

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No. 4284 of 1993

IN THE MATTER OF an application by
the Australian Liquor,
Hospitality and Miscellaneous
Workers Union - Tasmanian Branch
to vary the Security Industry
Award

re security officer - level 4 and
firearms

COMMISSIONER GOZZI

HOBART, 19 August 1993
continued from 15/6/93

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: Any changes appearances? If not, I'd like to thank the parties for their forbearance with the alteration of dates. I appreciate that, and I'll even be more appreciative if you tell me the whole thing is settled.

MR O'BRIEN: Well we'll take what we've got so far and do with it as well as we can. The position is that whilst I'm not in a position to say the matter is settled, the parties have agreed that that part of the application which deals with the classification structure ought to be further adjourned on the basis that the parties are going to explore some matters relating to classifications, I think is the best way of putting it, which may provide the mechanism for resolving the matter.

COMMISSIONER GOZZI: Well that's encouraging.

MR O'BRIEN: It may not, but that's what we're intent upon exploring. We have, since the last hearing, conferred involving the principle of the contract at the EZ Risdon site, but, as I say, in relation to that matter, having gone through the process, as suggested by you, Mr Commissioner, we've now agreed to a further set of discussions.

COMMISSIONER GOZZI: Very good. I certainly think it's worthwhile to involve Pasminco in those discussions. I support that.

MR O'BRIEN: It may be that other courses of action as suggested in those discussions, but I won't pre-empt anything in those at this stage, rather that simply indicate that we will be seeking that that aspect of the application be adjourned. However the part of the application which relates to gun licensing is intended to be proceeded to conclusion today, as I understand it, provided the commission is happy with the shearing off of part of the application and dealing with it in two parts. In that way, I propose to make submissions in relation to the application.

COMMISSIONER GOZZI: Yes, I think, Mr O'Brien and Mr Abey, that the issue really is an 'in principle' issue and therefore I think it's quite capable of being dealt with on the basis that you propose. So we may as well get that one over and done with.

MR O'BRIEN: Mr Commissioner, the award as it stands in relation to licences for firearms, has existed in its current form - and I exclude the quantum for the allowance in clause 15(a) - but otherwise in its current form, since this commission came into existence and before.

In other words, the provision currently in the award, to my understanding, was the provision when the award was an award of the Industrial Board system, the system preceding the

Tasmanian Industrial Commission's formation. And I have not been able to establish the exact lineage of the clause to date.

The words of the clause read, subclause:

(a) Firearms - An employee required to carry firearms shall be supplied by the employer with firearm, ammunition and the cost of the licence.

And then it goes on:

If an employee is required to supply his/her own firearm he/she shall be paid 67 cents per week extra.

Now the key words currently would be, of course, 'the cost of the licence'. The evidence is that up until recently the only licence required was a licence for the weapon itself or the firearm itself, I should say. And that situation has now changed where the person who is to carry the firearm must have a licence which is specific to a person engaged in the security industry, that is that the licence is not one which is relevant for private use, but relevant only for use in the security industry. And that is the evidence of Mr Weir in this matter.

If we look to clause 17 - Licence Fees, we have a provision where the employees in this industry are required to be licensed to perform their work. Those provisions have been the subject of changes over the last few years with award changes and various wages systems which now require the employee to meet the cost of the first year of licence on the basis - if you understand the wording - that the employer pays it and the employee reimburses the employer from wages and at a mutually agreed rate.

Subsequently the employer pays the licence, but if the employee leaves the service of that employer within 6 months of the employer paying the licence fee, then the employer can recover a pro rata deduction and there are specific provisions in clause 17 as to how the employer's entitlement to deduct is calculated. I would have to say that in relation to that, it is clear that the employer cannot recover the whole amount of the licence cost and, indeed, if the employee worked for 5 months the maximum \$70.00 recovery would be reduced to \$7.50.

COMMISSIONER GOZZI: Five months by \$12.50 from \$70.00.

MR O'BRIEN: Yes.

COMMISSIONER GOZZI: Yes, right. \$62.50 from \$70.00 is \$7.50.

MR O'BRIEN: So that's the principle that's contained there. Now I refer to that because there is some, I think, important evidence which has been presented through Mr Weir about the issue of obligation in relation to the payment of these fees.

