified a number of work practices and employment condition flexibilities which I will put on record.

PN35

The list is not exclusive in our view and we reserve the rights to include others if we identify others in the future. For the purpose of the record these matters have been taken into account in the annual adjustments, as I said the Steve Balkham annual adjustments over the years and Impact does not believe they are relevant in any future negotiating exercises. Just for the purposes of the record the ones which we have identified, those examples of flexibilities and we also discussed more recently the inclusion of a carer's leave provision and that has been agreed we would leave that to another exercise, but - - -

PN36

THE DEPUTY PRESIDENT: Well, actually whilst you are on that subject there was something that I was going to raise, is that it appears - or seems to me a little odd to be making a new award that doesn't have provision for carer's leave which has been the subject quite some years ago of a test case in the AIRC - - -

PN37

MR FITZGERALD: I understand that. No, I understand that.

PN38

THE DEPUTY PRESIDENT: - - - a Full Bench decision here and in most cases awards of this Commission do reflect those provisions which are a community standard.

PN39

MR FITZGERALD: I understand that and the union raised it at the last - the eleventh hour as well, but there has been agreement to address that matter in the future. The basis - - -

PN40

THE DEPUTY PRESIDENT: Is there a timetable for that?

PN41

MR FITZGERALD: That hasn't been any specific timetable, but if - I mean there is certainly a commitment which the company can give to the union on that if necessary.

PN42

THE DEPUTY PRESIDENT: And there is also the matter of the reasonable overtime clause as well which is another standard clause.

PN43

MR FITZGERALD: I thought that was actually in there.

PN44

THE DEPUTY PRESIDENT: Is it in there?

PN45

MR FITZGERALD: I think that is in there.

PN46

THE DEPUTY PRESIDENT: I have had a quick look, but I got this very late as you, yourself - - -

PN47

MR FITZGERALD: Mr Flanagan can probably - - -

PN48

MR FLANAGAN: I believe it is in there.

PN49

MR FITZGERALD: Yes, I think - it should be in there.

PN50

MR BAKER: Perhaps I should intervene at this point of time, Deputy President. While you may have received the latest copy very late - - -

PN51

THE DEPUTY PRESIDENT: Yes, so reasonable overtime is in there, yes.

PN52

MR BAKER: I don't have a copy of it at all.

PN53

MR FITZGERALD: Well, we can give a copy to Mr - - -

PN54

THE DEPUTY PRESIDENT: Okay, we will get you one right away and my apologies reasonable overtime clause is in there, but carer's leave we have all acknowledged is not.

PN55

MR FITZGERALD: If I could address first a couple of matters in tandem, the matter of Mr Baker's intervention, up until this point we were not really sure about the position of the AMWU given their indication at the last hearing and I will talk more about it, obviously we will be required to do that later once the AMWU put their submissions and we reserve our rights to obviously reply to the AMWU position, but I am not going to put any matters yet on record in that regard. We did - I understand the AWU provided Mr Baker's union with a copy of the intended award some three weeks ago and I understand that there has been no response.

PN56

Certainly there has been - Mr Flanagan can speak of that, but there has been no response certainly to our organisation on behalf of Impact. The document which was provided at that stage which was following the Rydges meeting, if I can call it that - - -

PN57

THE DEPUTY PRESIDENT: You can call it that.

PN58

MR FITZGERALD: I think it is probably the easiest way if I do, because there was a series of meetings over three days. The document which was provided at that point was not the document which Mr Baker has got now, but it did not differ substantially. There might have been some minor issues which have changed, certainly tidying up issues, formatting issues, those sorts of things, but - and the reasonable overtime clause I think was in there very much so.

PN59

THE DEPUTY PRESIDENT: And support wage clause is in there as well, I was just wondering why carer's leave - - -

PN60

MR FITZGERALD: Why we didn't do a carer's leave?

PN61

THE DEPUTY PRESIDENT: Yes?

PN62

MR FITZGERALD: Well, I think it was something which was raised at the last moment. I mean clearly it is open for the union to make application and we would have to obviously - once the award is made, we would have to then either agree to consent to that clause or oppose it, or vary it, or whatever and it would be difficult of course I recognise that against the fact that it has been subject to a test case. It has been - and I am glad I raised it now, because you were going to raise it anyway and it has been informally applied by Impact at the work place in any event. And that is an example of one of the flexibilities which work, in our view, for the benefit of employees.

PN63

So just to reinforce my submissions about these flexibilities, we say they exist now, they are part of the no gain no pain principle and they should be taken into account in the making of this award and we don't believe they should be used in terms of any future negotiating exercise, but we understand the AWU have a contrary position. We are quite happy for them to put that on record and we don't want it to hold up the making of the award today, but it is very much our position which I have stated on record.

