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, 24 May 2002
Continued from 13 December 2001

TRANSCRIPT OF PROCEEDINGS

UNEDITED

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

HEARING COMMENCED 10.30am

MR P. BAKER: I appear on behalf of the applicant organisation.

COMMISSIONER IMLACH: Thank you, Mr Baker.

MR A. FLOOD: Thank you, Commissioner, Andrew Flood from the Tasmanian Chamber of Commerce and Industry.

COMMISSIONER IMLACH: Thank you, Mr Flood. Now, who is kicking off?

MR FLOOD: I might as well stay on my feet, Commissioner. Since the last appearance before you in relation to this matter we have advised the AMWU by letter and I understand you received a copy of that, but we have advised the AMWU that we don't consent to their application and today I would like to take you through the reasons as to why we don't consent. The areas that I intend to look at, Commissioner, are first of all whether there is a nexus between the State and Federal awards, Mr Terzic submitted to you that there was. I am then going to look at the nature of casual employment, the difference between the casual employee considered under the Federal award and the casual employee that we are considering under the award of this Commission.

I am then going to ask you to address the actual mathematical formula that the Australian Industrial Relations Commission determined when coming to their decision that a 25 per cent casual loading was warranted. I will briefly address you on some of the other, more minor submissions of Mr Terzic. I will also briefly address you, Commissioner, on the economic impact of a 25 per cent casual loading in Tasmania and I think that will bring me to the stage then of being able to summarise our position. I expect that we won't be particularly long, Commissioner, I imagine that will probably only take an hour, I don't think we will go over the hour.

But if I can address you first of all, Commissioner, in relation to the nexus that Mr Terzic alleged existed between, if I can refer to them simply as the State and Federal awards. In his submissions to you Mr Terzic relied on the principles set out in the decision of the AIRC which I understand, just bear with me, was exhibit T1 from Mr Terzic and that decision of course was the one where the AIRC conceded the union's application to increase the loading. Mr Terzic claimed that there may be a nexus between the Federal award and the State award. We don't accept, Commissioner, that there is a nexus between the two awards, despite Mr Terzic's comments.

We say that if this Commissioner were to approve this particular application merely on the supposed existence of a nexus between the two awards the TCCI and I guess other employer bodies and I guess

other union bodies may well be entitled to make application to vary the Tasmanian awards in areas where the Federal award is either more beneficial to employers or in the case of unions more beneficial to employees. In our view the Federal redundancy provisions are in some cases more beneficial to employees and if there were a nexus between the two awards we believe that on application it would simply be no other option open to this Commission other than to approve those types of applications, but that is nonsense, Commissioner, and it is certainly not what we are seeking.

We say that there is no nexus between the two awards and I ask you to so find. In my view, Commissioner, you need to decide is the Tasmanian award system simply a photocopy of the Federal system or is the Tasmanian Industrial Commission and independent body able to determine matters on the facts before it. Quite clearly our answer is yes, you are an independent body and yes, you are able to determine the facts in each application before you. Mr Terzic also submitted at line 74 of the transcript that even if there was no nexus between the two awards that the doctrine of precedent would create a, and I quote, "A greater comity between the prevailing arbitrated standards," in the two jurisdictions and that reliance on precedent should be, "Persuasive and authoritative."

It is clear to us, Commissioner, from previous decisions of this Commission that this Commission isn't bound by any perceived doctrine of precedent as has been evidenced in the past in its decision to reach alternative findings in State wage case hearings from those that the Australian Industrial Relation Commission has determined in their national wage case hearings. Once again we say that this Commission is not merely a rubber stamp for the Federal Commission and in fact the freedom for this Commission to make its own decisions is found in the Industrial Relations Act section 20(1) which sets out how the Commission should exercise its jurisdiction.

In a decision of the Full Bench of this Commission which I am sure everyone here is familiar with is Matter 125 of 1985 I think was the first Full Bench hearing of this Commission and I do have copies should you so wish me to tender those Commissioner, but I doubted it was necessary. In that matter the bench was asked to consider whether or not that application should be regarded as a test case. Perhaps if I can quote from the decision of the Full Bench which in considering - in its decision in considering whether or not that matter should have been a test case, the bench said:

> *Looked at critically we are left inescapably with the conclusion that detailed information ...(reads)... intended to apply generally across all awards.*

And the Full Bench found that it should not be regarded as a test case because of the differences between the national practices, trends and

so on as against the Tasmanian practices. We use the same reasoning in this matter Commissioner, the Australian Industrial Relations Commission when they considered the application to increase the casual loading considered the matter before it based on information relevant to the Federal award. The AMWU has put no detail to this Commission in this matter on Tasmanian conditions, they have simply relied on the Federal decision to justify its application to flow on the increase in casual loading. So we ask this Commission to hear the application on its merits and to put aside any thoughts of a nexus existing or of any doctrine of precedent applying.

COMMISSIONER IMLACH: Yes, just before you go any further, Mr Flood, are you able to tell me the page that reference was on, that is all I need?

MR FLOOD: Perhaps the easiest way I can do it, Commissioner, is I downloaded the decision and perhaps if I tender that document I can tell you then that it is on page 10 of the decision.

COMMISSIONER IMLACH: Of the downloaded decision.

MR FLOOD: Of the downloaded decision, that is correct.