And if I can turn to the appropriate page. On page 74 of the transcript -

COMMISSIONER GOZZI: Just let me see, Mr O'Brien. It doesn't appear to be on here. Yes, page 74 of transcript.

MR O'BRIEN: I'm cross-examining Mr Weir and about two-thirds of the way down the page I say:

What you're saying then is that the employer can require an employee to spend that -

it says \$130. It should be obviously a larger amount.

Is that what you're saying?... I'm saying - well - yes. I'm saying to you under the current way that the legislation is written that it is - it makes yourself - you know, present yourself in a fact that you can be employed, yes.

And I take that to mean that it's the employee's obligation to license himself so he can be employed.

COMMISSIONER GOZZI: Right.

MR O'BRIEN: Okay.

So, in relation to - the employer's situation is that you merely have to supply a licence to a firearm and then all of the obligations fall on the employee in relation to fulfilling the special requirements that apply to your employees. In other words, the employee can't obtain the public licence which you described as costing \$30 to perform work for you. It will cost the employee \$300 - ?... That's true.

Is the answer. And the question goes on:

- but - and you can require them to pay them. Is that what you are saying?... I believe so.

Whether the - the licence is only relevant whilst they are working in the security industry. Is that right?... That's true, but they can work for whoever. I mean, it's the licence for the person. It's not a licence for the company.

Now I highlight that part of the transcript first because what is suggested by the employer in this case is that the obligation lies upon the employee to licence themselves to be able to present and able to perform the work. That is clearly in contradiction of the principles contained in clause 17, which is about the specific licence required to present yourself able to work in the industry.

There is a recognition that the employer will pay that, bearing in mind that that's a licence fee which is recurrent rather than a perpetual licence.

And putting it at its best, through offsetting procedures for wage increases, the cost of meeting the licensed cost is now shared - it was originally entirely upon the employer, but is now shared in the first - in the initial period of employment, but initially met by the employer, the first year to be recovered and subsequent licence fees only recovered where the employee doesn't continue to work for the employer effectively for more than 5 months.

So the principle that the employee must pay the cost to present themselves as able to be employed is specifically dealt with in the award in relation - in clause 17 as to the specific licence.

But then we come to what else - the other provisions in the award which have existed unaltered for some time - and that's clause 15(a) that I referred to before. Now in relation to the firearm cost, what the award has said is that the employer will supply the firearm, ammunition and the cost of the licence. Now I think the reality is that on the evidence that the employer has paid the cost of the licence, if an employee was required to supply his or her own firearm, well they would then have a licence for that firearm themselves and they would be paid an allowance. Now that's what the award says now - obviously in relation to a minimal cost structure.

What has now occurred in these days of greater concern about the prevalence of firearms in the community and the need for proper controls, whether the company or the union likes it, there is now a requirement for employees in this industry to be individually licensed to carry a firearm whilst working in this industry, so it's another licence building upon the licence fees referred to in clause 17. It is a licence which carries a one-off fee and a training fee - and I'm not sure that that training fee is one-off - it certainly is initially.

I would be surprised if over time there is a not a requirement to - to participate in refreshers, but whether that's specified in the legislation or not now I think is irrelevant - that's my view of the future in relation to the - these sorts of licensing provisions.

The employee is being told through the employer's evidence in this matter, well, you know, that's your responsibility. If we want you to carry a firearm you go and get a licence, you go and pay \$300 or whatever it costs you to maintain that if anything in the future that's not our obligation.

Not the case insofar as the practice in relation to firearms in the past. Clearly not the case as - as prescribed in clause 15(a) provision which has been in the award for some time.

Now I don't think it's unfair of me to say that if we weren't talking about \$300 we wouldn't have the opposition that we have. And the opposition is to the level of the fee.

On page 75 of the transcript at the bottom, I begin questions:

MR O'BRIEN: Yes. Are you aware of there being similar legislation for the licensing of security guards to use firearms in other states?

Answer:

There isn't similar legislation. There is - and if I could quote - although I don't have the figures because I'm not sure if they're still exactly correct. In the case of Wormald in Melbourne, they get a - they pay - they have a trainer who is part of the staff and they pay a fee of, I think, \$50 or something like that which represents then the ability for them to train the people and the people are then recognised under Victorian legislation and that is -

- I think it should say - and that is to -

- say as what we're trying to do here.

