TASMANIA

Tasmanian Industrial Commission

Industrial Relations Act 1984

T No. **9626 of 2001**

IN THE MATTER OF an application by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union to vary the Metal and Engineering Industry Award

Re: variation of Clause 12 - Contract of Employment

COMMISSIONER IMLACH

HOBART, 13 December 2001
Continued from 19 July 2001

TRANSCRIPT OF PROCEEDINGS

UNEDITED

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

HEARING RECOMMENCED 11.09am

COMMISSIONER: I'll take appearances.

MR B. TERZIC: Commissioner, appearing in this matter on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, TERZIC, B.

MR D. PYRKE: If the commission pleases, DARYL PYRKE appearing on behalf of the Association of Professional Engineers, Scientists and Managers Australia.

COMMISSIONER: Thanks, Mr Pyrke.

MR A. FLOOD: Thank you, commissioner. ANDREW FLOOD from the Tasmanian Chamber of Commerce and Industry.

COMMISSIONER: Thanks, Mr Flood. Mr Terzic?

MR TERZIC: Commissioner, I've had discussions with representatives from the Tasmanian Chamber of Commerce and Industry and the agreed procedure for this matter, if it pleases the commission, is that I will present a substantive case today in support of the application and then at the conclusion of the applicant's case the matter will be adjourned so that the respondent can make a considered reply. That is satisfactory to the union and we are quite content to proceed on that basis.

The representative from the TCCI did state that they would be seeking to reserve leave to call witnesses if necessary and just at this juncture we would similarly like to have leave reserved to call further evidence in reply if the union considers that would be necessary for the presentation of a full and complete case but at this stage we will not be calling any witnesses in making of the case in support of the application. Instead, we will be relying on various precedents and documentary evidence.

Commissioner, this case seeks to augment the casual loading in the award under review, namely, the Metal and Engineering Industry Award by 5 percentage points from 20 per cent to 25 per cent and the principal group relied on by the AMWU is the precedent found in re Metal Engineering and Associated Industries Award print T4991, a decision of the full bench of the Australian Industrial Relations Commission which was made on 29 December 2000 and I have copies of that decisions to pass on to the parties.

COMMISSIONER: **EXHIBIT T.1**. The federal commission looks like it is allying its numbers with our numbers.

MR TERZIC: Yes, just for a brief period.

COMMISSIONER: The tail wagging the horse, or whatever it is.

MR TERZIC: Of course there would be a strong case in simply handing over a copy of this decision to this commission and contending that there is sufficient parity and reasoning for the precedent in the federal casuals case to flow on to the state award by making the necessary assertions as to there being nexus between the awards and one could probably characterise the state award as a counterpart award to the federal award. The federal award of course being the Metal Engineering and Associated Industries Award 1998 Part 1. The federal award does apply in Tasmania to either named respondents in the metals and engineering industry or to members of employer associations that have membership in Tasmania.

The notion of there being a nexus between the state and federal awards or the state award being a counterpart for the federal award, I understand has not been clearly spelled out in any pronouncement of this commission. Nevertheless, I think in a submission made to this commission on 26 May 2000 the Tasmanian Chamber of Commerce and Industry do allude to, admit and submit, that there is such a nexus and a copy of that submission I would like to put into evidence.

COMMISSIONER: **EXHIBIT T.2**.

MR TERZIC: This submission is found in a document that principally has the form of a letter dated 26 May 2000. It's addressed to the president of this commission and it concerns an application in respect of the award now under review and on the second page of the submission which is under the hand of Mr Terry Edwards, manager of operations of the TCCI, one finds four dot points. The second of the dot points, and I quote:

> *the award has a strong relationship with the Metal Engineering and Associated Industries Award 1998 and yet the current provision for payment of annual leave periods is inconsistent with that in the Federal award;*

The two awards referred to of course are, in the case of the former, the Tasmanian award in the case of the latter, the Metal and Engineering Award is the federal award.

Nevertheless, despite there being a nexus, we say that the precedential value of the federal decision is amplified by the doctrine of precedent which is part of the system of laws in this country and other common law nations such as the United Kingdome, United States, New Zealand, et cetera and the doctrine of principle is one that is imbedded in arbitral industrial law and we say, furthermore, that a flow-on, if a flow is indeed found in the principles embodied in the federal case, if the flow-on does occur, it would create greater comity between the prevailing arbitrated standards in the Tasmanian jurisdiction and the

federal jurisdiction for work of a like nature in a like industry by a like body of working men and women.

We say that apart from making any sort of declaration as to the Tasmanian award being a counterpart award, reliance on precedent should be persuasive and authoritative and if the precedent does support this application this commission should henceforth vary the award in the manner sought moving the loading from 20 per cent to 25 per cent.