PN64

The other flexibilities which I can just put on record weren't practice-related which again I think should be there on record if we do need to come back in any future time. In terms of trades classifications there is basic cleaning of equipment before repair undertaken which is part of the duties; involvement improving aspects of business including formal improvement teams which involves all employees; delay of meal breaks to best suit the business needs which I think is

actually incorporated in the document, but you know there had been an ongoing practice; operators undertaken minor maintenance tasks; operators acting in trades assistant capacity when required; basic rigging operations both trades and operating, they undertake that; crown ravel replacing on conveyors by operators; painting and gardening by all sections of the crew, so you know, not working in a particular area those days, functions are undertaken.

PN65

Disconnection by operators of FSA fly lines which need to be unblocked; operators changing wires on granulation drum; removing conveyor covers; removing and replacing guards; operating and greasing mobile equipment; using computerised control system such as CYTEC; computer work on ordering parts. So they are generally of a work practice nature, but they are all practices which are currently undertaken, there may be others and as I said we reserve our right with respect to identifying those. We have done a fairly exhaustive exercise and that is what we have come up with and we just put those on record for the purposes of future bargaining exercises.

PN66

As I said, Commissioner, since the last hearing the parties, not always the AMWU, but the parties have met on numerous occasions and invested a great deal of time and effort. There has been a, dare I say, a great deal of mutual faith displayed by both parties, even the supplying of lunch by Impact for the purposes of keeping us all in one place. I have a chronology of events which I can use if necessary, but I think it is probably not necessary at this point in time depending on what the other parties say.

PN67

I certainly reserve my right to just go through that chronology just to demonstrate to the Commission the number of meetings and the various positions of various parties which were taken during the course of the discussions since the matter was last before you. I wasn't intending, although you have already taken me to some matters within the document, I wasn't intending to take the Commission through each provision, but obviously the Commission has raised some issues with me and may have some others which I am happy to answer.

PN68

The document and one feature of the document is it is user friendly in format, it complies generally with the Commission's format, there is some changes in numbering, but we think it is in fact an improvement on the Commission's format, with the clause numbering, but the parts I think are there. I am not sure whether you would agree or not, but we think it is a document much easier to follow than some of the Commission - - -

PN69

THE DEPUTY PRESIDENT: I have no problems with the way it is set out.

PN70

MR FITZGERALD: Thank you. The document is in our view in accordance with the Commission's first award principle and as you would be aware prima facie, and it is prima facie reflecting existing rates and conditions and I suppose that is again consistent with the AMWUs application which doesn't provide any detail, but it does talk about reflecting the existing rates and conditions which

were transferred across when Impact came into being after coming across from the old EZ company. The document is consistent with the public interest and obviously before you make any award or agreement the Commission must be satisfied pursuant to section 36 that the document is in accordance with that section.

PN71

In our view I would submit that it is very consistent with the Act to finally have an award on an enterprise basis and I just stress that, it is not an industry award it is an enterprise award. It is the only enterprise of this type in this State. There may be some small manufacturers, I think I am aware of a small fertiliser maker out of seaweed, I think, but a major commercial undertaking in this State - the only major commercial undertaking in this State is Impact Fertilisers.

PN72

THE DEPUTY PRESIDENT: But this only applies to the Derwent Park site?

PN73

MR FITZGERALD: It does apply only - - -

PN74

THE DEPUTY PRESIDENT: Impact Fertilisers as I remember from the inspection and discussions has got people employed in other parts of the State.

PN75

MR FITZGERALD: They have, but the agreement was that - and they are not involved in the manufacturing process, it is the manufacturing process which we are involved with and that is the Derwent Park site, Commissioner - Deputy President. I will get it right eventually I am sure by the end of my submissions. We say that it is in the public interest to have all those employees at the Derwent Park site engaged by Impact excepting those managerial and administrative employees to be covered by an award. Conversely, it is not in the public interest for those employees or a section of those employees to be award-free.

PN76

I know that it is very much the approach of the Commission to accept that principle that on the face of it employees have the right to be covered by awards of this Commission. I am struggling to think of any particular areas which would be award-free. I know one which I was involved with some years ago which was one of the last, was private school teachers and I know they have awards, but generally most employees and I could be wrong here and I don't have a broad knowledge of the totality of industry, but most employees would have the benefit of being covered by at least a base award. And that is what we are providing to all those employees of the Impact site.

PN77

We would believe that it is very much in the interests that this award is made here today, with the Commission to reserve their decision and obviously it will depend very much on what the other unions say, but there was always an intention of the parties, of all the parties to seek an award. And that has been evidenced by the fact that every party around this table have in fact made applications in various formats, but those applications are live applications, they haven't been withdrawn. It was always Impact's intention initially to invest their time and effort in the

making of an enterprise agreement, but the unions - all the unions, clearly made their position known that their intention was to make an enterprise award.