Sorry, it should be - and that is the same -

- as what we're trying to do here. So it's not true to say that the legislation in other states resembles what we've got here.

Question:

Are there any charge -

- charges that should be -

- to the Victorian employees at Wormald for gun licences?... No, the licences - they don't have a licence, per se, for the person in that state. What they do is they train the person and that

trainer then issues them the ability to carry a firearm on behalf of Wormald, doing his job.

And they're different from the general members of the public in that regard?... They are.

And the company pays the cost of that?... Well there isn't a cost associated with it. There's -

- and then there's an interruption -

- a blanket cost to recognise the trainer, but their training is recognised under Victorian legislation.

So there's a cost of recognising the trainer provided by Wormald - ?... That's true.

- and Wormald pays that cost?... Well it's a nominal figure, yes.

Yes. Well what - ...? Yes, it's a nominal figure and they pay it.

And there's a \$50.00 per head - ?... No, it's a \$50.00 fee which they pay - and that's what I'm saying to you It enables the -

Question -

Yes, I'm trying to understand and get it correct, see?... It enables the trainer to then train the people, right? So it's a \$50.00 notional fee paid to the system.

And once trained can the employees use that qualification elsewhere?... No, not at all. It's what I'm saying; it's not the same legislation as here.

No, it's not portable?... That's right.

Wormald pays the cost of meeting the requirements of the legislation but it isn't portable in that state?... That's right.

And because it is portable here you take objection to paying that cost?... We do. The licence here relates to the person.

I think that's all I've got to ask, Mr Commissioner.

Now I draw from that the suggestion, not only is it fact that it's specific to the person, but the quantum is a concern. Indeed, that's been my understanding of the position of the employers in this industry - that having to pay \$300 per employee was something which concerned them.

COMMISSIONER GOZZI: Mr O'Brien, just interrupting there for a moment. That's \$300.00 for the licence fee -

MR O'BRIEN: Yes, \$150.00 licence fee and \$150.00 training fee.

COMMISSIONER GOZZI: Oh, right. That's what I was going to ask. And you suggest that perhaps the training fee could be a recurrent cost at some stage further down the track?

MR O'BRIEN: Yes.

COMMISSIONER GOZZI: Okay.

MR O'BRIEN: I'd be surprised, even if it is specified now, a future cost in relation to refreshers.

COMMISSIONER GOZZI: Yes. But, in any event, at this stage we are talking about a \$300.00 cost per employee?

MR O'BRIEN: That's right.

COMMISSIONER GOZZI: Does Hansard give any insight as to what the legislators intended?

MR O'BRIEN: I haven't read Hansard, to be honest with you.

What is clear from the evidence is that you can't get a licence without doing the training, and my understanding is that legislation and regulations allow for the appointment of a person to provide the training, and I understand Wormald has sought exclusions and exemptions, or whatever, and been denied those. As with any other provider, a security operator in the industry, I presume also would be denied that opportunity, and the government insists that for the employees in this industry there will be a fee of \$150.00, there will be a course conducted by a nominated provider who charges \$150.00.

COMMISSIONER GOZZI: Is the nominated provider going to be the government?

MR O'BRIEN: No. The nominated provider is another individual who is licensed under the regulations and the act to be the provider.

So they establish a monopoly provider -

COMMISSIONER GOZZI: Pretty good if you can get it.

MR O'BRIEN: Yes. And I guess the position we find ourselves in, Mr Commissioner, is that we are effectively the meat in the sandwich between the employer's desire not to pay the cost and the requirement of the government that it be paid, and our people's situation as employees what can be required of them, what should they have to pay, and what obligations do they have.

In our view it is unreasonable for the employee to meet these costs. They have not been required. No licensing costs have been required previously, and whilst there are a variety of circumstances in different industries about licensing costs this industry has already a primary licensing factor, which is addressed in clause 17. The use of a firearm is at the discretion of the employer. That's what the award says.

It is our view, if it is at the discretion of the employer that the employer ought to meet the costs of equipping the employee with the firearm and the legal dispensation, which allows the employee to carry out the business of the employer.