We will present principally an analysis of the federal casuals case in support of this application but we would further note that the analysis of the federal case will show just how the doctrine of principle has been applied in reaching the conclusions that the federal commission did. It did rely to a significant extent on earlier decisions both within the federal jurisdiction and other state jurisdictions. In respect of the loading one of the principal authorities cited is a decision of the former employment relations commission of Victoria. That commission has now been abolished of course and its federal law that applies in the state of Victoria.

A full analysis will show that there are variations in the way casual employment is regulated across industries, geographic regions or states or jurisdictions and across different occupations. Nonetheless, the federal decision does provide, we say, authority for a new standard both in respect of loading and other features of casual employment and we say that this arrival of a new standard for loading is not dissimilar to other elements that are common in employment relations across the commonwealth. Such things as four weeks annual holidays, long service leave, carer's leave, provisions for notice on termination which are generally standard across industries and awards.

Turning to a more detailed analysis of the decision, the first place I would turn to would be to page 67 of the decision. When the federal commission turned its deliberations and reasoning to the issue of loading, they agreed to some extent with the submissions of the commonwealth which intervened in proceedings and part of the commonwealth's outline of contentions are quoted therein and they say, and I quote:

> *... probably the most recent and comprehensive analysis of loading quantums across industry sectors and the rationales underpinning such loadings.*

Are found in the decision on the Employment Relations Commission of Victoria decision and relevant passages are set out immediately above paragraph 150. They are italicised. I return to the contentions of the commonwealth as reproduced in the full bench decision:

> *The Full Bench adopted Commissioner Hastings' recommendation that the setting of rates of pay for casuals should be approached*

on a sector by sector basis given that what constitutes casual employment varies widely across awards, and the loadings provided and conditions attached are wide-ranging. In determining the minimum wages relating to casual employees, the Commission adopted a simplified streamlined approach and set a standardised casual loading across the various industry sectors of either 20% or 25%. The Commission held that any quantum should appropriately be determined on an industry sector by industry sector basis.

COMMISSIONER: What does that last bit mean, Mr Terzic?

MR TERZIC: The loading should be set on an industry by industry basis.

COMMISSIONER: It says, industry sector. Does it mean, really, they could have left out the word, sector?

MR TERZIC: I would suggest so. That is simply part of the commonwealth's submission or outline of contentions. I think it's fair to categorise what the bench was agreeing with, is the notion that an industry by industry basis might be the most appropriate way in which to visit the issue of casual loadings and I think that is put into focus when one compares the approach that has been adopted in the state of Queensland and later I will refer to a decision of the Queensland commission.

In Queensland the approach is more of a standardised approach across the state. Rulings historically of the Queensland commission have set a loading that is to apply across awards within that state. Up until recently, the standard loading in the state of Queensland was 19 per cent. That has been reviewed and it is now being moved incrementally to 23 per cent. What the federal commission is alluding to is a system by which an industry or perhaps an industry sector might be examined.

It might be said that industries can be characterised with varying degrees of precision, that is, a concept embodied in standard industries codes where manufacturing would take in, for example, the metal and engineering sector and various other elements of manufacturing such as food processing, for example. So, perhaps some times it might be appropriate to disaggregate certain parts of an industry perhaps along an award basis.

Nonetheless, that approach would fit neatly within what we seek this commission to do and that is to keep a standardised loading within what might be described as a sector of the manufacturing industry, namely, the metals and engineering sector and to keep the loading consistent across the federal and state jurisdiction because there would be a similar body of workers within that industry sector working under now two different jurisdictions with two different loadings and

that is the situation that we say should be adjusted and on the reasoning found in the federal decision there is precedent for it to be adjusted because there is a sufficient level of similarity between award regulation as it currently stands.

What the federal commission attempted to do in this decision was to derive general formula that could be applied to perhaps any award and if the computations that follow from that formula indicated that an increase in the loading was justified, then the formula would do the work. This approach was derived by reference to the metals and engineering industry but there was also of course, as I said before, a broad review of different precedents and this review of precedents went across jurisdictions and industries. In some instances the elements of precent were disregarded, in others they were used to support reasoning.

As I stated earlier, considerable weight was given to the decision of the Employment Relations Commission of Victoria decision that was summarised and done, extracted in this decision. The extract appears at paragraph 149 and a further reference was made to it at paragraph 186, although I won't turn the parties to that extract.

So, what will become apparent in the presentation of this case is, it does appear to be a mathematical answer to whether the loading should be adjusted. That mathematical answer is supported by precedent and we say that it can be applied in the circumstances now before the commission.

The formulae on how the casual loading should be dealt with is essentially as simple as this, commissioner – the bench stated that the employment of casuals vis-à-vis full-time employees should be cost neutral and that is, one mode of employment should not be any more expensive for the employer than the other or taking the inverse of that notion, a casual employee should not suffer any pecuniary disadvantage by virtue of being a casual employee as opposed to a full-time employee. That is, the loading must provide for a complete and full level of compensation for the foregone entitlements that casuals face such as, long service leave, annual leave, notice on termination and other factors that are discussed in its decision.