PN78

The company as a result changed their position and accepted that view and have in good faith spent a lot of time and effort negotiating principally with the AWU in recent times, but in earlier times with the three unions including the CFMEU and the AMWU.

PN79

THE DEPUTY PRESIDENT: With the CFMEU?

PN80

MR FITZGERALD: Yes.

PN81

THE DEPUTY PRESIDENT: Their application 10840 or 10804 - there is a discrepancy with the numbers here, has been changed to today's proceedings.

PN82

MR FITZGERALD: Yes.

PN83

THE DEPUTY PRESIDENT: Now, they are not here.

PN84

MR FLANAGAN: I wonder if I could deal with that, Deputy President? Deputy President, the position is that there was a carpenter which was employed by the company on site who was a member of the CFMEU and therefore you will see in the AWU application in these proceedings the CFMEU was identified as a party. The company subsequently restructured its operations and no longer employs a carpenter and therefore is not able to satisfy the award interest test established by the Act. So that may explain why they have not appeared today. I haven't discussed it with them in any detail, but that position is a factual accuracy.

PN85

THE DEPUTY PRESIDENT: Yes. The notice of hearing that went out has transposed numbers and it refers to T10804 and it is actually T10840, however, the hearing notice states clearly that it is for the making of the Impact Fertilisers Enterprise Award, so I don't think it can be argued that it was simply that they didn't know. So you are saying that they have got no interest. I am satisfied that they have been served despite the error in the number - in the T number.

PN86

MR FLANAGAN: Yes. Under the Act they have to have a member within the constitutional rules to demonstrate award interest.

PN87

THE DEPUTY PRESIDENT: And they are not here - - -

PN88

MR FLANAGAN: And they don't have that.

PN89

THE DEPUTY PRESIDENT: And they can't demonstrate it. Yes.

PN90

MR FITZGERALD: I thank Mr Flanagan for that. I would certainly endorse that submission as well. So - and I agree with you, Deputy President, the notification procedures despite the numbering inaccuracy I don't think should be a barrier. We can say that it seems very soon after the restructuring which Mr Flanagan spoke of, the CFMEU didn't involve themselves in any discussions. So we - and they didn't specifically communicate as to why they had withdrawn, but they just basically faded away if I can put it that way. We assumed because of that restructure that they no longer had an interest and we are certainly not aware of any member, and that is the reason why they have been deleted from the document.

PN91

As I said it is our intention to move that the award be made today. The intention of the parties as I indicated which was stated back in 2002 was that an enterprise award should be made for the purposes of providing a, if you like, a platform for future bargaining and negotiating exercises. That is what this document does before you. If you like the main game is yet to come, but we believe it is very much in the public interest that the document before you is endorsed and approved by the Commission with an operative date as today's date. I would complete my submissions there unless you have any questions, but I would also reserve my right to - and I don't think I want to be laborious about this, but I don't want to reply to the statement regarding the delete of 3(iv) I think we have put that on the record enough, but I would like to reserve my right to respond to any submissions from the AWU and/or the AMWU.

PN92

Commissioner - Deputy President, we would have quite pleasure I think in putting the document to you and seek, particularly with all those years of discussion, negotiation and recent hard discussions, if I can call it that, but friendly - hard, but friendly discussions and in good faith discussions, I would seek the Commission's approval of the document before you. If it pleases.

PN93

THE DEPUTY PRESIDENT: Thank you. Mr Flanagan?

PN94

MR FLANAGAN: Thank you, Deputy President. Deputy President, at the outset I need to indicate that the AWU will need to seek to be excused from the proceedings at approximately 10.30 am this morning due to other commitments. So I don't think anything turns on that, we can very clearly indicate our position on matters raised by Mr FitzGerald. I think at the outset I need to indicate that to the extent that the award relates to production employees, the AWU seeks the approval of the award by the Commission. If I can just go back to the history of the matter, as Mr FitzGerald has indicated to you - before I do that, there are approximately 30 production employees engaged by the company at their manufacturing operations.

PN95

The AWU application initially also sought to regulate employees in depots. An investigation of that matter has identified that in fact we do not have any members in the depots, therefore if they want to sign up we may then consider

seeking to extend the award to them. But in those circumstances the award only applies to the manufacturing operations. Now, the history of it is that the employees at the time in the early 1990s were engaged by Pasminco and worked under the terms of the Electrolytic Zinc Award. Impact Fertilisers purchased the business from Pasminco and as Mr FitzGerald has read out to you provided employees with a letter indicating that the award conditions would continue to be in accordance with the Electrolytic Zinc Award.