Now if the employer were able to establish that there was also a private benefit, the employer may say that that cost needs to be a shared cost, but it is clear from the evidence that this is not a private benefit. It only applies whilst the employee is employed in the security industry.

COMMISSIONER GOZZI: Yes, it is not a general licence.

MR O'BRIEN: That's right. It may be that the employee chooses to go out and get a general licence, but that obviously is not a matter which would be dealt with in the award.

So what we are dealing with here is a licence specific to the employment in this industry, and then the problem comes down to the complaint of the employer, well look, what if the employee is licensed, they can use it throughout the industry. Well, it is the employer that decides that they want the employee to provide that service.

Ultimately if that's a service that has to be provided to a client and they are contracting for that, and this is predominantly a contract industry, then that's a factor to be borne in mind in the dealings between the principal and the contractor.

The employee's position is that they are employed by the contractor providing the service to the principal. They don't have a direct relationship there. They don't have the ability to have a bearing in the terms of the negotiated contract. The only ability they have is to bring matters to the employer

and, if not resolved, to this commission to seek to resolve a matter in terms of fairness and equity in relation to remuneration for a cost.

Now there have been no suggestions of any alternative position from opposition to the claim in relation to these proceedings. The position that the employer takes on evidence is that this is the employee's obligation.

And, in our view, the first finding that the commission would make, and ought to make in this matter, is that that is not so. It is not so, having regard to the existing principles established within this award in relation to licence fees and in relation to the provision of firearms. That is, with regard to clauses 15(a) and clause 17.

Secondly, we would believe that because the use of the firearm is at the discretion and requirement of the employer and it is not an obligation which lies upon the employee in terms of obtaining employment in the general sense, and for example the evidence of Mr Wright was that he doesn't need a licence where he is working now so one would expect that the employer is not required to licence him unless they wish to use him in a situation where a firearm might need to be carried or where they want to hold him available for flexibility reasons to be able to be called into those circumstances. Again, the choice is of the employer.

We are not saying that if, for example, Henry Wright who is in a circumstance where he is not required to use the licence, can go and obtain one and require the employer to pay it, we are saying, here where the employer requires the employee to use a firearm and therefore be licensed to meet the obligations of the law, that is the employer's obligation.

It is totally optional; it is not a licence which is relevant to personal use; and I can imagine that perhaps Mr Abey might say, well what about a motor vehicle licence? Well, it just isn't a parallel because this licence is specific to the job, and the employee cannot use this licence for example as a hunting licence or to authorise him or herself to have a firearm in their home for personal protection or peace of mind or display, or whatever.

COMMISSIONER GOZZI: I guess the analogy that was going through my mind relates to somebody working as - a truck driver comes to mind, a heavy truck - I think they have to have a licence. Who meets the licensing costs?

MR O'BRIEN: Well, I can't answer that question off the top of my head, but I would say that that's a parallel with licence fee in clause 17.

I mean, that's not optional for the job. The job is specific to driving a truck and -

COMMISSIONER GOZZI: To present yourself you need a licence.

MR O'BRIEN: Yes.

COMMISSIONER GOZZI: You are saying here the employer can require a person to carry a firearm, therefore it's at the discretion of the employer?

MR O'BRIEN: That's right.

COMMISSIONER GOZZI: You don't have to have it to present yourself for the job.

MR O'BRIEN: That's exactly right.

COMMISSIONER GOZZI: Right.

MR O'BRIEN: And for that reason I think that the commission can distinguish a provision in this area from, you know, the range of licences that might be involved.

And that's why I highlight clause 15(a) and clause 17.

So we see this as a matter of continuing the principles currently laid down in the award, and if the commission were to find that the alternative was a provision of an allowance, then we would seek the opportunity to address the commission further in relation to the quantum of any allowance.

But, in our view, because an employee might be engaged and required to obtain a licence for a relatively short-term employment, that an allowance in this circumstance is not desirable and the alternative - if there is any alternative to the employer providing the licence - is the sort of alternative that's contained in the second proviso in clause 17.

COMMISSIONER GOZZI: Right.

MR O'BRIEN: If the commission pleases, we would be seeking to proceed on that basis.