In some respects it might be as simple as just saying, do the sums, whatever the figures produce we'll give the appropriate amount.

That notion is found firstly at paragraph 155 of the decision which appears on page 68. The bench noted:

> *Our consideration of the components and values to be given to particular components in a review of the casual rate loading has been most influenced by the safety net function of the loading. The rationale for the loading more or less dictates what components should be taken into account in calculating it.*

Primarily those components are the standard award benefits applicable to full-time employees but not applicable to casuals.

That is the essence of it, commissioner. It's a matter of identifying and valuing those standard award benefits that full-time employees receive but casual employees do not. They go on to say:

Any other components, including off-sets, will need to be derived from the operation of the Award on casual employment including its incidents, in comparison with other types of employment and their incidents. Although we have had regard to the submissions put to us, and to the precedents to which we were referred, we are not persuaded that all components for calculating a fair loading can be specified with precision or individually valued. The possible exception is paid leave.

But even with paid leave there are contingencies that defy precision or can be controversial.

Moving onto the next page the bench eventually stated that, no matter which way one applies the sums differing results can be found and ultimately, at the top of page 69, in the last sentence of paragraph 155, they said:

Arbitral judgment is likely to be necessary in making an assessment of what is far and reasonable.

Ultimately, that is what the bench did. They derived their own formula. It is perhaps worth noting, just at this juncture although I may return to it later, but the computations that the union provided in support of an adjustment of the casual loading to 30 per cent – that was the application as made, which can be found on page 59 of this decision, suggested that a fair, adequate and just level of loading would be up to around 45 per cent.

The employers on the other hand took the view that the loading was appropriate at the level that was current when the matter was heard, which was around 20 per cent and ultimately the relevant computations of the full bench were found on page 83. They came up with a figure of 125.88 per cent.

COMMISSIONER: What page was that, I'm sorry?

MR TERZIC: Page 83.

COMMISSIONER: Right.

MR TERZIC: There'll be a bit more analysis before we revisit those figures. Commissioner, it might be instructive to inform the commission and the parties, I took part in presenting a large part of the case before the federal commission and I can say that the various

parties led evidence from 28 witnesses including expert witnesses, workers who were casual employees working under the award and the employers principally led evidence from employers and again from experts, mainly a Professor Mark Wooden, who is one of the leading labor economists in Australia, although he is a labor economist of, what one might say, a right wing bent.

Moreover, extensive witness and survey evidence was put before the federal commission to give it a comprehensive picture of casual employment generally and as it applied in the metal and engineering industry across the commonwealth.

We choose to desist from following that course again in this matter. We do not think that it would be a prudent use of time and resources to undertake that process afresh but we will, nonetheless, provide an abbreviated account of some of the salient features of casual employment in the labour market and some of that will come not from the federal decision because the way the federal decision dealt with the matter to a large extent, and they did this at paragraph 33, page 17 – they simple said that there was extensive evidence, good quality evidence led by both parties but they decided not to summarise or make any findings on various social and economic issues. Instead, they turned their attention to setting out reasoning for how the award would be varied without taking into account – giving their views on the casual employment phenomenon.

Recently, a full bench of the commission did note some of the incidents of casual employment in Australia and some of those figures may be instructive to the parties. I will hand up an extract from the recent federal decision that may be of some assistance.

COMMISSIONER: **EXHIBIT T.3**.

MR TERZIC: Commissioner, T.3, as handed up, is just an extract from a decision of the federal commission issued on 31 May 2001. The reference is PR904631 and in this case it's referred to as the Parental Leave for Casuals decision. At page 6 the bench gave some assessment of casual employment and therein they say between 1990 to 1999 casual employment as a proportion of the labour force increased from 19.4 to 26.4 per cent. Over the same period, some 71.4 per cent of total employment growth was casual. In June 1998 31.8 per cent of female and 22 per cent of male employees were employed on a casual basis. In regards to the nature of casual employment, the most recent released ABS data indicates that over two-thirds of self identified casuals work regular hours, about 40 per cent have a guaranteed minimum number of hours, over one half have been in their jobs for more than one year, 13.6 per cent have been in their jobs for five years or more, almost three quarters expect to be in the same job in 12 months time and some 39 per cent report that their earnings have not varied.

I present that merely as a snapshot of the state of casual employment in Australia generally. Many of these issues were of far more significant concern when the federal application was pressed and that was because the federal award prior to the orders being issued as a result of the federal decision, had very much a laissez faire or unregulated approach to casual employment. The provisions then in the federal award were tantamount to saying that a casual was an employee engaged and paid as such and they were to receive one 38th of the weekly wage plus 20 per cent. There was virtually no other regulation on the use of casuals. They could be picked up for an hour, a day, a month, a year or 10 years and of course attendant with that situation there were other issues that affected the way casuals were deployed in industry and they were numerous. They went to such matters as job security or the lack of it, the inability to take leave or holidays in a regular and paid fashion, the lack of the notions of paid sick leave and I can report that some of the evidence as to some of the other issues that were brought out by some of the witnesses may seem somewhat trivial but they did affect, what we call, the industrial citizenship or the self esteem many workers faced.