PN96

Now, in fact the relevant instrument that they were referring to was order number 1 of 19992 which during negotiations between the company and the union we have respectfully referred to as the Dead Sea Scrolls. Now, I guess that is indicative of the fact that the drafting and expression contained in the Dead Sea Scrolls reflects the industrial environment very different to that which we are dealing with today. An employer very much more focused on one specific aspect of the business rather than the broad and diverse considerations that Pasminco had.

PN97

It was also an industry award whereas what we propose to make is a site-specific enterprise-specific award. Now, the difficulty is that that letter was out there and was not enforceable within the industrial jurisdiction. It was and has been the AWUs position that the arrangement was enforceable at common law. However, that argument was never tested. Now, the AWU has indicated to the company that we wish to pursue enterprise bargaining on behalf of the employees and it was agreed in principle with the company that the matter would be dealt with in two stages. The first stage would be to establish an award on a no pain no gain basis which is the matter which is before you today.

PN98

THE DEPUTY PRESIDENT: So you actually mean by that no pain and no gain, with the and being the important part?

PN99

MR FLANAGAN: That is correct. The intention was to redraft the Dead Sea Scrolls to give effect - - -

PN100

THE DEPUTY PRESIDENT: So nobody would gain anything, nobody would lose anything?

PN101

MR FLANAGAN: That is right. Now, there were some changes which were implemented to the award by the company which were not objectionable to employees which have been incorporated into the award which is before you insofar as that relates to production employees. In particular you have been addressed that there were wages outcomes which were granted by the company. Those wages outcomes were identified percentage increase, I believe perhaps some bonuses as well from time to time which went on the actual rate of pay, but were never applied if you like to the work related allowances.

PN102

So what we have done in relation to rates of pay and allowances is apply the actual rates that have been paid for those respective matters at the moment on the basis of the no pain no gain arrangement. One of the issues which emerges from that is a concern by the company that generally pass on to employees a wages increase at June - around the period of June/July of each year and that they would not be wanting to be in position where they pass that wage increase on and then as a consequence of the making of this award were required in addition to pay a safety net adjustment. The AWU has indicated to the company that that is not our intention, that the award will operate as a minimum rates award and they will be entitled if they pass on wages outcomes greater than the safety net adjustment and absorb that adjustment into the wage increases.

PN103

So the process is first that we establish an award on a no pain no gain basis and then secondly that we proceed to enterprise bargaining. Now, as I have indicated the intention of the document before you is to provide a document which picks up the existing award conditions with simplified drafting tailored to suit the circumstances of an enterprise award, rather than an industry award. Now, that final document has been emailed to myself, but I have not been in the office to check that email, so we would reserve the right to check the document which is before you. I am not sure if it has been tendered as an exhibit?

PN104

THE DEPUTY PRESIDENT: No, it hasn't.

PN105

MR FLANAGAN: In fact I - - -

PN106

THE DEPUTY PRESIDENT: Right, we will mark that exhibit A1.

EXHIBIT #A1 DRAFT IMPACT FERTILISERS AWARD

PN107

MR FLANAGAN: We would simply reserve the right to come back to the Commission within seven days if we identify any errors or omissions in A1 that do not reflect the earlier document which the parties have been working through. Now - - -

PN108

MR FITZGERALD: Do you want another copy, because I have got one here if you want it?

PN109

MR FLANAGAN: Have you?

PN110

MR FITZGERALD: Yes.

PN111

MR FLANAGAN: I better have one.

PN112

MR FITZGERALD: I think, maybe I did give it to Mr Baker, I am sorry.

PN113

MR FLANAGAN: Now, Deputy President, at this site the AWU represents the production employees and has negotiated the award as it relates to the circumstances of production employees. The AMWU represents the industrial interests of maintenance employees and to that extent - and to the extent that the award relates to maintenance employees, it is a matter in our view between the AMWU and the company. During negotiations with the company we have made it clear that we are only authorised and can only represent the interests of production employees at this site. So if there are matters, and there are matters within the award which go to maintenance employees the AWU makes no comment on those issues, that is entirely a matter for you to further hear the Metal Workers Union and the company.

PN114

Now, the next point which has been raised by Mr FitzGerald is that in an earlier document it was proposed that there be clause that says:

PN115

The parties embrace the principle of continuous improvement/flexible work practices in accordance with existing custom and practice and acknowledge the principles existing/flexible work practices in the making of this award.

PN116

That is the provision that the AWU specifically rejected and continues to reject. There is also an assertion that the annual pay increases which were paid by the company essentially were some sort of bargain for flexibility in the work practices. The AWU does not see the making of the award or the award making process as a forum to discuss enterprise bargaining and what matters may or may not be relied upon by employees as part of that process. It is not as suggested in our submission an eleventh hour position and we have been faithful to the integrity of the in principle agreement reached between the AWU and the company on the establishment of the no gain no pain award, and that is the process which is before you.

