

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 1681 of 1988

IN THE MATTER OF an
application by the Secretary
for Labour for an
interpretation of the Retail
Trades Award

re definition of assistant

PRESIDENT

LAUNCESTON, 15 November 1988

TRANSCRIPT OF PROCEEDINGS

CHECKED BUT NOT EDITED

PRESIDENT: Yes, thank you. I'll take appearances thank you.

MR EVANS: **EVANS J.**, appearing on behalf the Secretary for Labour, Mr President.

PRESIDENT: Yes. You are at liberty to approach the front bench if you wish, Mr Evans.

MR EVANS: Thank you. I'll just take a moment to move all the goods and chattels.

MR FENTON: If the Commission pleases, **FENTON P.A.**, on behalf of the SDAEA. I resume appearance as per the last hearing. Also appearing is **MR PAUL TARGETT** on behalf of the SDA.

PRESIDENT: Thank you, Mr Fenton.

MR ABEY: If the Commission pleases, **ABEY T.J.**, appearing for the Tasmanian Confederation of Industries.

May I just have 1 minute to consult Mr Edwards on an urgent matter before he disappears into the blue and yonder? I'm sorry about this.

PRESIDENT: I ought to say no, Mr Abey, but I'm in an expansive mood today. By all means.

Gentlemen, will we go off record.

...

PRESIDENT: Mr Evans, and I'll invite you to proceed.

MR EVANS: Thank you, Mr President.

Mr President, this matter first came to our attention when it was brought before Acting President Robinson on 26 August 1987 in matter T.187 of 1987.

I have copies of that particular matter, sir.

Now that particular matter was an application ...

/LM - 02.12.88

APPEARANCES - PRESIDENT - EVANS

PRESIDENT:

Oh, this will be noted as Exhibit A.
Yes.

MR EVANS:

That particular matter was an application by Mr Targett on behalf of the the Shop Distributive and Allied Employees' Association to vary the definition of the system contained in the Retail Trades Award to encompass telephone sales.

Now that application served to kindle an interest in the proposition of telephone sales people having award coverage.

If I could provide some history from our point of view, sir.

We've always considered that telephone sales people, door-to-door sales people, and canvassers generally, as being award free. Certainly in relation to direct coverage from the Retail Trades Award, that view has not changed.

The scope of the Retail Trades Award, provides this award as established in respect of the industry of selling goods by retail in shops.

Now we believe that that scope prevents the award having direct application to that sort of person.

However, pursuant to section 40 of the Industrial Relations Act, and regulation 14 of the Industrial Relations regulations, which simply provide for an award to be extended to an area not otherwise covered by an award, it is possible to provide award coverage for such persons.

That is, if the definition of assistant is capable of embracing it. And that's what we're looking at today.

Subsequent to T.817, I was advised that agreement had been reached between the parties, that is, the union and the Confederation of

/LM - 02.12.88

PRESIDENT - EVANS

MR EVANS:

Industries, that the definition ought to be amended, to include the classification of telephone sales.

I guess that served to satisfy us at that stage, and the matter was left for the time being.

However, the matter came before Deputy President Robinson again, on 14 September of this year, in matter T.1125 of 1988. Have copies of that.

PRESIDENT:

That will be Exhibit B.

MR EVANS:

In that particular matter, the end result was that the SDAEA no longer sought arbitration on the question, and withdrew their claim to amend the variation to the definition to include telephone sales canvassing, and indeed they'd earlier sought permission to enlarge that for door-to-door sales.

So it seemed to us that we were back to square one, and the only way to resolve the matter, was to apply for interpretation.

It still remains far from clear to us, as to whether the definition of assistant is broad enough to cover persons canvassing for the sale of goods.

Now in turning to the definition, it seemed that there were several crucial elements that needed to be satisfied, however if I may, before I look at the definition as it presently is, it seems to with the evolution of time, become somewhat confused and changed, in that if I could back to the award as it was known, under the Industrial Board system of the ironmongers, the definition used to read:

"An employee who devotes any portion of his or her time to the sale of goods, parceling goods, or assembling orders

/LM - 02.12.88

PRESIDENT - EVANS

MR EVANS:

and/or messenger".

That definition was subsequently varied to include key-cutting services.

/LM - 02.12.88

EVANS

PRESIDENT:

And takeaway food, is it?

MR EVANS:

Yes. But in that variation the definition seemed to get somewhat scrambled, in that as it presently is at the moment, it's a little bit nonsensical in that it devotes any portion of his or her time to the sale of goods, including takeaway food, parcelling, key cutting, goods or assembling orders and/or messenger.

Apart from the word 'goods' seemingly being out of place, the previous definition seemed to be easier to read, in that it provided for:

"An employees who devotes any portion of his or her time to the sale of goods".

That can then be extended to parcelling goods or assembling orders.

PRESIDENT:

Yes. But if it was takeaway goods, would it not be possible, Mr Evans, for someone who works in, say, a pizza shop or a chinese restaurant to accept telephone orders over the phone? I suppose it's where else could you accept it but over the phone. And would that make any difference?