COMMISSIONER IMLACH: We will mark that F1.

EXHIBIT F1 DOWNLOADED DECISION MATTER 125 OF 1985

MR FLOOD: Perhaps if we go to page 10 up in the top right hand corner, Commissioner, page 10 of 25, it is the third paragraph commencing, "Looked at critically."

COMMISSIONER IMLACH: Yes, thanks Mr Flood.

MR FLOOD: Thank you. So once again, Commissioner, we ask the question as to whether this Commissioner is - this Commission is simply a rubber stamp for the Australian Industrial Relations Commission or whether it makes decisions independent of the AIRC and clearly we say it is the latter. If I can draw your attention, Commissioner, to the types of employees that were considered. The types of, particularly the types of casual employees that were considered in the decision C22704 of 1999 of the Australian Industrial Relations Commission when they were asked to review the casual loading under the Federal award.
The casual employee under that Federal award is a different type of employee to that under the award that we are considering today. In the Federal award, Commissioner, prior to the amendments made as a result of C22704 of 1999 the definition of a casual employee was, and it was found at clause 4.2.3:

A casual employee is to be employed by the hour. A casual employee for working ...(reads)... of the casual employees all-purpose rate.

That definition, Commissioner, in our view places no limits on the nature of the hours of work for which casual employees may be engaged, such as whether or not there is any need for irregularity in the hours of work before the employee may be considered a casual employee. So we say that definition allows a casual employee to work regular hours each week.

COMMISSIONER IMLACH: Is this the new definition or the old one?

MR FLOOD: Perhaps if I can just go on, Commissioner, the decision 22704 of 1999 of the AIRC actually retained that casual definition. The casual clause itself was - there were some provisions added to it in relation to notifying casuals of the - of their casual status and allowing casual employees to elect to go on to part time after a particular period of service, but the definition itself of a casual employee remained. There is still no limit as to - there are no conditions placed on the casual employment as to whether the hours of work should be regular or irregular and that is still in fact clause 4.2.3 of the Federal award.

In addition, Commissioner, clause 4.2.3(a) provides for conditions for casual employees other than irregular casual employees and clause 4.2.3(f)(i) defines an irregular casual employee as one who has been engaged to perform work on an occasional or non-systematic, or irregular basis. Now, the alternative to occasional, non-systematic or irregular work is in my view regular and systematic work and the Federal award clearly allows for casual employees to be engaged on a regular and systematic basis. If we were to compare that, Commissioner, to the award of this Commission, the State award defines a casual employee as - sorry, in clause 7 defines a casual employee as:

Any person who is employed on an irregular basis to perform a specific task or tasks over a defined time period. At the completion of such period the contract or task, the contract of employment shall be deemed to be terminated.

So quite clearly under our - under the Tasmanian award a casual employee may only work irregular hours. The opposite of that is an employee that works regular hours, in our view cannot be engaged under this award as a casual employee. So the two awards and also the two applications are, in our view, dealing with different types of employees. Whilst their both called casual employees in actual fact we say that they are different types of employees. The Federal award includes regular casuals and the State award includes only irregular casuals.

Now, the importance of this, Commissioner, the importance of this difference is that the AMWU submissions to the Australian Industrial Relations Commission in C22704 of 1999 were based, in part, on the entitlements of casual employees who work regular and systematic hours. And when making its decision the Australian Industrial Relations Commission considered in part the difference between entitlements of full time employees and these regular casual employees. As this Commission can only be asked to consider the difference in entitlements of full time and part time employees and irregular casual employees, because in our view the State award only allows irregular casual employment, this Commission should not consider some of the issue that the Australian Industrial Relation Commission considered.

As an example in its decision the Australian Industrial Relations Commission said - it is at paragraph 178, Commissioner, of their decision:

> *That the differences in notice periods for full time and casual employees was a more prominent discrepancy than any other.*

And presumably this difference between full time and casual employees had a large affect on their decision to increase the casual loading. We accept that there is some merit in their reasoning when considering the notice periods applicable to full and part time employees as against casual employees working regular hours of work. No doubt the AMWU would claim that a casual employee who works regular hours of work should receive the same notice as a full or part time employee. But Commissioner as the Tasmanian award only includes casual employees who work irregular hours of work this so-called more prominent discrepancy we say should have no relevance either to the Metal and Engineering Industry Award or in fact to this application.

In addition Mr Terzic in his submissions to this Commissioner appears to rely on the comments of the Commonwealth in their submissions to the Australian Industrial Relations Commission where the Commonwealth referred to a decision of the Employment Relations Commission of Victoria and which Mr Terzic quoted at line 126 of the transcript of the earlier hearing in this matter. I am sorry which - yes, I am sorry, I will leave that. In that matter Mr Terzic says that the Commonwealth submitted that the Full Bench of the Victorian Commission adopted a recommendation that the setting of rates of pay for casuals should be approached on a sector by sector basis and the reason for so doing was that casual employment varied widely across awards.

Without making specific comment, Commissioner, there may be some merit in determining casual rates of pay on an industry by industry

basis, but in this particular case as I have already submitted to you there is a considerable difference between a casual employee under the Federal award and a casual employee under the State award. And given the reason behind the decision of the Victorian Commission and that was the wide variety of award provisions, it is our submission now that the two awards have considerably different definitions of what is a casual employee and that in this case it is more appropriate - we say to you it is more appropriate to consider the casual rates of pay on an award by award basis, rather than simply an industry sector by industry sector basis.