COMMISSIONER GOZZI: Yes, Mr O'Brien, before you conclude, that second proviso puts some onus on the employee to pay back within certain periods, which diminishes as the longer he is there. What sort of ratio would you have in mind?

MR O'BRIEN: Well we are talking about a different animal here and I guess we are looking there at the repayment of half of a cost, and which extinguishes basically once 6 months has elapsed.

And we're looking at principles similar to that. So if you extrapolated further using the proportional principles that are contained there, that that may be a solution to the concerns that the employer has about licensing a person who then immediately ups stumps and goes to another employer. In this case -

COMMISSIONER GOZZI: But in any event, if you went to another employer -

MR O'BRIEN: He's got the licence.

COMMISSIONER GOZZI: - he's got the licence for the unexpired portion of - well it's a one off licence.

MR O'BRIEN: It could be one off. I think there will be further charges but that's why we're saying that the employer should meet the costs of retraining, but the reality is that if someone is licensed it's for the purposes of the employer and it's a matter of then making the decision as to the people to be licensed.

COMMISSIONER GOZZI: All right, thank you, Mr O'Brien. Mr Abey?

MR ABEY: Thank you, Mr Commissioner. I would agree with Mr O'Brien that the existing award provision has been in the award for a considerable period of time, certainly at least since 1979 and, I suspect, before that, but our records don't, without a great deal of scratching around archive boxes, don't precede 1979.

And it goes without saying that the award prescription was written in the context of what applied at that time, and it would be a nonsense to seize on the existence of some words and attempt to apply them in totally different circumstances.

I'd like to take the commission to, what I would call, the then and now situation. If I may table an exhibit which is -

COMMISSIONER GOZZI: We'll mark that A.1, I think, Mr Abey. Oh, it may not be. Just let me have a look. Yes, A.1.

MR ABEY: Now that's essentially - this represents the position which did apply under the previous legislation, which was known as the Firearms Act of 1932. Now, in essence, there was a requirement, firstly, to register a pistol, and that's on the bottom half. With that went a permit to carry a pistol. You could not obtain a permit to carry a pistol without having a registration of the pistol.

But the critical point which is very clear from this document, that the permit and the certificate of the registration apply

to the company, not the individual. So the company took out the certificate of registration, the company obtained a permit to carry the pistol and that, as I understand it, enabled the company and, indeed, any company to, in fact, use its employees to use firearms in those circumstances.

Clearly, it is the cost of this permit and this registration that is contemplated in the award prescription which is applied probably for the last 20 years. You will note from that documentation that the registration fee was \$3.00 and the permit to carry was \$1.00. And there is no way that the architects of the original clause - there is no way that the architects of the original clause could have contemplated what is contained in the Guns Act of 1991.

Now if I could take the commission to, what I would call, the now situation and table a further exhibit, being an extract from the regulations.

COMMISSIONER GOZZI: Exhibit A.2.

MR ABEY: Thank you. This is an extract from the regulations which applies under the Guns Act of 1991. The cover page is for identification. The next page - the next two pages deal with applications for licence or permits. The page after that refers to the registration of pistols, and then on page 14, 15 and 16 we have the schedule of fees which is applicable for each class of licence.

Now the only commonality between the old and the new is that pistols are still - there is still a requirement to register pistols. Not surprisingly, the cost of registration has increased from \$3.00 to \$10.00 per pistol. The employer, as the owner of the pistol, will continue quite properly to pay this cost of registration in accordance with the award clause. But beyond registration of pistols the new act introduces an entirely new concept. The thrust of the legislation is to licence users rather than the weapon itself, pistols being the notable exception.

Now if I can take you to page 14, it spells out in the schedule the various fees which apply. Now I hasten to add that we are not simply talking about the quantum of the fees but there is a very firm principle at stake which I'll address in some detail shortly. But you will note that the application for a security guard's gun licence is \$150.00, the application for a gun licence for Joe Citizen is \$30.00. There is an enormous difference, unexplained to the best of our knowledge. I'm advised that the cost of the training course is \$150.00 and there is no contest about that. And it is a prerequisite to do the training course before you make application for a licence.