For example, one witness called by the union, a Mr Hans Webster, testified as to how full-timers and permanent employees in his workshop were issued with safety boots and uniforms but the casuals were not. A Miss Small testified that casuals were not invited to staff meetings but permanent employees were and a Mr Caveni said that he found it annoying that at the company Christmas party permanent employees were given a ticket in the lucky door prize but the casuals were not.

Not only that, evidence was led from credit counsellors by the union that indicated the difficulty in obtaining credit either a mortgage or credit for other purposes. The notion of the difficulty with credit is briefly alluded to at the bottom of page 79 in issues of intermittency in the federal decision and the union also led evidence from a Ms Carol Croche, who was a project officer from an organisation called National Shelter. That a non government organisation that lobbies for improved access for housing and she gave evidence as to how the income insecurity that is attendant with casual employment can have detrimental effects on the provision of housing for casual employees. Perhaps all of these matters are axiomatic, commissioner. We will not be formally leading evidence to support those notions but we would concede it would be equally open to the employers to find evidence to suggest that an increase of 5 percentage points in the causal loading would have adverse effects on the employment of labour. Ultimately though, this is a matter for the commission to decide and we say the decision should be based on the precedent because all of those issues have been given full and extensive ventilation and in the subject of deliberation once already at the federal level.

One issue though that we would wish to revisit, again albeit briefly, because it does pertain, we say, to the issue of casual employment and

loadings, is matters going to the earnings of casual employees. Even on the current award prescription casual employees are entitled to, theoretically, a level of gross earnings that should be 20 per cent higher than those that permanent employees would be entitled to but when one considers or looks at the evidence as it actually applies in the labour market itself, it appears that casuals do not receive earnings at that level.

To give this commission some indication of how earnings are actually found in the industry, I can refer to various exhibits that were part of the federal case. I'll hand them up simultaneously. The first is an exhibit from the union and the second is an exhibit from the Australian Industry Group, which was the principal employer party to proceedings.

COMMISSIONER: The MTFU document, **EXHIBIT T.4** and the other one, Australian Industry Group, **EXHIBIT T.5**.

MR TERZIC: The issue of income security was touched on in the federal decision at page 61, and it's the third dot point in paragraph 139. The bench said:

> *Ample authority exists for a loading for lost time and itinerance. There is no reason in law or principle why the grant of such a component dating from the original grant of a 10% loading in 1921 should change. The AMWU's evidence discloses that over 45% of casual workers experience fluctuating incomes from month to month compared with 17% of permanent workers. The Commission should acknowledge the legitimacy of a loading for irregularity as a matter of industrial equity. The Commission should also recognise the value of placing a financial deterrent on casual employment by placing a fair value on the cost to an employee of working casually. Such recognition of intermittency as a component of the loading has been recognised in industrial jurisprudence for many years, particularly in two Queensland Industrial Relations Commission decisions delivered after the abandonment of the needs based family wage principle of wage fixation.*

Apart from fluctuating incomes, evidence that was led that was subject to cross-examination and scrutiny of the parties including the commonwealth indicated that there are other features of the reality of casual employment that shows that casual employees just don't fair as well as full-time employees. If one turns firstly to the MTFU exhibit, MTFU meaning Metal Trades Federation of Unions, that's an association of the various metal unions from the AMWU to the Australian Workers Union and others. At page 18 of that decision there appears a table titled, Earnings of Permanent and Casual Blue Collar Workers in the Manufacturing and Metals and Engineering Industry. Referring principally to metals and engineering, that being a sector of the manufacturing industry, one finds that the average and

median total earnings, in the left-hand column, blue collar permanent as opposed to blue collar casual employees is set out therein and one finds that blue collar casual earnings are significantly lower than blue collar permanent employees, on an average and on a median basis. This is despite a 20 per cent loading applying.

Moving over to the next page there are figures on an hourly basis set out in different percentiles. The percentiles refer to the lower earning to the higher earning percentiles. It's actually quartiles as it's set out of employees in the industry. One can find in the table, on page 20, unpublished data from the Australian Bureau of Statistics, that in metals and engineering in labourers and related workers, which is the second box down, permanent full-time employees receive on an average $14 per hour, casuals receive $13.10 per hour and in trades and related workers, which is in the very bottom box in the right-hand corner, permanent full-time employees received $17.30 and casual full-time employees received $17.00 per hour.

The conclusions which were reached, which are set out on page 19, in the last paragraph which is in bold type face is:

> *Even before considering access to overtime and work related benefits it appears that the majority of casual labourers and related workers, whether full or part time, tend to have a lower hourly rate of pay than their permanent full time counterparts even though most of these casuals receive a 20% loading.*

The same could be said of trades and related workers.