So far, Commissioner, I have submitted to you why we believe this Commission should refrain from simply accepting the Australian Industrial Relations Commission's decision on the casual loading and now I turn to what decision I think you should make in this application that is before you. In their submissions to this Commission the AMWU states that the Australian Industrial Relations Commission developed a mathematical formula to determine casual loadings. Perhaps a sceptical person and maybe I am a sceptical person might believe that the Australian Industrial Relations Commission decided that they would grant a 25 per cent loading and then went about trying to justify it mathematically, and I must say I am not sure, Commissioner, whether you have looked at the formula that the Federal Commission used, but it does seem to be somewhat confusing and at parts I believe without a great deal of justification.

But anyway I think if I can take you through that formula you will understand better the concerns that the TCCI have. In relation to - the mathematical formula, Commissioner, appears at paragraph 197 of the Federal decision and perhaps I might ask you to turn to that because I will refer to it fairly consistently from here on in.

COMMISSIONER IMLACH: Yes.

MR FLOOD: At paragraph 196, Commissioner, which is obviously leading into that mathematical formula the Australian Industrial Relations Commission stated:

> *For the reasons we have given in the preceding sections, we are satisfied that ...(reads)... in determining a casual loading for the award.*

They then went on in paragraph 197 to set out a mathematical table with cumulative loadings for each of those main components that I have just mentioned and that totalled 125.88 per cent. But in paragraph 198, Commissioner, the Australian Industrial Relations Commission is careful to say that their calculations were, and again I quote:

But one of a number which might be used to demonstrate points and costing effects or estimates.

And further, and again I quote:

We are not persuaded that an exact or precise quantification of different components should be welded onto the determination of the casual loading.

In the case before them the Australian Industrial Relations Commission considered, and again this appears in paragraph 198, Commissioner, that changed access to personal leave since 1974 and that was when the casual loading was last reviewed in the Federal award, they have changed access to personal leave since 1974 and there is substantially different access to notice of termination for weekly employees justified some additional loading. I wish to now address each of those main components separately, so the main components that the Federal Commission raised.

The first one being paid leave. When the paid leave provisions of the Metal and Engineering Industry Award, the State award, were last substantially varied in 1974 and the award of course then, Commissioner as you would be aware, was known as the Mechanical Engineers and Founders Award. The amount of annual leave was increased from three weeks to four weeks. It was at about that time that the casual loading was also increased from a flat 15 cents per hour for all employees to a 20 per cent loading. And perhaps, Commissioner, just for the sake of completeness if I could just tender this document.

COMMISSIONER IMLACH: That will be F2.

EXHIBIT F2 DOCUMENT

MR FLOOD: Mr Terzic, in his exhibits - bear with me Commissioner, at exhibit T10 provided you with a copy of the Award subsequent to the decision to increase the casual loading in 1974. The document that I have just tabled to you, if you can turn to page 3 of that document - - -

COMMISSIONER IMLACH: Just note the members of the board there, I am sure Mr Baker and I have - I don't know about you Mr Flood, but we have mixed memories there. Yes go on, page 3.

MR FLOOD: Some of them anyway. Page 3 and the actual variation from the board is set out in the second paragraph. That is the - so the board agreed to the variation of subclause (d)(1) and clause 19 and so on. So that is the document, Commissioner, which actually changed the casual loading. And it was - no, that is okay. As the Australian

Industrial Relations Commission decision stated at paragraph 160 and again I will just quote:

> *It is reasonable to infer that the consent variation in 1974 took into account -*

The recent increases to annual leave and sick leave. And I think it is reasonable, Commissioner, for us in the absence of anything to suggest otherwise to presume that the increase in the casual loading which is set out in that exhibit F2, and that exhibit F2 was agreed to as a result of the at the time recent increases to annual and sick leave entitlements. So since that decision in 1974 to increase the casual loading to 20 per cent there have been no variations to this award which have had the effect of increasing paid leave entitlements to full or part time employees.

This award hasn't been varied since 1974 to increase the amount of sick leave available, that has remained at two weeks per year. The award has been varied to allow full and part time employees to access their sick leave in different ways as in carer's leave, but the quantum of the leave hasn't been altered. It was two weeks in 1974 and it is still two weeks. This award also hasn't been varied to increase the annual leave entitlements of full and part time employees and this award also hasn't been varied, as far as I can determine at least anyway, to increase the number of holidays with pay for any employees.

The AMWU in its submissions to the Australian Industrial Relations Commission at paragraph 161 of the Federal decision claimed that the principal changes to paid leave entitlements since 1974 were: notice of termination of employment, a job search allowance which was time off during the notice period, one day and further one day per week of notice for redundancies, severance pay, public holidays was changed so that a day that falls within annual leave is added to the leave entitlement, and personal leave changes. The AIRC the Federal Commission stated at the end of paragraph 163 that those entitlements are not available in any paid form to casual employees and that they accepted that they are appropriately to be evaluated as a component in the assessment of the appropriate level of the casual rate loading.