PN117

The examples of the flexibilities in work practices which have been identified by the company today are the first occasion in which they have done so. And I am not in a position to give a considered comment or respond and I am not able to confirm if in fact there is contention as to the practices. Commissioner, you have raised the issue of carer's leave. the bottom line is that the company actually have an arrangement in place in relation to carers leave which is more generous than the State standard.

PN118

There were some discussions about carer's leave and what I indicated to the company is that if we are unable to reach agreement in incorporating that more generous provision into the award today, then we would reserve the right to make an application to vary the award to insert carer's leave provision, and we so do.

Now, there was a suggestion that the AWU provided the award to the AMWU. As a matter of fact, as a matter of courtesy a draft of the document we were working to in March was provided to the AMWU, but that was by way of courtesy, by way of information, the AWU did not ask the AMWU to respond to that document either to ourselves or the employer, it was simply so that they were aware of what was happening in relation to the production workforce given that they have members on that site and given, as I understand it, that the AMWU currently have an application before the Federal Commission and have for some time to take the maintenance employees into the Federal award.

PN119

That - whether they are either State or the Federal is a decision which can only be made by the Metal Workers Union on behalf of the members because they are their members. Now, it is important that the application which is before you is in accordance with the first award principles.

PN120

THE DEPUTY PRESIDENT: Yes, but is it a first award?

PN121

MR FLANAGAN: Yes, it is.

PN122

THE DEPUTY PRESIDENT: What has happened to the EZ Award that is the Dead Sea Scrolls or whatever?

PN123

MR FLANAGAN: The history of - yes, I brought the Dead Sea Scrolls along with me, Commissioner, just in case the issue came up and what occurred number 1 of 1992 said in the clause 2 Scope:

PN124

This award is established in respect of the industry of: (a) producer of electrolytic zinc, zinc oxide, acid and other products of zinc ores and aluminium sulphate; and (b) manufacture of artificial fertilisers.

PN125

It was at that point in time an industry award, but subsequent to that there was a significant restructuring which took place at the Pasminco Hobart Smelter in early 1990s, I believe it was '93 or '94. The Electrolytic Zinc Award was converted from an industry award to a site-specific award specifically to employees of Pasminco at the Risdon Smelter site. So the effect of that was in an industrial sense to make the employees engaged in manufacture of artificial fertiliser award-free.

PN126

MR FITZGERALD: Deputy President, do you want me to respond to that now just in terms of sequence, it might be easier rather than coming back to it?

PN127

THE DEPUTY PRESIDENT: I will let Mr Flanagan finish and then you can respond.

PN128

MR FITZGERALD: Okay.

PN129

THE DEPUTY PRESIDENT: And Mr Baker speak first and then you can respond after that.

PN130

MR FITZGERALD: That is fine. No, I was just trying to make it easier, that is all.

PN131

MR FLANAGAN: So in our view, yes, given that history it is a first award and the first award principle is appropriate and prima facie that principle requires, as the parties have done, that the existing conditions be reflected in the award and we say that the award insofar as it relates to production employees is consistent with that principle. We are not aware of whether it does or does not in relation to the maintenance employees as it is none of our concern.

PN132

Insofar as it relates to the production employees we also submit that the award does not offend the public interest. In those circumstances we would support the establishment of the award as identified in relation to production employees with an operative date of today's date. If it pleases the Commission.

PN133

THE DEPUTY PRESIDENT: Thank you. Mr Baker?

PN134

MR BAKER: Thank you, Deputy President. I have sat here for the last almost an hour listening to at times almost submissions which arise almost from wonderland. When this matter was first before the Commission I do recall Mr Flanagan presenting a document in similar terms to the one that is before you today and Mr FitzGerald was - Mr FitzGerald castigated Mr Flanagan for putting up such a document. And here we are having done the complete circle, we have got a document that is before the Commission in similar terms to the one that was being proposed by Mr Flanagan over a year ago now. And not only is he supporting it, but he is enthusiastically recommending it to the Commission for endorsement. Not consideration, but endorsement as at today.

PN135

Today, it must be registered today. And it has followed on from many, many, many, many, many meetings. Many meetings to consider a document as Mr Flanagan has explained to the Commission was written literally in 1992. And here we are a dozen years on and we are asked to give our consent to a document that was written in 1992 language which is okay, but I would strongly suggest to the Commission does not in fact represent the current conditions of employment. I note quite strongly Mr Flanagan's submission that the document only relates to - or as far as his view is concerned that it pertains only to - his comments are directed towards production employees only and yet there are classifications contained within the document which relate to metal tradesmen and other persons that we would consider would fall within our scope of membership.