MR EVANS:

Well I believe it's hard to say. We incline to the view that people engaged in this industry that do canvass or take orders by phone, that the definition is capable of embracing it. However, looking at the pizza side of it specifically, we wouldn't be looking at this definition in relation to that category of employee in any case.

PRESIDENT:

What would you be looking at?

MR EVANS:

The Restaurant Keepers.

PRESIDENT:

I see. Even if a shop had a takeaway service that included, say, pizzas or ... it wouldn't have to be pizzas,

/WL - 02.12.88

PRESIDENT - EVANS

PRESIDENT: well fish and chip shops.

MR EVANS: Well it would depend... I mean, we've always had the rather unholy mix of Retail Trades and Restaurant Keepers Awards. As it presently stands, the Retail Trades is the appropriate award where a substantial part of the employer's business is engaged in retailing of goods other than those for sale in other than those such as takeaway food which fall within the scope of Restaurant Keepers.

I mean, we've always had that unholy mix of a corner store that is principally associated with selling of groceries vis-a-vis a supermarket it has a takeaway food corner which award applies.

I believe that we haven't had any problems of late with that mix. Certainly in times gone by we have.

In an attempt to unscramble the definition to determine whether or not it was capable of encompassing this class of person, I believe that, as I said, there are several crucial elements of it: 1) the person obviously has to be an employee - I think for the purpose of the exercise we take it as read that we are dealing with employees - who devotes any portion of his or her time to the sale of goods.

To determine exactly what was meant by that expression ... if I can find it. I had to resort to the Australian Commercial Dictionary by Yorkston in relation to the expression, 'sale of goods'.

To my mind it's by no means conclusive. It didn't provide me with any great faith in my view that perhaps the definition was capable of embracing these people, but nevertheless, I tender them for your information.

PRESIDENT: That will be Exhibit C.

/WL - 02.12.88

PRESIDENT - EVANS

MR EVANS:

If I was to try and draw comfort from it at all, I would rely on in the 'sale of goods', the extract:

"The contract for the sale of goods is defined as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called 'the price'".

As I said, to my mind that is by no means conclusive.

It certainly didn't specifically deal with the expressions 'offer for sale' or 'canvass for sales'.

I think 'offer for sale' can be disregarded since all sales assistants engaged in shops where goods are offered for sale may not actually sell the goods. We have certainly had in the past matters before the Court of Petty Sessions going into the other jurisdiction, sir, where it has been accepted that the crucial point is that the employer is engaged in the selling of goods. Not that the employee actually sells or does not sell goods on any day or given days.

Dealing with the expression 'canvass for sales', in trying to determine the meaning of that expression I had to resort to various dictionaries. I haven't got extracts from the dictionaries, sir.

I realise, Mr President, you rely to a large degree on the Macquarie. I couldn't find ...

PRESIDENT:

You've been doing your reading, haven't you?

MR EVANS:

Oh, always. I couldn't find anything conclusive in Macquarie in relation to canvass. Certainly the Collins English Dictionary indicates that 'canvass' provides inter alia, 'to

MR EVANS:

solicit votes, orders, advertising
et cetera'.

The shorter Oxford English Dictionary
provides that 'canvass' is to solicit
as support - votes, orders,
contributions etc.

That leads us to finding a definition
for 'solicit'.

MR EVANS:

'Solicit' is defined in the Collins English dictionary as 'to make a request, application or entreaty'.

In the Shorter Oxford, it's defined as 'to entreat or petition a person for or to do something to urge, importune'.

My research didn't provide me with any conclusive evidence, I'm unhappy to say, as to whether the present definition is capable of encompassing this type of person or, indeed, not only telephone salespeople, but door-to-door salespeople.

But as I indicated earlier, I do have an inclination towards the view that such persons are covered. And while I would point out that philosophically we, as a department, would prefer that all employees are covered by an award.

As the regulating agency, as I pointed out before, it's really irrelevant. And we simply need to sort out, because of the number of enquiries that we're presently receiving in relation to this problem, exactly whether or not the definition can encompass people selling by telephone, people who are canvassing for order by telephone and, indeed, people who are selling door-to-door.

Whether that visit actually results in a sale or whether, as a result of that visit, they refer customers to salespeople who actually make the sale.

I feel rather apologetic that I can't advance the case any further. As I've indicated several times now, the research that I've conducted into this has left me in some doubt as to whether or not it is capable.

PRESIDENT:

Could you give me an example of the type of person you have in mind, Mr Evans? As you've no doubt read from

/CD - 02.12.88

PRESIDENT - EVANS

PRESIDENT: decision of this Commission that generally speaking where we have an adversary-type situation the Commission requires an actual example.

MR EVANS: Yes, I do.

PRESIDENT: Now I understand in your case it's slightly different. But if you could give me an example of the type of person you have in mind so that in coming to a decision on this I can apply my mind a little more directly to a factual-type situation.