Now in relation to the current legislation, we wish to make a number of points. We have no argument against the principle of registration for the use of firearms. We have gone to quite extraordinary lengths to find a way through the cost of such a licence. I would like to table a further exhibit -

COMMISSIONER GOZZI: A.3.

MR ABEY: - which chronicles a long and ongoing saga about our efforts in relation to this. It began with correspondence to the then Minister for Police and Emergency Services, Frank Madill; a meeting with Dr Madill, the early correspondence was particularly polite. You will note as you go through it, I guess we became increasingly agitated through the lack of any sort of response from the minister's office, rather than anything else. Finally, we were moved to go direct to the premier to seek his intervention in the proceedings. Finally, almost 5 or 6 months after the first approach we did get a response from the Minister for Police and Emergency Services which was in the negative.

We also got a response from the premier which was of no help, although I think it's fair to say that the premier's office did open doors for us to make a direct approach to the Commissioner for Police to try and seek some relief from the potential cost. I would emphasise throughout this exercise there is no way that we ever conceded that the cost was a cost on the employer. It was a cost on the industry and the application of Mr O'Brien was live at that stage, and it was yet to be determined as to who would meet that cost. So this correspondence should not be interpreted in any way as a concession on our part that it's a cost to the employer; it's a cost to the industry.

So after what, on the face of it, was a productive meeting with the Commissioner for Police, we subsequently got a negative response from the Commissioner for Police. As the last option we wrote or complained to the ombudsman. That's contained there. And finally, and probably the last chapter in this saga, we got a negative response from the ombudsman. And at your leisure you may choose to go through that correspondence.

One of the key aspects in this submissions to the various ministers and premiers, et cetera, related to the training. Now, for example, Wormald, being the major employer in the industry in Tasmania, has for many years of its own volition provided a comprehensive gun training course each year for all its employees. There was no requirement to do that; they did it off their own back and met the full cost of it.

Part of the submissions we made to the government was that at the very least Wormald should be allowed to continue to provide that training and have it recognised as the appropriate training course. Lots of nodding heads and, yes, it sounds reasonable and all the rest of it, but at the end of the day we find out that the government has entered into a monopolistic contract with one provider which provides that all training will be conducted by this one provider. And it is of no consequence as to how good the training which had previously been provided by Wormald of its own volition was.

It is not recognised by the bureaucracy because they've entered into a commercial deal with a single provider and who's the only one who's allowed to provide the training.

COMMISSIONER GOZZI: Is that possible under the legislation?

MR ABEY: Well I would have said not, and was the thrust of our complaint to the ombudsman. But the ombudsman disagrees. To our mind, there is a clear discretion for the Commissioner for Police to authorise any training, and that's what the act says.

COMMISSIONER GOZZI: I mean, if you're going to pay for it. Let's say that it was awarded against you and you're going to pay for it, it seems to me the very least you should be able to offset against the Training Guarantee Levy, if you're an accredited trainer.

MR ABEY: Well I'm sure it would be capable of being offset against the Training Guarantee Levy. But that really misses the point. Under the act it clearly says that the Commissioner for Police has a discretion to approve any training course. And, indeed, it's evident in correspondence with the Commissioner for Police that he expressed the view that if there was a way that he could exercise that discretion he would and recognise at least the training of Wormald.

It transpires that on investigation the government has entered into this tight contract on a commercial basis.

COMMISSIONER GOZZI: That's remarkable.

MR ABEY: Well it is remarkable and that's the nature of our complaint to the ombudsman, but we didn't get any joy there. So we have -

COMMISSIONER GOZZI: Who is the training authority then? Who is the trainer?

MR ABEY: It's an organisation called Gun Safety Tasmania. Whether it's an individual, I suppose - I don't know the person.

COMMISSIONER GOZZI: So Wormald are not very happy as is the same for the industry.

MR ABEY: That's exactly the point. So having said that we have done everything in our power to reduce or remove the cost which is potentially imposed on the industry. Who pays that is essentially a matter for you to determine.

But the critical issue, in our submission, is that the licence attaches to the individual and stays with the individual for life. It is a one off licence; it is not renewed annually; once taken out it attaches to the individual and is fully portable within the industry.