PN136

Deputy President, we would suggest to you that under section 21(1)(ii) that in fact the proceedings in this matter be discontinued as they are not in the public interest for it to be proceed. And that is a statement which I do not make lightly because these are employees who are award-free. They are award-free and have remained award-free for some considerable time. We have sought to regulate the conditions of employment and the wage rates of our members at Impact through the negotiation stage that has proceeded over the last 12 months. We found that that position had become intolerable and hence we sought to move to the Federal jurisdiction.

PN137

That matter was due to be heard before Commissioner Blair of the Australian Relations Commission this Friday, but due to Mr FitzGerald's inability to prepare submissions that matter has now been deferred to three or four weeks.

PN138

MR FITZGERALD: I think you should correct that, my son. In terms of time inability is not the issue.

PN139

MR BAKER: Well, it may have something to do with your submission this morning about the making of the award as at today. But insofar as the document purports to raise issues pertaining to trades people and technical employees at Impact, we would say to you that this document does not in fact apply to anyone. No-one. I was interested in Mr FitzGerald's comment that clerical employees are in fact award-free. This is one of the constant concepts I have with the Australian Mines and Metal Association who simply refuse to acknowledge that there are awards of this Commission which operate other than industry or site-specific awards.

PN140

As you are and I am well aware there are industry - industry of the employee specific awards such as the Clerical and Administrative Employees Award which would certainly have application at Impact. If they were to employ a draftperson or a technician they would be covered by the Drafting and Technical Officers Award. And there are other awards of this Commission that would equally apply. So there are other employees who have been excluded by the operation of this award.

PN141

THE DEPUTY PRESIDENT: Well, the Act actually does say that an enterprise award can apply to all or any private employees employed at an enterprise, it doesn't have to cover them all.

PN142

MR BAKER: I understand that, Deputy President, but if you were making an enterprise award why would you not extend it to the whole of the workforce and not just parts of it? But without getting into the scope of the purpose and the background of it, let us have a look at some of the applications that my organisation that is being asked to consent to this document today as I understand it - - -

PN143

THE DEPUTY PRESIDENT: And I take it you are not?

PN144

MR BAKER: Clearly not. And that is why I am saying to you that the application before you today ought to be dismissed because under point 6(i) we have this extraordinary probation clause.

PN145

THE DEPUTY PRESIDENT: That people can be dismissed at the end of the probation period?

PN146

MR BAKER: Yes. Which we would simply not agree to in any circumstances. In no circumstances at all. Then at point 6 point 7 there is a stand down provision.

PN147

THE DEPUTY PRESIDENT: Yes, if machinery breaks down they can be stood down without pay.

PN148

MR BAKER: I mean that is absurd. I mean it was all right in 1992 or in 1971 when the old Electrolytic Zinc Award was in operation, but that has no relevance in today's society. And we are talking about us all being one big happy family, but the first sign that a fuse blows out well we can send employees home. The
- - -

PN149

THE DEPUTY PRESIDENT: But this all goes to whether or not the first award principle applies doesn't it?

PN150

MR BAKER: I am sorry, Deputy President?

PN151

THE DEPUTY PRESIDENT: This goes to whether or not the first award principle applies.

PN152

MR BAKER: Well, that is correct, but I am - but in the making of an award - well, let us just take that issue as it stands now. There is no right for this employer to stand down an employee. They have no right at common law to stand down an employee because something breaks down on their site.

PN153

THE DEPUTY PRESIDENT: I don't think they have got a right under the Act actually.

PN154

MR BAKER: So even if they were making the first award, the first award principle in this case does not apply.

PN155

MR FITZGERALD: If I could just - - -

PN156

MR BAKER: No, sit down.

PN157

MR FITZGERALD: If I could just assist the Commission without being rude and told to sit down. Just in terms of your query about - - -

PN158

THE DEPUTY PRESIDENT: If it is to assist or clarify that is fine, but if it is to respond or make submissions it is not.

PN159

MR FITZGERALD: No, no, it is to assist you, it is in response to the question you raise.

PN160

THE DEPUTY PRESIDENT: Whether the Act allows it?

PN161

MR FITZGERALD: Yes, that is right. There is no right to stand down, I would agree on that. There is a right under section 50A to stand aside where employees refuse to do their duties - - -

PN162

THE DEPUTY PRESIDENT: Where they are applying bans, yes, but that is the only circumstance.

PN163

MR FITZGERALD: So if Mr Baker can recognise that and I am not trying to be difficult, I am just simply trying to assist the Commission.

PN164

THE DEPUTY PRESIDENT: Thank you. Well, which raises the question of whether or not I should be approving an award that has something that is contrary to the Act.

PN165

MR BAKER: Correct. And then of course we can move to Part 3 which is Wages and Related Matters and it talks about wage rates and classification descriptors.

PN166

THE DEPUTY PRESIDENT: Sorry, what page are we on?

PN167

MR BAKER: 10.

PN168

MR FLANAGAN: What clause?