Under the State award, the Metal and Engineering Industry Award since 1974, as I have already indicated we say that there has been no change to the amount of notice of termination of employment, no job search allowance, no severance pay, no change to the outcome of a public holiday falling during a period of annual leave and the quantum of the personal leave has not increased. We therefore submit that in your consideration of this application you should not follow in the steps of the Australian Industrial Relations Commission and include changed access to paid leave provision since 1974 as one of the criteria for determining an increase to the casual loading.

The second main component, Commissioner, that the Australian Industrial Relations Commission considered when establishing the 25 per cent casual loading in the Federal award was long service leave. Casual employees in Tasmania aren't exempted from accruing long service leave under the terms of the Long Service Leave Act. In fact to my knowledge casual employee isn't even mentioned in the sections of that Act that deal with accruing leave. And so far as accruing leave is concerned casual employees are treated no better or worse than part or full time employees.

In the matter before the Australian Industrial Relations Commission the AMWU submitted that even so casual employees were disadvantaged because their short duration of employment meant that the could never realistically become entitled to the payment of long service leave. In relation to that particular point, Commissioner, we rely on the submissions made by the respondents in that Federal matter. That is that the effect of including long service leave among the specific components of the casual loading would lead to an inequitable situation because casual employees, irrespective of their length of service, would achieve a cash benefit from a contingent entitlement not available to most so-called permanent employees.

That is that for every hour worked - sorry, I will start again. That is that if the casual loading was increased to take into account the allegation by the AMWU that casual employees never work long enough to become entitled to a payment of long service leave then for every hour that a casual employee worked they would receive some payment for long service leave and of course that is not available to other types of employees. We also go further, Commissioner, than the respondent in the Federal matter, we say that if this Commission is to increase the casual loading because of a belief that casual employees do not become entitled to long service leave that that would amount in effect to a doubling up.

Not only would casuals be paid for long service leave through an increase in the casual loading, but those employees could also become entitled to an actual payment for long service leave under the terms of the Long Service Leave Act. So an employee that does work for 15 years or 7 years and becomes entitled to a pro-rata payment, can claim under the Act that they have an entitlement and that would clearly, in our view, be a doubling up.

The third main component that the Federal Commission considered when establishing the 25 per cent casual loading was differential entitlements to notice of termination. That was the differences in entitlements of full time employees and casual employees to notice. And in consideration of this component the Federal Commission was required to take into account the notice required for the termination of employment of part and full time employees and that is provided for in

clause 4.3.1 of the Federal award which requires a minimum - of an employer to give a minimum of one week's notice and this amount increases, Commissioner I think you would be aware, but increases depending on the period of service of the employee.

As an example an employee who has five or more years of service and who is over 45 years of age is entitled to five week's notice of termination. Clause, I think I may have written this down incorrectly Commissioner, but I think it is clause 4.3.2 of that award requires almost the same notice for an employee to initiate the termination. The AMWU submitted to the Australian Industrial Relations Commission that the extended periods of notice had come about after the 1974 review of the casual loading and that therefore the Federal Commission should take the increase into account - the increase in notice into account and that the fact that casual employees did not benefit from the extended periods of notice.

It appears to us, Commissioner, that the Australian Industrial Relations Commission has ignored the fact that casual employees also benefit by not having to give extended periods of notice. But nevertheless the Federal Commission did take the extended notice periods into account when calculating their mathematical formula for the casual loading. In the State award, Commissioner, the standard period of notice for the full and part time employees is currently one week. It has remained at one week since at least 1970, I didn't feel like going much further back than that, but certainly way before the 1974 review of the casual loading.

We therefore submit that in your consideration of this application you should not follow in the steps of the Australian Industrial Relations Commission and include changed access to periods of notice of termination provision since 1974 as one of the criteria for determining an increase to the casual loading. In its decision the Australian Industrial Relations Commission said at paragraph 178 that the differences in notice periods for full time and casual employees was a more prominent discrepancy - discrepancy than any other. And presumably this difference between full time and casual employees had a large affect on their decision to increase the loading and that is reflected in the mathematical formula which I will get on to shortly, but that is reflected in the mathematical formula they developed at paragraph 197 shown in ratio D.

So once again we say for employees covered by the State award there has been no change to notice periods since at least 1970 and that this most prominent discrepancy as the Federal Commission termed it does not have any bearing. Finally, Commissioner, in bringing a close to my submissions on the mathematical formula to determine an appropriate casual loading, I would now like to refer to the mathematical formula itself which the Australian Industrial Relations

Commission used to justify their decision to increase the casual loading to 20 per cent.

Up until ratio E, Commissioner, in the formula the Australian Industrial Relations Commission was able only to calculate a loading of 121.6 per cent and it appears that the major part of their decision is based on ratio E or a component for short time worked or paid hours differential determined. Perhaps if I can take you through this mathematical formula, Commissioner, I am not sure how closely you have paid attention to it, but I paid a lot of attention to it and struggled to understand it. So perhaps if I can take you through it and as best I can explain how I think the Federal Commission has arrived at that figure of 125.88 per cent.

Firstly, the - if I can direct your attention firstly to ratio A. At ratio A the - what the Federal Commission did they determined that a full time employee would be able to work taking into account weekends and 260 actual working days in the year. They then, Commissioner, in ratio A took into account the 10 public holidays under the Federal award and they accepted submissions from the parties that the average day's per year for sick leave was 6. So and what they then did, they deducted those 10 days public holidays and 6 days sick leave from the 260 possible working days to arrive at a figure of 244 days which for the purposes of ratio A was the number of days that a casual employee might work. What they then did - - -

COMMISSIONER IMLACH: That last point Mr Flood, I don't quite get that. Can you explain it to me again, "Was the number of days a casual might work."