MR EVANS: Oh, yes. Well, one specific enquiry that we did have that wasn't completely resolved was from a firm of accountants on behalf of a employer. The firm of accounts didn't indicate the name of the employer; they simply ... if I may simply read the enquiry as it was address to us?

PRESIDENT: Yes.

MR EVANS: "I've been instructed by a client of this office to seek clarification of the award wages and conditions to be paid to their employees. The industry in which the business is involved is the home improvement industry, i.e. cladding and weatherboard, extension to houses, constructions and erection of car ports et cetera.

The specific employees to which this question has arisen are: (a) telephone salespeople; i.e. employees telephone at random homes to ascertain whether the householder is interested in discussing any home improvements with a salesman; i.e. salesman; i.e. employee who follows up the leads provided by the telephone salesperson by providing

MR EVANS:

quote and documentation
before the contracts."

The letter went on to give some very brief details as to the hours of work and simply asked for information relative to the enquiry and suggested that if we required further clarification that we seek it.

Well, certainly I did require further clarification. I replied to that particular letter. If I may again read from my file, Mr President?

"I refer to your letter ...
et cetera ...

From the information provided it appears that your clients business is subject to the State Building Trades Award which, while including classifications for carpenters, labourers and associated construction classifications, does not provide award coverage for either telephone or outside salespeople.

Award coverage in such situations is generally provided by section 40 of the Industrial Relations Act which allows prescribed classes of work or classifications as defined and the award containing that class of work to be extended to work not otherwise subject to an award.

One such prescribed class of work is assistance from the Retail Trades Award [I go on to define or, to outline that definition].

It is far from clear whether this definition is broad enough to cover both types of salespeople referred to in your letter. To clarify the matter I'll make application

MR EVANS:

to the President of the
Tasmanian Industrial
Commission for an
interpretation of the
application of the
classification of assistant."

And I sought from them ... I suggested that they, as a guide, use the Retail Trades Award and provided them with those rates, and asked them to provide me with more precise details of their clients business. Specifically, does the client only supply materials when he's involved in the actual construction or does he also retail the wholesale to other builders.

Unfortunately, no further information was forthcoming, so I guess I've rather long-winded in providing an answer to your question. Specifically, the one instance that I can give you is an employer engaged in the home improvement industry, that is cladding and weatherboards, extension to house, construction and erection of car ports, and the salesperson simply rings around prospective clients, either taking them from the phone book, from a variety of other journals or publications, seeking sales.

Now they may or may not follow that up and actually participate in the sale. They may simply refer them on to another salesman.

PRESIDENT:

Yes. You said ... it may have been a slip of the tongue, you said 'salesperson rings around'. Did you mean 'salesperson' or 'some persons'?

MR EVANS:

Well, sorry, some person, yes.

PRESIDENT:

Yes. Because, you see, whilst you're addressing I was reminded of a recent case that I dealt with, and Mr Abey will bear with me, it has nothing whatever to do with the merit of the case, but it involved a fairly small business.

/CD - 02.12.88

PRESIDENT - EVANS

PRESIDENT: In which only one sales person was employed as such, but from time to time - and when I mean 'from time to time' I mean each week, perhaps each day - the storeman employed, as such, and the office assistant, employed as such, would spend time in the showroom, certainly on the premises, selling the company product.

Now, ...

MR EVANS: Certainly, in ...

PRESIDENT: ... that doesn't go to telephone sales, but it seems to me that the point is pretty much the same.

When does a person become a sales person or an assistant and when do they become something else? Is it a question of their instrument of appointment? Is it a question of what they physically do, regardless of their instrument of employment? And does it really matter that they may solicit business over the telephone or simply take an enquiry over the telephone?

MR EVANS: Certainly, in some of those instances we would not have any difficulty in providing, we believe, award coverage for the people.

Dealing with your first example of a sales assistant who might drift in and out of the storeroom or whatever performing other functions, ...

PRESIDENT: It was the other way around. If the storeman ...

MR EVANS: ... or that they ... and the other way round ...

PRESIDENT: ... if he drifted out of the store to sell the company product.

MR EVANS: The Industrial Relations Act provides mechanisms to cover that sort of situation whereby they are covered by an award for a particular period of their time.

/GP - 02.12.88

PRESIDENT - EVANS

MR EVANS: The problem area, as we see it, is not with that sort of person, but with someone who is specifically engaged by an employer - using the example of the cladding employer - and their duties only encompass canvassing for sales by telephone, not necessarily from the employer's premises.

Now, as I said at the outset, for the purpose of the exercise, I've assumed that the people engaged are employees. Of course, that would be one question that we would have to examine in each instance.

PRESIDENT: Yes.

MR EVANS: But assuming that that is satisfied, we then come back to the question of whether the definition is capable of being extended to this otherwise award-free area of employment. Award-free because, in our view, the scope of the Retail Trades Award quite clearly only provides for selling of goods in shops.