That was of course the union evidence. The figures are slightly different in one of the principal pieces of evidence led by the employers' evidence and that came in the witness statement of Professor Mark Wooden and a copy of that has been put into evidence and marked T.5 and his studies on earnings are found at paragraph 22c which is on page 18. Professor Wooden stated:

> *It could be claimed that my own empirical work suggests casuals are not well-paid, even after holding constant other individual and job characteristics. The definitive paper here is* [one of his own published in 1999]. *In that paper casuals are estimated to attract between a 5% and 6% wage premium, all other things held constant. This appears rather small given the presence of a casual wage premium of 20% in many awards, but is not unexpected.*

He attributes the difference in wage rates to be primarily a function of the lower skill base held by casuals. Their skills and experience just aren't as valued. We've attributed other factors that were not put or published as part of the full bench's decision. The evidence led by the union indicated that casuals just simply find it more difficult to bargain for higher wages and conditions. Bargaining is the principal

means of wage determination for the majority of employees in Australia but more and more casuals simply rely on award prescription.

It was very much our case in the federal case that unless the federal commission was to improve the casual loading, the casuals employees themselves would find it difficult to bargain for higher wages, except where they had a sufficient connection with a unionised and organised workplace or if they had higher levels of skills or chose themselves to work on a casual basis for whatever particular reason.

Commissioner, the matters that we've touched on could be full ventilated and we could present to this commission a full inquiry into the social and economic phenomenon of casual employment but we will leave off our level of analysis at that point because as we have said before on more than one occasion, we rely on the sums, the mathematical approach that has been adopted and furthermore, we rely on the notion, there should be a nexus between the state and federal awards.

Before I go again to the sums, it might be instructive for this commission to hear a report on the state of the other state counterpart awards to the federal award and where the level of loading applies therein. I will go firstly to the state of New South Wales and I have various pieces of documentary evidence in this regard. In New South Wales, commissioner, there was recently a full review of the counterpart award which is known as the Metal, Engineering and Associated Industries (State) Award. That award was recently reviewed and the issue of the loading as it applies to casuals was put to review. The review at the state level occurred after the federal commission had reserved its decision in the federal matter but before a decision had been issued, so the prevailing amount was 20 per cent but it was of course possible that that would change and of course it did change.

The issue in New South Wales is confounded by the interaction between the *State Annual Holidays Act* and the award and it was dealt with in a manner set out in a memorandum of agreement that I'll hand up as a piece of evidence.

COMMISSIONER: **EXHIBIT T.6**.

MR TERZIC: At paragraph 3 of T.6, which is a Memorandum of Agreement between the parties to proceedings in the review of the New South Wales State Metals Award, the parties agreed:

> *The issue of the effect of the interaction of the Award and the* Annual Holidays Act 1946 (NSW) *on the entitlements for casual employees engaged under the Award . . . is to be left unresolved at the time of –*

Making the award under review and it would be left in a state of abeyance.

Commissioner, to explain what the issue is, it can be very complicated or simple. I will give the simple analysis because I don't think it adds too much to go into excessive detail.

The award provides for 15 per cent for casual employees. The *Annual Holidays Act* provides that casual employees are entitled to pro rata annual holidays at the rate of one twelfth of their income, which is the equivalent of 8 and 1/3 per cent. You add those two figures together and the amount that casuals receive, effectively, would be 23 1/3 per cent, being the sum of 8 1/3 and 15 per cent. However, there was some doubt as to what would occur if the parties attempted to adjust the award loading to take into account the provision under the Act.

There was a view expressed by the presiding member in this matter, Mr Justice Walton, that no matter what goes into the award, the 8 1/3 per cent will apply as a benefit conferred by legislation, so until that issue was to be fully decided, there'd be no certainty how one could express any change in the interaction in the loading, given that the interaction of the award and the statute are, at the moment, a vexed question. What the parties had intended to do was to seek declaratory relief before the commission in court session. The state commission can act as a court and a ruling would be issued on how things would work.

In other words, commissioner, if the loading in the state award was to go to 20 per cent, would that absorb part of what was available under the *Annual Holidays Act* or not. That is a question that is still to be determined within New South Wales law, not just for the Metal Award but for all awards in the state. So, effectively, one could say that the rate in New South Wales is now 23 and 1/3 per cent.

In Queensland the level of loading was recently reviewed across the board and it is to move to 23 per cent. A copy of the decision that made such a declaration, I can hand up to the commission.

COMMISSIONER: **EXHIBIT T.7**.

MR TERZIC: The declaration is on the front page and the reasons are found in the decision that carries on over the page. One can see that in a phased approach the loading will eventually move on and from 2 April 2002 to 23 per cent.