MR FLOOD: The maximum number of days. We are talking that the 260 is 52 times 5.

COMMISSIONER IMLACH: The maximum for a full time worker.

MR FLOOD: The maximum ordinary days that a full timer can work.

COMMISSIONER IMLACH: Yes.

MR FLOOD: They then said that there are 10 public holidays that the full timer doesn't work -sorry, they then said there is 10 public holidays that a full timer gets paid for, but a casual employee presumably doesn't work, there is 6 days sick leave that a full timer gets paid for, but if the casual had that they don't get paid. So in other words they deduced 16 days from 260 to say that the maximum, this is on average, that a casual would be able to work would be 244 days.

COMMISSIONER IMLACH: If you applied the same reasoning.

MR FLOOD: That is exactly right. So the casual loading figure is arrived by dividing the total number of working days per year for the full time employee by the number that the casual employee could work and that gives 106.5 per cent.

COMMISSIONER IMLACH: Is that - - -

MR FLOOD: Or to put it another way if they were only considering the public holidays and the sick leave taken, the Federal Commission says that is worth a loading of - a casual loading of 6.5 per cent.

COMMISSIONER IMLACH: Yes. And the 260 over 244 multiplied by 100 on 1, is that right?

MR FLOOD: That is right, yes.

COMMISSIONER IMLACH: Thank you.

MR FLOOD: If gives us that 106.5 per cent figure. They then looked at, at ratio B the vested entitlements and they first of all considered that a full time employee would be entitled to 20 days leave per year and that the annual leave loading is worth 3.5 per cent. I can tell you, Commissioner, that that is worked out at 17 1/2 per cent which is the same loading as applicable in the award that we are considering. Because they were - they treated those differently because they were vested entitlements and what they did they took those additional 23.5 days and added it to the 260. Now, I have got to admit I am not quite sure, personally, why they did it that way, but that is what they have done. So that they have then arrived at a figure of 283.5 days that a full time employee, I guess, is paid for.

In the same way they then divided that figure, again by 244 days for a casual to arrive at that figure of 116.6 per cent. Or to put it another way considering the matters in ratio A and ratio B they thought that was worth a casual loading of 16.6 per cent. Again, if I can keep going to ratio C they then took into account accrued personal leave, remember we said back at ratio A that the average sick leave taken was 6 days per year, that still left 4 days out of the 10 that were vested. So full time employees are still accruing 4 days sick leave a year, if you like, 4 days that goes into the bank.

They also took into account there the vested benefit of long service leave and once again I can tell you that that in my view is based on 13 weeks after 15 years of service which would be similar in Tasmania.

COMMISSIONER IMLACH: So that would be approximately 9 days a year, is that right?

MR FLOOD: The long service leave?

COMMISSIONER IMLACH: Yes.

MR FLOOD: It is 4.3 days per year.

COMMISSIONER IMLACH: I see, yes.

MR FLOOD: Now, it is not 9 days and I think the reasoning behind that, that the Federal decision and I can't direct you to it, Commissioner, but the Federal decision also took into account that not everybody actually took long service or became entitled to long service leave.

COMMISSIONER IMLACH: Right.

MR FLOOD: I think that is where that one came from. So once again they added those to the figure above it to come up with 291.8 days for a full time employee and once again dividing that by 244 days for a casual gives us the loading of 19.6 per cent.

COMMISSIONER IMLACH: Well, it is a cumulative thing isn't it.

MR FLOOD: It is a cumulative thing, that is right.

COMMISSIONER IMLACH: It is 10 per cent approximately.

MR FLOOD: So taking into account ratio A, B and C we are now up to a loading of 19.6 per cent.

COMMISSIONER IMLACH: Just a minute "Ratio B accrued personal leave" that is sick leave we are talking about is it?

MR FLOOD: That is ratio C, Commissioner, accrued personal leave is sick leave, yes. The 4 days - sorry, full time employees have 10 days credit per year. Up at ratio A they have already taken 6 days, so they have taken into account the 4 that have - that stay accrued if that is the right way of saying things.

COMMISSIONER IMLACH: They may as well have made it 10 up the top.

MR FLOOD: That is what I thought when I went through it too, yes. I couldn't understand that myself, it would have made it a lot easier. At ratio D then they considered the effects of one week's notice or payment in lieu of notice, again a contingent benefit and following the same processes they have added that to the figure above and ratio A, B - considering the matters involved in ratio A, B, C and D they came up with a loading of 121.6 per cent. The 296.8 divided by 244 is 121.6 per cent.

Then at ratio E the Australian Industrial Relations Commission accepted evidence from the parties that the average weekly hours for casual employees was 36.1 per cent. I will address that in a moment, Commissioner.

COMMISSIONER IMLACH: No, you mean 36.1 hours.