PRESIDENT: If a person ... you haven't addressed yourself to the ... where it devotes. Does that ... is that relevant do you suppose? An assistant means:

"Any employee who devotes any portion of their time ..."

Well now if any ... and I presume that means if any portion of your time is occupied.

MR EVANS: Mm. I've certainly made the assumption who's engaged primarily and solely on utilising the telephone in canvassing for sales was devoting their time to ...

PRESIDENT: That would be the whole of their time.

MR EVANS: That's right.

PRESIDENT: But if somebody was engaged for something else or had other duties,

PRESIDENT: but utilised part of their time, say, their spare time, to canvassing by random telephone call sales, would that not meet the definition of assistant, given the nature of the employer's business?

MR EVANS: Allowing for the nature of the employer's business to fall within the award, certainly, I believe that that would satisfy it, yes.

PRESIDENT: So that we'd then have to determine each case on its individual merits, I suppose, Mr Evans, in those circumstances.

I think I know exactly what you're on about, and I think I may have had a number of those telephone calls myself, but I would have no idea if the person making the call had other duties and was simply phoning around to keep himself or herself usefully employed during slack periods.

MR EVANS: Mm. I understand.

PRESIDENT: It would be unusual, I would imagine, for an employer to employ somebody exclusively to be on the telephone each day.

MR EVANS: Well it's certainly our understanding that that sort of practice does occur.

PRESIDENT: Well then it did occur, wouldn't the chief and principal purpose of that employment be the sale of goods by one means or another? The end result would be to bring about a sale presumably?

MR EVANS: Well that's the questionable point. In it, of course, is whether the canvassing for the sale of goods is the same as the sale of goods. As I said, I incline to the view that canvassing for sale, bearing in mind this definition is sufficient.

PRESIDENT: Yes.

/GP - 02.12.88

PRESIDENT - EVANS

MR EVANS: But certainly there's alternative view around.

PRESIDENT: Would a used car salesman who peruses the Wanted to Buy column, for example, of the media and then makes a telephone call where a telephone number is given and attempts to make a sale of a vehicle that might be in the yard, would that person pose any problems for you in determining whether he or she was involved in the sale of goods by telephone, ...

MR EVANS: No, I don't believe so.

PRESIDENT: ... even though he might also sell in the yard?

MR EVANS: Notwithstanding that it's a different award that we're talking about, I don't believe that it would present a problem because, as you've indicated earlier, that particular employee would be engaged, principally, to sell cars.

Now as an extension of the engagement, he's canvassing through whatever means that are available to him.

MR EVANS:

To my mind that doesn't present a problem at all. As I said, it is my belief that there are people who are engaged solely to canvass for sales, and it is that person who we believe we have some difficulty in determining whether or not the definition is capable of embracing.

I take on board and agree entirely that where the canvassing for the sale is simply an extension of the employee's contract the problem doesn't exist.

PRESIDENT:

So it would be your view that, first of all, any canvassing for sales would have to fall squarely within the scope of the Retail Trades Award for a start. And that would mean that it would be the person ... the employer would have to be in the industry of selling goods by retail shops.

MR EVANS:

No. The scope of the award isn't important in extending the classification from an award to an otherwise award-free area.

PRESIDENT:

Because of section 40?

MR EVANS:

Yes. That's right.

PRESIDENT:

Something about which I've had a great deal to say from time to time, I'm afraid, because you are, in effect, extending the operation of an award part of one industry into other industries that are in no sense, in many cases, related to the original award.

MR EVANS:

Mm, I agree, it certainly can present problems. But in defence of the section of the Act, if I may, certainly in an ideal world we'd simply have an award or a registered agreement or an instrument covering all areas of employment. And it would be quite clear as to what instrument covered that particular employment.

But, unfortunately, whilst it may be

MR EVANS: getting closer to the ideal, it still isn't. And certainly going back some years, it wasn't. And going back some years, there were certainly vast areas or groups of employees that could be simply categorised in the award-free area. And with the provision such as section 40 to enable us to extend award coverage to those employees, whilst it certainly is acknowledged it's not the ideal way to do it, they'd have been totally out in the cold, as it were.

PRESIDENT: And unless they wear Mr Abey or Mr Blackburn's brand, the employer concerned doesn't get any say in it.

MR EVANS: Yes. That, unfortunately, is correct.

PRESIDENT: Unless, of course, he has a private agreement.

MR EVANS: Mm.

PRESIDENT: Yes, thank you, Mr Evans.

MR EVANS: Yes.

PRESIDENT: Anyone going to ... who's going to open the batting from the other side?

Oh, one other point, Mr ... excuse me, Mr Abey. It's customary to indicate that a preference for a retrospective or prospective date of operation of any interpretation.

MR EVANS: It is something that I have given some thought to. I have mixed feelings about it, to be perfectly honest.

If the definition is today capable of including these people, it was capable of including them yesterday. But extending that reasoning, when you actually declare it operative from, I think in all fairness it's have to be from a date fixed in the future - that is, prospectively rather than retrospective.