Commissioner, in Western Australia, the loading remains at 20 per cent. The AMWU is the principal respondent to the award and on making inquiries of the branch, they have informed me that the problem for the state award is that it applies across the construction industry. It is a counterpart to the national Metal and Engineering Construction On Site Award 1989 and that award still has the loading

set at 20 per cent. The relevant employers do not want to have the state award move ahead of the counterpart federal award but I can report that there are moves afoot within the federal office of the union to look at the Metal Construction Award, which is a separate award to the federal award, and have the loading therein dealt with. So that is really a matter for the creation of a sequence in the way that various awards will be dealt with but it is the intention, I can submit, of the AMWU to seek to flow on the federal decision in Western Australia in due course and the relevant award there is known as Metal Trades (General) Award 1966, a provision for loading is found at clause 31(5).

Commissioner, in South Australia, after extensive hearings principally by the union, the employers have conceded, one might suggest, and agreed to a flow-on of the federal provisions. A draft order has been submitted to the commission and it is expected that an order will be handed down shortly. I do have a copy of the draft order. I prefer not to hand it up at this stage but I would suggest that in the course of these proceedings an order will be issued in respect of South Australia.

The two other jurisdictions that should be taken into account of are the Australian Capital Territory and the Northern Territory, both of which are governed by federal awards of course. In both of those awards the loading remains at 20 per cent but no application has been made by the AMWU, which is the principal union respondent to move the loading but I can indicate that it is the intention to eventually flow on the loadings.

The titles of the award and the relevant provisions I have extracted from the awards and I'll put them into evidence.

COMMISSIONER: The Northern Territory one, **EXHIBIT T.8** and the other one, **EXHIBIT T.9**, the ACT.

MR TERZIC: Commissioner, that would conclude my survey of the situation in the industry across different jurisdictions and now I would turn to the analysis which is, to some extent, a mathematical analysis of the casual loading and why it was altered federally and why such a course should be taken in the state jurisdiction.

As I've stated earlier, the bench took the view that the costs of deploying casuals or being a casual employee should be roughly equivalent, not cheaper or more expensive, than those that apply to permanent employees, although there was some recognition of factors such as itinerancy and deterrents, deterrents means that in general casual employment should not be the preferred mode of employment. That was stated at paragraph 139 in the third dot point and I've already given an analysis of that but that is later embodied in the final reasoning of the commission in the table on page 83, although the weighting applied to deterrents was almost negligible. It was touched on at paragraph 187 on page 79.

Having said that, the bench noted that even in computing the leave aspects, there is scope for differences of views and denominators and other factors in finding the amount but they dealt with that eventually by simply using the discretion available to them as arbitrators and deciding on a particular formula. The federal bench noted that the last time that there had been any movement in the federal prescription was in 1974 and that was to reflect changes in the amount of annual leave generally available.

It is interesting to note that the change in the annual leave entitlement and consequent change in the casual loading more or less corresponds with what occurred in the state of Tasmania and some rather persistent and dogged research by my Tasmanian colleague has managed to uncover the documents that evidence the last movement of the Tasmanian jurisdiction and I do have some copies of those documents. They're just not at hand at this moment, commissioner. I will find them and put them into evidence but I can state that – that appeared again with the help of my friend, [inaudible] –

COMMISSIONER: Your dogged friend.

MR TERZIC: He can find them under any circumstances.

COMMISSIONER: **EXHIBIT T.10**.

MR TERZIC: They're irrelevant documents from what was the predecessor to this commission, the relevant Wages Board, and as and from January 1975 one sees that at clause 18(d)(i) the applicable loading for a casual therein appears to be 20 per cent. Further examination of the records indicates that it was prior to that date at 15 per cent and that change, as I said, corresponds with what occurred in the federal award and the change is noted at paragraph 159 of the federal decision and again at paragraph 160 on page 70 where it says, in about the fourth line:

> *- the Metal Industry Award 1971 moved the casual rate loading from 15% to 20% with effect from 6 June 1974.*

So it appears that the lag between the jurisdictions was in the order of six months.

The reference to the differences in the incidents of casual employment and full-time employment was presented by the AMWU in proceedings as quantifiable at paragraph 161 of the decision on page 71 and –

COMMISSIONER: Paragraph?

MR TERZIC: 161. I withdraw that, commissioner. The submission I should make is that at paragraph 161 the AMWU submitted to the commission a list of changes in award entitlements that were available to permanent employees – I use the term, permanent employees, but

the nomenclature of weekly employee tends to be interchangeable. Weekly employee now is somewhat archaic but weekly or permanent employees and since the last change in June 1974 the AMWU identified various differences in conditions.

Probably of most relevance to these proceedings because there does appear to be direct correspondence, would be severance pay and notice of termination but, commissioner, ultimately, even though severance as a standard feature of permanent employees' job entitlements and notice provisions going to termination that go beyond one week are now standard for both federal and Tasmanian employees and I do have various decisions of this commission that deal with how severance pay and notice are dealt with. I don't think it would ad anything for me to spend much time giving any sort of analysis or description of those decisions. One, because they would be well known to the commissioner and two, because they were not adopted ultimately in the table that set out the relevant figures and that table is the one that I've referred to at page 83.