PN169

MR BAKER: Part 3 Wages and Related Matters, clause 7.

PN170

THE DEPUTY PRESIDENT: Clause 7.

PN171

MR BAKER: Now, as Mr Flanagan indicated his organisation is wholly and solely dealing with production employees so I shall confine my comments to trade, technical person classifications. And there is this structure there which goes from grades 1 to 10. There is a training matrix of points. There are equivalent qualifications and then there is a series of wage rates attached. At the bottom of it Module 1 refers to modules from the appropriate associate diploma course and Module 2 refer to modules from a relevant tertiary institution's training syllabus.

PN172

I have no idea what they are and in fact there seems to me to be no modules that refer to trades people. And as you may recall from submissions I have made in other matters before this Commission, there are no such things as modules any more. Associate Diploma is a title which no longer exists within the training institution in the State. I mean they are only sort of minor things, but I don't know what for example B Modules 1 are, 175 training matrix points. Now, it is an old system that came out of the Pasminco - the old Electrolytic Zinc Award in the 1980s and was totally discredited. Was totally discredited.

PN173

MR FITZGERALD: Who by?

PN174

MR BAKER: And it no longer exists, but we are going to put in a training matrix that has no relevance in this State whatsoever. No relevance whatsoever. And then we have apprenticeship rates, not consistent with the State requirement. There is a standard trade rate - sorry, I better rephrase that. There are standard apprenticeship rates that apply in this State, they do not equate to that. Again, it is drawn from the 1951 edition of the Electrolytic Zinc Award. And Robert has actually - sorry, Mr Flanagan is understating where some of these allowances and bits of pieces came from out of the old Electrolytic Zinc Award.

PN175

Some of these clauses you will note will go back to the 1920s when the award was first made. We would also suggest to you that the superannuation clause is inadequate. Two lines is simply not enough, there is a standard clause which the Commission uses in relation to superannuation and this does not reflect that. There are allowances, monetary allowances which quite frankly are out of date, they bear the 1992 equivalent. And I notice Mr FitzGerald makes a comment in relation to that, but for example, Deputy President, the tool allowance is \$5.17. Now, I understand that the current tool allowance that is floating around our State awards is around the \$10 mark and the trade technical allowance is at over 11, but we won't go into that.

PN176

There is issues in relation to shift allowances which I will - I won't comment on at the present time, but there is clearly an issue with those. There is the issue of the hours of work. The hours of work are specified in two areas, but the working week goes from 6.45 through to 6.45 but the daily spread of hours is from 6 until 6, perhaps somebody might be able to explain how all that works. Clearly that is an old hang-over from Pasminco, but of course if you just pull out various lines

out of one award and stick them in the other without reflecting the whole of the provisions, you finish up with what you have before you.

PN177

And likewise the whole of the hours of work clause under clause 13 is a mix-match of - well, it is just dreadful drafting because it doesn't refer to - it is not consistent. It talks of hours and days and weeks, there is no consistency. And of course there is this gem that appears in the last paragraph:

PN178

Except for the changeover of shifts an employee will not be required to work more than one shift in each 24 hours.

PN179

Well, if you happen to work a 12 hour shift and you have changed your shift over, you might actually be having to work 24 hours straight. Now, clearly that is not the intent of the clause, but that is what it says because no attention was paid to the drafting of the clause.

PN180

THE DEPUTY PRESIDENT: Okay. Well, I mean clearly there is not consent in relation to this application. Mr Flanagan has to be somewhere else at 10.30. You look as though as you have got a fair way to go yet?

PN181

MR BAKER: A fair way, yes.

PN182

THE DEPUTY PRESIDENT: Yes. And I would suggest that we adjourn to another day.

PN183

MR BAKER: I am content with that, Deputy President.

PN184

MR FITZGERALD: Can I just seek some instructions on that, Deputy President, if we can just have one moment?

PN185

THE DEPUTY PRESIDENT: You will want a right of reply to what Mr Baker has been saying?

OFF THE RECORD

[10.20am]

RESUMED

[10.25am]

PN186

MR FITZGERALD: Thanks, Deputy President. Yes just acknowledging where you are and Mr Flanagan's commitment is one which is a bit untimely I would have to say, but nevertheless we all have commitments and I have the same and I acknowledge that he is required to commit to it and we didn't expect that it would

take this long. We would expect that given that it was a consent matter that the matter would proceed. Deputy President, as I indicated in the initial submissions there has been a great deal of time and effort invested in this process. We believe that if an adjournment is to be granted and it appears you will grant one, and I think for those reasons it would be difficult for us to put a case against that today, that the adjournment should be short, preferably this Friday at the latest, or and it will be Friday afternoon in terms of my commitments - my own commitments if that is possible, or early next week at the latest.