PRESIDENT: Oh, yes. I think you'd be right,

/CD - 02.12.88

PRESIDENT - EVANS

PRESIDENT: because in the event an interpretation conferred a right on somebody or took something away from somebody there's the question of retrospectivity and very, very difficult.

MR EVANS: Right.

PRESIDENT: Yes.

MR EVANS: Thank you, Mr President.

PRESIDENT: Thank you.

Mr Abey?

MR ABEY: Thank you, Mr President.

I myself am in a slight difficulty in that I came along prepared to argue something different to that which has fallen from Mr Evans, in that I was reading his application which says:

"Declare whether or not the above definition is capable of providing award coverage for persons canvassing for the sale of goods, whether or not an actual sale results".

PRESIDENT: Yes.

MR ABEY: I had believed, as indeed I believe you did, sir, judging from one comment you made, that we were dealing with possibly, whilst it be hypothetical, at least an actual situation, and the question would be whether or not under the scope of this award the definition of assistant was capable of covering these people.

I had no idea that we were going to be dealing with a very hypothetical extended application pursuant to section 40 of the Act, which makes it somewhat more difficult to argue. In that, clearly, I had intended to come along and say, 'Well, if we are talking about telephone sales canvassing or, indeed, door-to-door selling then the primary question,

MR ABEY:

the first question that had to be asked was whether those people are engaged in a shop.

I was prepared to argue that. It's not necessary as it's been conceded essentially that they are not, so they would not fall within the scope of that particular application.

Having said that, I would certainly argue that allowing for the extended application of it, and allowing for the fact that this is an interpretation and it must be determined as the words fall, the Commission should still be constrained from providing what would ultimately be a ludicrous situation, should you find in favour of the DLI's application in this situation.

MR ABEY:

Bear in mind that this matter, at the request of the Union, has gone to merit - the full argument has been presented - before the Deputy President handed down his decision and the SDA indicated that they wish to withdraw that application, for whatever reason, the application being to insert a classification to cover telephone sales and, indeed, door-to-door canvassing.

I think you can't ignore the fact that that application has been heard and run and withdrawn at the penultimate moment and should you find in favour of the DLI in this case, then I foreshadow now that we would immediately be back to seek to amend the application to indeed exclude these people or take some alternative action because to apply those words in the literal sense could create an absurd situation.

Because the words say, 'means any employee who devotes any portion of his or her time'. It is of no relevance whether an employee devotes 1 minute a day or 8 hours a day.

If the DLI application is successful, if an employee devotes 1 minute a day to the sale of goods, then by the extent of the application, that person is an assistant.

Now that can have quite absurd consequences, of course. For example, I might make a phone call to sell someone a workers' compensation hand book we've recently published. Now in the literal ... quite literal, but absurd interpretation of that construction, that would make me an assistant within the definitions.

I think we have to read the term 'assistant', in the context of which the award was made, and that is, shop assistant.

Further down we have the definition

/GP - 02.12.88

ABEY

MR ABEY:

of 'senior sales assistant', means:

"An adult sales assistant who is second-in-charge of a department controlled by a departmental manager or owner and such an employee shall be classed as second-in-charge only if so appointed by the employer or his representative."

That the senior sales assistant, which is an extension of the assistant classification, is clearly designed to cover the shop assistant who is in charge of a department. And I don't think however you interpret this, you could get away from the fact that assistant really means shop assistant.

And one obvious application that we would make or one obvious way around it should this go against us, would be to insert the word 'shop' before the 'assistant', to put it in its proper context.

There could be ... I can think of no classification which potentially could be broader than the term 'assistant'. It could mean anything. It would be on a par with taking an award and there are many of them which have a classification of operator and extending that by general application and does not need a vivid imagination to see the consequences of that.

I suppose everybody at some stage, if they're in business, devotes some portion to the sale of goods. Not necessarily directly. It might be market research or something like that.

But to take the logical extension of the DLI argument, they would be deemed to be assistants and for that reason, we say that do extend that definition beyond what is commonly accepted as a shop assistant, could create or would create an absurd

MR ABEY:

conclusion, which would obviously have to be remedied on a merit argument.

It would, for example, extend this award to cover the well-known Avon ladies, who go door-to-door at all hours of the day purely on a commission basis.

The consequences - and I know this is touching on merit - would be unbelievably horrendous, and for those reasons, whilst I don't intend to get into the merit, all I'm saying is the award has to be applied sensibly and not in a manner which makes a nonsense of the whole claim.

I guess we could sit here and trade dictionary definitions as to what is envisaged by the sale of goods. I would have difficulty in arguing that canvassing or ringing people up didn't, in some way, touch on the sale of goods. Just as I'd have difficulty in arguing that a person engaged in market research or something of that nature wasn't engaged in some way on the way of the sale of goods.

I guess everybody's engaged in the sale of goods because that's what makes the world go round. But to apply it sensibly it has to be seen in the context of a shop assistant.