Commissioner, I would just point that that the relevant factors that do appear in the table are virtually comparable with the differences that apply to Tasmanian employees working under the state award and Tasmanian metalworkers working under the federal award. I guess, what might be called the – termed the, point of this submission is to be reached at this juncture and that would be a review of the figures that appear in the computations in the table on page 83.

I'd ask the parties to look at how those figures were arrived at and I won't go through each and every one of the figures therein cited but the reasoning at how they were derived is found earlier in the body of the decision. Firstly, the bench attempted to determine how many working days occurred in the course of a year and the figure arrived at by taking out weekend was 260 and then there were adjustments made for public holidays, 10 is cited therein. It is arguable that the figure is 11 in Tasmania but we will proceed on the basis that it is 10. Then the sick leave or personal leave – the provisions in both the state and federal jurisdictions are more or less identical at 10 days per year. The figure cited therein is six and there's a footnote to say, that takes into account the rather obvious, that most workers would not take all 10 days sick leave in any one year simply because they are there. A figure was derived at being six, being the average amount of sick leave taken and they were taken from analysis and submissions made by the commonwealth government, although later – directly underneath, the additional four days is later factored in.

The first part of the computation deals with public holidays and sick leave taken in an average year and that brings forward ratio A of 106.5 per cent being that there is a loading at 6.5 per cent attributable to a reduction in the days worked for the casual employees to 244. Of course that would mean that permanent employees don't necessarily work 244 days but they receive payment for 260 days.

The next part of the computation goes into ratio B, that takes into account annual leave and annual leave loading and the loading then moves to 116.6 per cent. Ratio C then imports into the total figure the remaining amount of sick leave and long service leave.

COMMISSIONER: Just a minute, Mr Terzic, leave loading 3.5. What does that mean?

MR TERZIC: That is, in essence, how many days a permanent employee would receive payment for because of the addition of a loading of 17.5 per cent.

COMMISSIONER: That's equivalent –

MR TERZIC: To 3.5 days' pay.

COMMISSIONER: Right.

MR TERZIC: Long service leave is equivalent to 4.3 days' pay in any given year.

The last two ratios, D or E, simply have the effect of adding 5 extra days to a full-time employee. That's the amount of loading that would be available. Generally because they're weekly employees but that's further made apparent by a section of the federal Act that applies equally to state and federal employees and that is section 170CM of the *Workplace Relations Act*, which is the standard periods of notice that apply.

In the full-time column, going in a vertical fashion, one sees that the paid days that a full-time permanent employees receives starts at 260, which is total working days or actual days worked but the figure keeps going up and by ratio C, those workers are actually paid for 291.8 days but one finds the opposite occurs for casuals. In the course of a working year, the days for which payment is received keeps reducing so that if a person was to remain as a casual employee in the course of a year, they would only receive payment for 244 days but for a permanent employee, eventually by the time one gets to matters considered at ratio C, a full-time employee is getting paid for over 290 days and that is, by dividing 244 into 291 that would, or should, work out at 119.6.

The ratio D was disregarded. That adds 5 extra days to take the number of days worked to 296.8, so that in effect increases the number of paid days that a full-time permanent employee would receive. Instead of adding to the number of paid days that a permanent employee receives, what the federal commission decided on ultimately was to leave it fixed at 291.8. So, they have taken into account public holidays, sick leave, personal leave, annual leave, leave loading and long service leave. Those are the element which decide the number of days paid.

To look at the loading and how it would be applied the bench instead chose ratio E, which I will explain in a few moments and ratio E did not increase the number of paid days for permanent workers but it reduced the number of paid days for casual workers and they did that on the basis of evidence led by the Australian Industry Group, that showed that for casual employees the amount of pay generally received would be for 36.1 hours per week. That is, 95 per cent of the 38-hour week. That figure can be seen in the table on paragraphs 189 and 190, which is just back a page, on page 80.

A survey of working patterns of full-time casuals and part-time casuals and full-time permanents and part-time permanents disclosed the average amount of hours worked by casual employees in the manufacturing industry and looking at paragraph 189, in italics, the AIG's findings revealed that:

> *Some 78 per cent of all casuals worked an eight-hour day, with 80 per cent working in excess of 30 hours per week. The average hours of work were 36.1 hours per week.*

That average, 36.1, is the figure that is cited in the box, in the table, and it was on that basis that they said that casuals would ultimately, in the course of a year, expect to work and receive remuneration for 231.8 days as opposed to permanents working and receiving remuneration for a total of 291.8. If you divide 231.8 into 291.8, you end up with the percentage of 125.88 and that eventually formed the basis for the change in loading. That was the simple matter of keeping the benefits that accrued to one as opposed to the other more or less at the same level.