MR FLOOD: 36.1 hours per week, I am sorry. So they accepted evidence from the parties that the average weekly hours for casual employees was 36.1 per week. Or as they say in their mathematical formula then it is 95 per cent of 38 hours. So what they then did, they took 95 per cent of 291.8 days and that is how we get the figure - I am sorry, just one moment. I am sorry, they took the figure of 291.8 days and divided it by 95 per cent of 244 days which was the days for a casual. So they said that because casuals only work 95 per cent of full time hours, we are going to convert that 244 possible days, we are going to accept that they can really only work, or they do only work 95 per cent of that, or 231.8 days.

So they divided their 291.8 days for a full timer by 231.8 for a casual and they arrived at that figure of 125.88 per cent which was the final casual loading they decided upon, or at least they rounded it down it appears to the 25 per cent that they decided upon.

COMMISSIONER IMLACH: The 231.8?
MR FLOOD: Yes.

COMMISSIONER IMLACH: What did they relate that to, to get 125?

MR FLOOD: They divided 291.8 which was the days for a full timer, I am not quite sure what the relevance of the column if fixed term is by the way, Commissioner, I have - that doesn't appear to be referred to at all through the decision to any extent that I can see. But they have taken the full time days for a full timer of 291.8 and divided that by 231.8 which is the number of days for a casual.

COMMISSIONER IMLACH: And that gives you 4 - round about 4 per cent? Round about.

MR FLOOD: No, that gives you a loading of 125 - the overall thing gives you a loading of 25.88 per cent.

COMMISSIONER IMLACH: Yes. But for that ratio E the increment is around about 4 per cent.

MR FLOOD: Oh, I am with you, yes. Sorry, yes, correct. Now, the danger in our view in accepting this formula that the Australian Industrial Relations Commission has developed and the final figure at ratio - how ratio E is determined, is that if you apply a figure which varies even slightly from the average hours for casual employees of

36.1 hours per week, which the Federal Commission accepted, you get wildly fluctuating corresponding figures for the casual loading.

As an example, Commissioner, if in Tasmania we accepted that the average hours per week for casual employees was 35 per week or 92 per cent of 38 hours, 92 per cent of 244 gives us 224.5 days and following through the mathematics gives us a final figure of around about 30 per cent. Now clearly I am not going to say to you that we believe a 30 per cent loading is justified - - -

MR BAKER: That was our claim.

MR FLOOD: Yes. But if I can take that further, Commissioner, following through the same mathematics the following average hours per week give the following calculations for the casual loading and if the average hours per week for casual employees in Tasmania was 30 per week it would give us a casual loading of 51 per cent, so not 25 per cent but 51 per cent. If we reduce further, say it was 25 hours we get a loading of 81 per cent. If it was 20 hours on average that they worked we start to get ridiculous and it is 125 per cent or over double time and on the reverse side of it if it was 38 hours we would have 119.6 per cent.

Now, I have got to say, Commissioner, that we don't know, the TCCI, doesn't know what the average hours per week for all casual employees under the Metal and Engineering Industry Award actually is. The Australian Industrial Relations Commission heard and accepted evidence that average hours were 36.1 per week for the Federal award, but that was Australia wide and that also, and I think very importantly, that also included casual employees working regular hours per week. Remember in the definition of the casual employee under the Federal award there is no limit on their hours, presumably it is anything under 38 per week they can be casual, and we say of course that those employees can't be included under the calculations for the State award.

Our own survey of members and I can tender the survey responses should you so wish them, Commissioner, but our own survey of members shows that of those who responded the average weekly hours for casual employees under this award is 16.34 per cent. Now - - -

COMMISSIONER IMLACH: 16.34 per cent?

MR FLOOD: Sorry, 16.34 hours per week. So they are the average hours for a casual from our members who responded to our survey. Now, quite clearly the TCCI doesn't represent every employer bound by this award and this is why I say we don't know for certain what the real average is and as far as I can determine nobody knows what that real average is but using that figure of 16.34 hours as the average the calculations based on the Australian Industrial Relations

Commission's mathematical formula for a casual loading would be a ridiculous 278 per cent.

COMMISSIONER IMLACH: Mr Baker wouldn't object to that, I don't think. Two hundred and - - -

MR FLOOD: 278 per cent. Be a good way to get rid of casual employees, wouldn't it, Phil?

MR BAKER: Well, it would be fix up the problems in the retail area.

MR FLOOD: Yes.

COMMISSIONER IMLACH: And other areas.

MR FLOOD: I think, Commissioner, it is probably for this reason that in its decision the Australian Industrial Relations Commission said we are not persuaded that an exact or precise quantification of different components should be welded onto the determination of the casual loading and that is why I said despite those comments we still have a mathematical formula where those things have been tacked on or welded on and they have come up with a figure which, as I said, a skeptical person might think they had in mind at the start. If you don't have any questions on that mathematical formula, Commissioner, I intend to leave that just for the moment.

COMMISSIONER IMLACH: No, I think we have canvassed some of the points as we went along. Nothing has come to mind.

MR FLOOD: Thank you. If I can then turn briefly to the submissions made by Mr Terzic in the last hearing before you first of all I would like to - this will only be fairly brief but I would like to address exhibit T4. It is a document that was prepared by the Metal Trades Federation of Unions and was tendered to the Australian Industrial Relations Commission in their consideration of C No 222704 of 1999. Mr Terzic directed out attention to this document from lines 356 onwards and particularly, Commissioner, at the top of page 14 of the transcript.

COMMISSIONER IMLACH: What was it, 214?