PRESIDENT:

Is the difficulty compounded by the fact that on the one hand we need only look to the scope of this award to determine the industry, but because of the - what I'll term, 'the common rule' or the extension - one could find that this particular classification might be applied in industries that, by their scope, would suggest that no such classification would be appropriate?

MR ABEY:

Well ...

PRESIDENT:

Ordinarily, one would say, 'Well if it's not covered by the scope ... (because the scope surely is the

/GP - 02.12.88

PRESIDENT - ABEY

PRESIDENT: incidence, the area of coverage, that's the industry of the employer) we could only make ... under the Act, we can only make awards covering the industry of the employer'.

So, I mean, ... but it's ... when ...

MR ABEY: Well that's, frankly, what I came along to argue today and I must admit I was remiss that today is the first occasion it's been drawn to my attention that there is extended or general application for an assistant. I wasn't aware of that.

PRESIDENT: I wasn't either.

MR ABEY: I knew there was extended application for a clerk, which is much more clearly understood, but not for an assistant. Assistant has to be sensibly read as shop assistant.

Thank you.

PRESIDENT: Yes. Thank you, Mr Abey.

You would agree then that any interpretation would be prospective, I take it?

MR ABEY: I think that goes without saying, Mr President.

PRESIDENT: Yes. Thank you.

Mr Targett, thank you.

MR TARGETT: Thank you, Mr President.

Based on the manner in which the request has been made by Mr Evans for the interpretation and the fact that it isn't based on factual circumstances and it goes to a question of the extent of application of the award, we don't intend to make any submissions as to the question of the interpretation of that word or that definition of assistant into the extended area.

MR TARGETT:

Mr Evans has certainly announcing our long held view anyway as to the question, but I'm a strong believer in interpretations being based on factual circumstances because I believe that is the only proper that any interpretation can be done.

MR TARGETT:

If the Commission was of that view, we would be quite happy to cooperate with the Department and with Mr Abey to see if there were available specific cases to put forward to the Commission, but if the Commission's quite happy to interpret the definition based on the request of Mr Evans, we would leave it at that.

PRESIDENT:

Well, I'm required of course to entertain such an application and in fact I can see merit in such applications coming before the Commission, having regard for the function of the Department of Labour and Industry in this area.

But I do agree, Mr Evans has posed a very difficult problem because we are not in fact attempting to interpret this award in any meaningful way. What we're trying to do is pick something out of this award and apply it to some unknown circumstances. An example given, has been someone in the building trade, or home improvement industry canvassing for business by telephone.

We don't know the substantive classification of such people. They may be employed as sales persons, they may be employed as office assistants or storemen, or it may even be a senior member of the firm, or it could be someone, as has been said, simply on commission.

I think you'll find examples of all of those in different circumstances. The DLI, nonetheless, is required to do its job.

MR TARGETT:

Mr President, I'm certainly not suggesting that the Department shouldn't bring these matters before the Commission. I'm merely stating the view that we hold as to interpretations and the difficulty that exists with these sorts of applications.

PRESIDENT:

What brand do you think those people

/JR - 02.12.88

PRESIDENT - TARGETT

PRESIDENT: would wear, Mr Targett?

MR TARGETT: How do you mean, brand, Mr President? Are you suggesting which union would have constitutional coverage of those people?

PRESIDENT: Yes.

MR TARGETT: If that question is being put to me, I would certainly say that we have constitutional coverage over those people. Our constitution does have ...

PRESIDENT: Do you actively seek to recruit them, and I know that we're getting dangerously close to merit.

MR TARGETT: We do have people as members who are exclusively employed as telephone canvassers.

PRESIDENT: Are you able to give an example of the industry?

MR TARGETT: Home improvements.

PRESIDENT: I see. But those people are employed as such, or do they have other duties?

MR TARGETT: No other duties.

PRESIDENT: No other duties?

MR TARGETT: Their sole duties are telephone canvassing.

PRESIDENT: Within the normal spread of hours, Mr Targett, or outside?

MR TARGETT: No. A bit of both, Mr President.

PRESIDENT: For which overtime rates are payable, time worked outside the spread?

MR TARGETT: That was the reason there was a lot of toing and froing with applications before this Commission, Mr President, as you're well aware.

PRESIDENT: Yes, thank you. Mr Blackburn, do you have any ... did you enter ...

/JR - 02.12.88

PRESIDENT - TARGETT

MR BLACKBURN: I did not enter an appearance. I don't think I can add to it. I'd support the things that Mr Abey's said. I guess, maybe we've got to address what is a retail outlet? Mr Abey is referring to a shop and I wonder whether the home improvement place is actually the retail outlet.

PRESIDENT: Well, I don't know. There's selling a product, aren't they?

MR BLACKBURN: They're also selling a service. They're selling something which is going to have work done on it.

PRESIDENT: Yes. Well, of course, some home improvement businesses, for example, I think can sell material in kit form, can't they? You do it yourself or they'll sell the material and erect it, or effect the improvement.