PN187

THE DEPUTY PRESIDENT: Okay.

PN188

MR FITZGERALD: Now, if I can - in support of that and I am not in the business of making disparaging comments about making submissions in wonderland as Mr Baker has, and it is not appropriate that I attempt to respond to those, but can I say that in respect to the AMWUs position, even though Mr Flanagan has said on record that the document which was sent to him didn't require a response, in my submission it begs a response. All of these matters which Mr Baker is suddenly coming out with today which in our view is untimely given the processes which were undertaken and the time invested, are matters which could have been raised by Mr Baker or Mr Hamisch three weeks ago when this document was provided to him.

PN189

Now, it is not open for Mr Baker to come and make all of these comments about stand down provisions and apprenticeship rates etcetera at this point when he could have done so three weeks ago. Now, for those reasons we say that any delay which should occur should be minimal. Friday afternoon in my view is the most appropriate time it should be set down. In fact if the parties aren't available then early next week. But we are not happy about the approach taken by Mr Baker, the disparaging remarks he has made when he chose to just absent himself from the process or his union did, and take their bat and go home if I can put it that way, and then come back and throw mud at the other parties. That is the context which it should be considered in and for those reasons the delay should be very minimal.

PN190

THE DEPUTY PRESIDENT: Well, I agree that the delay should be very little, but I am also going to be strongly recommending that all the parties have discussions before it comes back before the Commission. Friday afternoon might not provide enough time to do that and Mr Baker we have a matter at 10.30 on Friday morning which is the making of the Labour Hire Industry Award and do you have any idea how long that matter might go?

PN191

MR BAKER: I hope to talk to the TCCI today, they were going to come back to me this week prior to the hearing, so I will be making contact with the relevant person from the TCCI, but I have got other commitments on this week as well. I mean I think I should point out to the Commission that our position in relation to this matter was quite clear. We believe the negotiations were going nowhere and I am not going to go into all the whys and wherefores, but we made a decision that we would pursue a Federal award coverage.

PN192

THE DEPUTY PRESIDENT: Yes, I think you have already said that on the record today.

PN193

MR BAKER: Yes, and so we are here today because Mr FitzGerald and Impact Fertilisers have sought to rope us into a State award. That is why we are here today and that is why I have responded to Mr FitzGerald in the manner I have. There is no other reason.

PN194

THE DEPUTY PRESIDENT: Okay. But if you do go ahead with the Federal award then it would take precedence anyway once you roped all the employers in.

PN195

MR BAKER: But both you Deputy President with respect and Mr FitzGerald know very well that he is basing an argument pursuant to one section of the Act and that Act depends upon you ratifying that award.

PN196

THE DEPUTY PRESIDENT: Okay. Now, it looks as though Friday afternoon is not a possibility, I am in the North West Monday and Tuesday. It looks like completely not available until Monday the third. But I will hear you on the timing of the adjournment, Mr Flanagan?

PN197

MR FLANAGAN: I think there is a couple of things happening and we are not really the main game if I can put it that way, Deputy President. Our objective is to establish an award that puts us in a position that we can therefore proceed as agreed with the company to commence the process of enterprise bargaining. Now, we certainly think that the Commission's suggestion that all parties should get together and have a talk about it is a constructive one.

PN198

It may be that through that process there is agreement that this is simply a production award, there may be agreement that the AMWU don't want to proceed with the Federal, I don't know, but it would certainly be a constructive thing for the parties to get together. We don't want it to drag out indefinitely, but at the same time the timing needs to not only be convenient for the Commission which clearly is the most significant criteria, but it needs to be sufficient to allow those discussions to occur.

PN199

THE DEPUTY PRESIDENT: Okay. Well, the earliest date that the Commission is available after Friday afternoon is Monday, 3 May. Is that sufficient time in your view?

PN200

MR FLANAGAN: Look, I suspect that is a bit early actually. I don't actually have my diary with me, but I can make some inquiries to our office, so it may be appropriate to go off record to discuss it.

OFF THE RECORD

[10.30am]

RESUMED

[10.35am]

PN201

THE DEPUTY PRESIDENT: Okay. Now, this matter is adjourned until 9.30 on Monday, 3 May 2004 and I am directing that all of the parties have discussions before that date. That concludes today's proceedings, thank you.

PN202

MR FITZGERALD: Deputy President, that is not the CFMEU is it?

PN203

THE DEPUTY PRESIDENT: No.

PN204

MR FITZGERALD: Just the parties at this hearing.

PN205

MR BAKER: I am sure they may have a member.

PN206

THE DEPUTY PRESIDENT: The parties who are here today, yes. Thank you.

ADJOURNED UNTIL MONDAY, 3 MAY 2004

[10.35am]

INDEX

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #A1 DRAFT IMPACT FERTILISERS AWARDPN107