MR FLOOD: Yes. Sorry, lines 356 and particularly at the top of page 14.

COMMISSIONER IMLACH: Right.

MR FLOOD: It appears that Mr Terzic sought to use exhibit T4 to demonstrate that casual employees do not in reality even get wages which are 20 per cent higher than full-time employees, that is at the moment. We say that even if the differences between the two are as set out in T4 this is explained by the reality that I guess on average

more capable and productive employees are likely to be employed on a full-time basis and more importantly exhibit T4 refers to actual earnings or if you like, going rates of pay by way of average weekly earnings and this Commission isn't being asked to consider average weekly pay - sorry, average weekly earnings or going rates of pay but minimum award rates of pay and we therefore submit that you should place no importance on the content of T4.

Secondly, at around line 440 of the transcript in his submissions to you Mr Terzic discussed what he claimed to be a difficulty with casual employees to effectively negotiate with their employers. This was unsupported by any evidence by Mr Terzic or any others and we don't agree with the AMWUs submissions in this regard and we ask you to dismiss this part of Mr Terzic's submissions when making your decision.

Finally, Commissioner, if I can now address you on the economic impact of a potential 25 per cent casual loading under this award bearing in mind that this award - this application is the first application of its kind in this Commission and that if it were successful I don't think anyone would pretend that other applications wouldn't follow.

COMMISSIONER IMLACH: Makes me think perhaps I should have referred it to a full bench, Mr Flood.

MR FLOOD: The decision of the Australian Industrial Relations Commission was based on - from memory they made it clear that it was to be only in relation to that award, Commissioner, and obviously we would be seeking the same in this particular case.

COMMISSIONER IMLACH: Yes, but it was nevertheless a full bench decision, wasn't it?

MR FLOOD: Yes, it was a full bench decision, that is right.

COMMISSIONER IMLACH: I don't know whether the parties didn't raise it or I didn't think of it at the time or what.

MR FLOOD: Got to say that I didn't think of it.

COMMISSIONER IMLACH: No. Now, as time is short I feel unfettered in such a matter.

MR FLOOD: Mm. All right. If I can proceed then on what we - - -

COMMISSIONER IMLACH: I hope, Mr Flood, you don't take that as an indication of any sort.

MR FLOOD: No, I don't, none at all.

COMMISSIONER IMLACH: Good. Not meant to be, I can assure you.

MR FLOOD: I am ignoring everything you say, Commissioner, in that regard.

COMMISSIONER IMLACH: Yes.

MR FLOOD: The economic indicators for Tasmania in general, Commissioner, in general have been showing signs of improvement for some time, however we say a decision to increase the casual loading has the serious possibility of compromising our State's promising prospects, at least in the metal industry. Australian Bureau of Statistics figure released reasonably recently, a fortnight or so ago, clearly show that Tasmania's labour market continues to be on shaky ground with the number employer - number of employed persons significantly declining.

Any decision to increase casual loadings we say will do nothing to improve that situation. A 25 per cent casual loading represents a significant increase in labour costs and would have a drastic disincentive effect for the employment of casuals. By increasing the costs by such a large amount the effect would be to substantially deter use of casuals and to substantially inhibit their use even when they are actually needed by employers.

A decision to increase the loading to 25 per cent will, in our view, effectively mean that casual employees who keep their jobs get more as an hourly rate but they will probably work lesser hours while others are shut out of a job altogether because of decisions made on the basis of a finite overall labour cost decision by employers. It appears to us that the AMWU has ignored the size of the labour cost increase proposed in its application and the possible flow-on effect. According to the Tasmanian survey of business expectations businesses currently rank direct and indirect labour costs as the highest constraint on business growth at present and a decision to increase the loading of casuals would only, in our view, compound this constraint on employment.

A decision to increase the loading to 25 per cent radically undermines the ability of businesses to frame their labour force demands to their labour force needs. There is no principle more crucial in our view to a strong economy than the need for flexibility in the face of shifting circumstances. That flexibility assists economy such as Tasmania's to be competitive and productive and to therefore maintain our overall standards of living.

Casual employment is needed precisely because businesses want the flexibility of being able to bring employees in when they are needed. An increase in the casual loading creates a significant restriction of the freedom of choice for both - well, for employers and as a result for

employees so in summary we say an increase in the casual loading to 25 per cent will only raise costs and prices, lower productivity and reduce employment levels, four outcomes that are clearly contrary to the net interest of the public.

COMMISSIONER IMLACH: Four outcomes?

MR FLOOD: Raised costs - - -

COMMISSIONER IMLACH: Raised costs, lower productivity - - -

MR FLOOD: Costs, prices, productivity and employment.

COMMISSIONER IMLACH: Oh, prices.

MR FLOOD: There is - an "and" in between. Three outcomes if you like.

COMMISSIONER IMLACH: Yes.

MR FLOOD: Those are the major parts of my submissions, Commissioner. If I can just proceed and again, unless you have any further questions I would just now wish to summarise my submissions to you.

COMMISSIONER IMLACH: No further questions.