But I suppose we're getting a bit close to merit. I don't know what the real test is.

Coming back to you, Mr Evans, what does the DLI really believe? That these people are covered or are not covered?

MR EVANS: I guess we're treading the path that Joe Bjelke-Petersen trod once, it's one leg either astride the barbwire fence. We're hoping that the matter will be resolved as a result of today.

We're reluctant to extend the classification by way of general application because of the argument attached to it. I'm personally inclined to the view that it's capable of being extended.

We're reluctant to express that view. We'd certainly be further reluctant to come to grips with an employer in the Court of Petty Sessions trying to enforce the view that way.

Some of the matters that were raised

MR EVANS:

about retail outlets etc., as I said, it really becomes irrelevant because we're not dealing with the scope of the award. We're simply dealing with whether the definition out of that award can be taken out and applied to other areas, which the Industrial Relations Act allows it to do.

PRESIDENT:

Yes. If one were to turn it on its head and say, forget the Retail Trades Award for a moment, let's call it an occupational group of salesmen, or salespersons, wherever employed. In those circumstances, would someone, in your opinion, canvassing for sales by telephone be covered by such an award?

PRESIDENT: We were dealing only with an occupational group.

MR EVANS: Certainly. It's my view that that sort of person comes within the broad range of salesperson. I believe that canvassing for sales can be part of a salesmen's duties. Not only actually selling the product but canvassing for the sale of those products notwithstanding whether a sale results.

PRESIDENT: I'm not sure that you've answered my question actually. I thought you said you were making a decision whether not to extend that classification. Earlier you've left me with the impression that it already had been extended.

MR EVANS: I'm sorry. The classification is capable of being extended to this group of people.

PRESIDENT: There has been no regulation?

MR EVANS: Oh, yes. The regulation is there. What I mean by capable of and not being extended to date is that we haven't had any actual situations that have given rise to us saying 'Yes, we will apply this classification by means of extension from the Industrial Relations Act'.

But the mechanism is there. It has been extended by regulation. The regulations provide that the definition of assistant can be extended pursuant to section 40 in regulation 14.

PRESIDENT: Yes. It's included in that list, is it?

MR EVANS: Yes, it is indeed.

PRESIDENT: I see. And it can be excluded only on recommendation by the Secretary for Labour and with the approval of the Minister.

MR EVANS: That's right.

/JG - 02.12.88

PRESIDENT - EVANS

PRESIDENT: So it's out of our hands, isn't it?

MR EVANS: Yes, sir. I guess in a nutshell the problem simply is that we are being asked whether we can provide ... not we can provide but whether there is award coverage. And in a nutshell we are not sure as to what the answer is because of the provisions of the Industrial Relations Act that allow that classification to be extended.

If the classification is deemed broad enough to take in people who are canvassing for sale we can apply the Retail Trades Award to them notwithstanding that some of the conditions in that award might not be appropriate to the times that they work.

PRESIDENT: Yes, that's right. But the classification has been extended by regulation.

MR EVANS: Yes.

PRESIDENT: And I'd presume we haven't inherited it haven't inherited it. It hasn't been extended during the life of this Commission presumably.

MR EVANS: No.

PRESIDENT: It's a carry over from our old Industrial Board days, is it?

MR EVANS: Yes.

PRESIDENT: When boards ... well they still covered industries didn't they?

MR EVANS: Yes. Although there may very well be industries that have a specific award covering them that don't include the classification of sales assistant or ... sorry, assistant in them, I think from memory one was the Furnishing Trades.

I'm not certain on that fact but I think the Furnishing Trades is one example where it covers a wide range of classifications but has no provision for assistants. If that

MR EVANS:

award isn't one of those beasts certainly there are others around where the employer's main industry is covered by a specific industry award and he may have, as an off shoot, a showroom where he employs someone to sell something, yet the particular award doesn't have the classification of assistant in it.

We, quite clearly, can and do and have extended the definition of assistant to people in that sort of area.

So I would say that there is a need for it to be there, until such time as all classifications are covered by direct coverage from an award or an agreement.

PRESIDENT:

Yes. That's was probably perhaps the easy one. But your application, it deals with telephone sales, doesn't it ...

MR EVANS:

Yes.

PRESIDENT:

... specifically?

MR ABEY:

More ... no, no, ... I say, with respect, Mr President ...

MR EVANS:

Well it's not specifically ...

PRESIDENT:

No. No, it doesn't ...

MR ABEY:

It doesn't say, 'telephone sales'.

PRESIDENT:

... It says canvass ... just simply, 'canvassing for the sale of goods whether or not an actual sale results', yes.

MR ABEY:

That's right.

MR EVANS:

That's right

PRESIDENT:

But it would include telephone sales ...

MR EVANS:

Yes, that's right.

PRESIDENT:

... or door-to-door sales?

/GP - 02.12.88

PRESIDENT - EVANS - ABEY

MR EVANS:

Yes, that's right. It principally came about as a result of the matter before Deputy President Robinson which dealt with telephone sales, which was later expanded to include door-to-door sales, and deliberately, in my application, I simply left it open.