It might be worth pointing this out to the commission, the figure 36.1 that is found in the table in paragraph 189 is an average of small firms and large firms and when one looks at the survey in the table, in Table 6 reproduced therein, one finds that 20 small firms were surveyed as opposed to 91 large firms which I'm not sure is reflective of – it might be reflective of mainland AIG member manufacturing enterprises working under the federal award but perhaps if one was to put – more faithfully apply such a computation to Tasmania under the Tasmanian state award, perhaps there would be a greater preponderance of small firms and perhaps the ratio adopted should be 34.5 hours per week. Now, if that figure was factored in, in the relevant manner, one finds that that equals 90.8 per cent of 38 hours per week and when one applies that to the amount of hours worked and paid in the year, it falls from 231.8 to 221.5. Divide 221.5 into 291.8 and the resulting figure would be 131.7 per cent.

So, what I'm alluding to, commissioner, is that it could be open to this commission to accept the federal decision and let things stand but if there is to be further analysis of the incidence of casual employment, if further material is led, if further evidence is admitted, if a substitute survey takes place in Tasmania rather than the survey that was relied

on by the federal commission, it may indeed prove that a loading of greater than 125 per cent is warranted on the basis of the same formula.

Earlier in this case, we alluded to some of the incidents of casual employment, of the precarious nature of the employment, of the inability to earn a gross wage similar to that of permanent employees, notwithstanding a 20 per cent loading and further evidence could disclose a picture of casual employment in the state of Tasmania under the state award that could warrant a higher loading. That is something that we cannot specify with any degree of certainty, although the inference I've made about the Tasmanian award probably applying to a greater number of small firms than large firms might be a relatively safe assumption to make.

In some respects, it's a warning to the Tasmanian Chamber of Commerce an Industry, the deeper one might go in revisiting the evidence in looking at the Tasmanian experience, the more that might come out that could provide good and cogent reasons for the union to apply not for simply a 25 per cent loading although that is our application but perhaps leave could be sought to amend the application and seek that the loading sought would be 30 per cent as originally applied for in the federal jurisdiction.

Moreover, as I referred to earlier, the unions own figures that were found on page 59 indicate that on another form of doing the sums in the same fashion that the federal commission has done, one could perhaps justify a loading of closer to 45 per cent. Nonetheless, we are content to rely on the computations, the methodology and the reasons given in the federal decision to say that it is now justified that the loading now should rest at 125 per cent for casual employees, or casual employees should be paid at 125 per cent of what permanent employees receive and subject to the case that the TCCI puts, that would be our submission in support of the application. If the commission pleases.

COMMISSIONER: Thanks, Mr Terzic. Mr Flood?

MR FLOOD: Thank you, commissioner. As Mr Terzic outlined in his initial submissions to you, we have reached agreement with the AMWU that we would receive their submissions today and with your consent we would ask that the matter be adjourned for us to consider our response to that.

As to a period of adjournment, commissioner, this is a relatively major issue for the Tasmanian Chamber of Commerce and Industry. We would ask you to bear in mind the Christmas period is fast approaching, which is a period traditionally where this industry has Christmas close-downs. It will be difficult for us to contact our members during the next month or so and I would ask that the matter be adjourned until at least the end of March.

COMMISSIONER: Yes, thanks, Mr Flood. What do you say about that, Mr Terzic?

MR TERZIC: Well, we'd prefer a slightly abbreviated time frame. We'd press for a reply by the end of February.

COMMISSIONER: Yes. Do you mean a reply from the Chamber to you?

MR TERZIC: Yes.

COMMISSIONER: Yes, I think that's reasonable, Mr Flood.

MR FLOOD: Commissioner, my concerns are that that really only gives us a little bit over a month to probably speak with our members and assess their views on this matter. As I've said, it is an industry where most businesses are closed down for the better part of January.

COMMISSIONER: All right. I'll expect to hear that the response has gone to the union by the end of the second week in February and then, I presume, Mr Terzic, or Mr Baker, you'll be on to me to fix a time?

MR FLOOD: Sorry, commissioner, what was that – the end of the second week in – do you mean March?

COMMISSIONER: Yes, I see what you mean. Yes, the second week in March.

MR FLOOD: Thank you.

MR TERZIC: Commissioner, it'd be dependant on the reply. We'd have to then give consideration to the nature of the materials we'd have to put on and reply again. So, once we've received that reply, we will perhaps prefer to take the course that we will notify the commission of an appropriate day for a hearing.

COMMISSIONER: Yes, that's correct. I'll leave that with you, Mr Terzic. At this moment, the commission would be ready to accede to resuming the hearing within a reasonably short time, I would say. That's at the moment, unless there are mass sackings in the meantime which is not impossible, I suppose.

MR TERZIC: We hope not.

COMMISSIONER: Nothing else? Thank you, gentlemen. This matter is adjourned.

HEARING ADJOURNED SINE DIE 12.42pm