MR FLOOD: Thank you. And at - if I can first of all direct you to paragraph 155 and 155 onwards in fact, of the decision of the Australian Industrial Relations Commission. That Commission discussed the cost implications and considerations necessary to determine an appropriate casual loading. At paragraph 157 they said, and I will quote:

> *A logical and proper consequence of providing for casual employment with the incidence currently attached to it is that so far as the award provides it should not be a cheaper form of labour nor should it be made more expensive than the main counterpart-types of employment.*

COMMISSIONER IMLACH: Sorry, but where is that?

MR FLOOD: Sorry, Commissioner, at paragraph 157.

COMMISSIONER IMLACH: Fifty-seven?

MR FLOOD: 157.

COMMISSIONER IMLACH: Right, got that, yes?

MR FLOOD: So we say and I have already addressed these issues, we say that given that the majority of issues considered by the Australian Industrial Relations Commission in their mathematical formula to determine the casual rate, are not applicable to casual employees under the Metal and Engineering Industry Award. The Federal Commission also discussed as a part of this, that there should be some deterrent to ensure that casual employment should not be the preferred method of employment. There already exists under the Tasmanian award, if you like, a deterrent to casual employment, and that is that a casual employee may only be engaged to work irregular hours.

Casual employment, in our view, Commissioner, is not some dark evil that it seems to be portrayed in recent times, that in this particular case a casual employee can only be an employee who works irregular hours and those arrangements suit the needs of our members and employers in general to properly run their businesses and they also suit the needs of employees to manage their personal lives and perhaps other work obligations, so if there needs to be a deterrent it should not be that the loading should be increased, we say that in fact there doesn't need to be a deterrent for casual employment in Tasmania.

Under this particular award casual employees can only be used how I believe at least, how they are supposed to be used and that is on an irregular basis. We ask you to find that the AMWU has failed to show that so far as this particular award applies there has been no equal or similar change to full-time entitlements since 1974 which you will remember was when the casual loading was last addressed, as there had been under the Federal award.

We ask you to find that there has actually been no significant change to entitlements to full and part-time employees and to which casual employees do not have access and we therefore ask you, Commissioner, to dismiss this application.

COMMISSIONER IMLACH: Yes, thanks, Mr Flood.

MR FLOOD: Thank you.

COMMISSIONER IMLACH: Now, I must say, Mr Flood, that on the face value, which could be quite significant I am not prepared to say at this stage, you have canvassed the matter quite well - - -

MR FLOOD: Thank you.

COMMISSIONER IMLACH: - - - and quite honestly I have got no questions, put it that way.

MR FLOOD: Thank you very much.

COMMISSIONER IMLACH: I don't know what that indicates but - - -

MR FLOOD: No, I am not accepting that as anything. As I said before I ignore everything you say.

COMMISSIONER IMLACH: Thanks, Mr Flood. Yes, Now, Mr Baker?

MR BAKER: Sir, just with that comment I must admit when commented on from the bench in relation to the quality of the submissions that I have made over the years I often find that I tend to be somewhat disappointed by the result so - the outcome at the end of the day, so - - -

COMMISSIONER IMLACH: I see. That is boding ill for Mr Flood, you reckon?

MR FLOOD: It is a softening-up approach.

MR BAKER: Sir, in respect of this matter I am not sure of the detail of the telephone conversation that you had with Mr Terzic.

COMMISSIONER IMLACH: Perhaps if I state it is my understanding of it.

MR BAKER: Yes.

COMMISSIONER IMLACH: Mr Terzic rang me or rang my office yesterday and I indicated that if he was unable to attend and if it was requested that adjournment be granted for Mr Flood's - or the chamber's submissions to be perused and responded to that I had granted.

MR BAKER: Well, that was the understanding I had too, sir, so it would be our request that the matter be adjourned but Mr Terzic has indicated to me that he will respond as a degree of urgency given the circumstances that we currently find ourselves in.

COMMISSIONER IMLACH: Yes. Thank you, Mr Baker.

MR BAKER: And he will do that, as I understand it, in - how would you prefer him to respond; in writing or - - -

COMMISSIONER IMLACH: Perhaps if you just take a seat for a minute. I would like to hear what you think about that, Mr Flood. I don't know whether you are aware of those factors, perhaps I should have told you at the time but what is your reaction?

MR FLOOD: Mr Terzic contacted me at the outset and explained what he would like to do and I consented to that, Commissioner. I am happy for that course of action to take place.

COMMISSIONER IMLACH: I am relieved, Mr Flood, because I acknowledge that I should have confirmed that with you anyway.

MR FLOOD: Yes.

COMMISSIONER IMLACH: Thank you. Yes, what I propose to do is adjourn this matter to allow the union to prepare a response and perhaps if we could go off the record for a minute thanks, Ann.

OFF THE RECORD [11.47am]

RESUMED [11.49am]

COMMISSIONER IMLACH: Yes. Well, thanks for those comments, gentlemen, off the record. I will adjourn this matter and I expect that the union will indicate in a short time and arrange with the other parties for the resumption of the hearing to hear the final submissions and if that is not able to be done - I hope it is able to be done, but if not I would ask that the submissions be in written form, again within a short time. I think a fortnight is the outside time. Also I will endeavour to get the transcript done within that time too, if possible. In the shorter time, actually. Don't know what my chances are but I will try. Yes. Nothing else, gentlemen?

MR FLOOD: No, thank you.

COMMISSIONER IMLACH: Thank you. This matter is adjourned.

ADJOURNED INDEFINITELY [11.50am]