PRESIDENT:

Mm. Well, as you're aware, that in interpreting an award, if the Commission is of the opinion that something needs to be done to clarify a particular provision it can do so.

In the past I have been reluctant. In fact, I have declined to do so. I simply indicate what I believe the words mean and give a very strong hint that if people don't like it they ought to make application to vary the award.

Here we're dealing with something that really is clear cut so far as the Retail Trades is concerned. But it's only when we look at the effect of section 40 that we might run into difficulty.

Now what about the proposition that Mr Abey put up that if the word, 'shop' used, I presume in that context as an adjective to define the type of person, if that were to be included in this award would that put the matter beyond doubt?

MR EVANS:

I'm not completely certain that it would when one has regard to the regulations that's provided ...

PRESIDENT:

If one said, 'shop assistant'?

MR EVANS:

Yes, I understand.

PRESIDENT:

That's what you meant, Mr Abey, isn't it?

MR ABEY:

My argument is that the word 'assistant' should be read as 'shop assistant'.

MR EVANS:

Mm.

/GP - 02.12.88

PRESIDENT - EVANS - ABEY

PRESIDENT:

Yes.

MR EVANS:

Regulation 14 provides that:

"For the purpose of sub-regulation (1) class of work means a class of work to which a classification in the specified award applies or which is defined in that award."

I am, by no means, presenting argument either way, but I'm not completely satisfied that simply retitling the classification for shop assistant alters the actual definition.

It means:

`... a class of work to which a classification in the specified award applies or which is defined ..."

MR EVANS: Simply adding 'shop assistant' to 'assistant', I'm not sure that alters the proposition. It may well do.

PRESIDENT: Well, 'assistant' means 'any employee engaged as a shop assistant who devotes any portion ...'.

MR EVANS: I guess I'd have to concede that.

PRESIDENT: Yes. That would then make it unlikely that persons involved in telephone canvassing and door-to-door sales ...

MR EVANS: Yes, I would concede that ...

PRESIDENT: And it would upset Mr Targett.

MR TARGETT: Very much so.

MR EVANS: As I ... if I could point out again, Mr Abey, on one or two occasions, referred to a DLI proposition. It's not necessarily our view that this ought to be the case.

We're simply of the view that it's a possibility and we, to be quite frank, aren't sure whether it can be applied or not. We simply want to sort it out one way or the other.

MR ABEY: I accept that.

PRESIDENT: I understand completely, Mr Evans. Thank you. Yes.

Well, ordinarily I would have reserved my decision, as I most certainly will. But as this is the first such request for interpretation by the DLI, I'm quite prepared to hear anybody else who feels they need to say something if

MR TARGETT: You've prompted me with your most recent comment, Mr President. If you were looking at, as a result of the interpretation, taking some action to try and clarify the things. Considering the potential impact of some alterations that could be made,

MR TARGETT: it would be my submission that if you were inclined to make those sorts of suggestions it would appropriate at least to hear further submissions at a later time, as to the impact of such alterations

PRESIDENT: Yes. But I can't do that without going to merit, can I? Which brings me back to something I said earlier, as a rule I will not ... in fact, I have never yet to my knowledge, amended an existing provision.

MR TARGETT: I'm quite happy with that, Mr ...

PRESIDENT: Because I feel that parties ought to be afforded an opportunity to address the Commission on the merits of something.

You see ...

MR TARGETT: That's the point I'm making, Mr President.

PRESIDENT: You see Mr Abey's point, if taken up by the Commission would do you know harm at all so far as the Retail Trades Award is concerned. It would only be ... it might even be an exercise in tautology, because we all know that under the Retail Trades Award we're talking about shop assistants.

But it's the extension of that award into totally unrelated industries that creates the problem.

It would be open to you, of course, Mr Targett, would it not, to make an appropriate application to have whatever classifications you felt appropriate inserted in these unrelated awards, if you were minded to do so.

MR TARGETT: I'd prefer to see the exact opposite, Mr President, where we had all the assistant classifications in one award, instead of scattered throughout.

/CD - 02.12.88

PRESIDENT - TARGETT

PRESIDENT: Well, that too, is open to you, isn't it?

MR TARGETT: Oh, yes.

PRESIDENT: You can seek a occupational award. The Miscellaneous Workers Union did it, and I suppose I'm aware it seems to be working okay.

MR TARGETT: Those matters are under consideration.

PRESIDENT: I see.

Well then, gentlemen, I think it remains for me to thank you for your assistance. I'll reverse my ...

Oh, you want to have another go, Mr ... why not?

MR ABEY: That was an unfortunate choice of words, 'Thank you, for your assistance'.

PRESIDENT: Yes. Well, it's nice to see you smiling, anyway, Mr Abey. Yes.

In those circumstances, gentlemen, I'll reserve my decision.

That concludes this hearing.

HEARING CONCLUDED