In our submission it is entirely inappropriate, indeed, blatantly unfair, that the employer of the day should have to bear the cost of what is, effectively, a fully portable occupational licence. Now reference has been made to the award prescription going to the security guard's licence as such, and Mr O'Brien submits that that establishes the principle. I'd like to make a couple of quick points about that.

Firstly, in our submission, that doesn't establish any particular principle. All it does is point to the existence of a clause which was introduced into the award by consent many years ago, and we don't know the circumstances. You cannot say that that establishes any particular principle, indeed, I will shortly be taking you to an arbitrated decision which, in our submission, does establish a principle and, indeed, a contrary principle to that.

The second point I make is that the cost is shared in some part by the prescription in that clause. And the third point I would make is that it is an annual renewable cost or annually renewable licence, as distinct from the licence that's currently before, which is a lifetime licence and fully portable. And I think that is a very important distinction.

I'd like to take you now to a decision which I think very clearly establishes the principle and how these matters should be approached.

COMMISSIONER GOZZI: Mr Abey - we'll mark that A.4, but I just need to adjourn for a couple of minutes. I've got a message here which I need to act on. Excuse me for just a moment. Thank you.

SHORT ADJOURNMENT

COMMISSIONER GOZZI: Yes, Mr Abey?

MR ABEY: Thank you, Mr Commissioner. This is a decision of Mr Commissioner Clarkson in relation to the Transport Workers Industrial, Commercial and Domestic Refuse Award. It was made on 29 September 1978 and is contained in print D8559. The decision deals with a range of matters, and I'd like to take the commission to the end of the decision on page 67, where it says, halfway through the paragraph:

It says: A claim was made for the employer to pay the cost of licences required to be held by the driver. This claim is refused as it is the driver's responsibility to fit himself to carry out the duties and - there's a word missing off the end of the thing - and if this involves the endorsement of licences and the passing of tests, this is to be his own account.

So, in other words -

COMMISSIONER GOZZI: Where are you reading from?

MR ABEY: On page 67, halfway through that last paragraph, beginning: A claim of money -

COMMISSIONER GOZZI: Oh, yes, sorry. Right.

MR ABEY: Unfortunately, little bits have dropped off the edge of the page which you have to read it carefully.

COMMISSIONER GOZZI: That's okay. I've got it. Yes. Right.

MR ABEY: But we say that that established the correct principle. In other words, if an occupation requires a particular licence, then it falls to the employer to meet the cost of that licence in circumstances where the licence is portable within the occupational pursuit.

Now that clearly is an arbitrated decision established in the principle which we rely on. Of course, there are many other parallel circumstances where the same situation could be argued. And I table a further exhibit.

COMMISSIONER GOZZI: Mr Abey - A.5 - are you going to address yourself in respect of the exhibit you just tendered before, A.4, to the distinction that Mr O'Brien made, that distinction being that - in fact, I used the example of a truck driver - the distinction being that that was a requirement, the truck driver's licence, a requirement to present yourself for employment in the first instance. Whereas the principle that Mr O'Brien was developing was that you didn't need that gun licence to present yourself for employment in the first place, that you only needed the gun licence because the employer decided that you would carry a gun. In other words, the use of a gun was at the discretion of the employer.

So he made a distinction there in response to the sort of - well that was the thrust of what he was saying.

MR ABEY: Well perhaps if I could go through this and I'll come back to that point.

COMMISSIONER GOZZI: Okay. A.5.

MR ABEY: A.5 lists a range of occupations which require either registration and/or special licences and refers to the award where they're principally subject to and seeks to identify whether or not there is any requirement on the employer in the award to pay the cost of such licence or endorsement.

And as we go down you will see plumbers and electricians, auctioneers and estate agents, surveyors, hairdressers, nurses, drivers, dental mechanics, dental assistants and taxi cab drivers. And there would certainly be others but they are the ones that came readily to mind. Now all of those require some form of registration or special licence.

COMMISSIONER GOZZI: And all attract a fee.

MR ABEY: And all attract a fee, and in every case there is no requirement on the employer to pay that fee. And, indeed, so far as our investigations can reveal, it is invariably paid by the employee because it is a licence, effectively, to carry out that occupation and to sell that occupation throughout industry.

Now we say that the circumstances are no different in this case. Certainly, the licence is limited to the security industry but you could say exactly the same thing about surveyors, hairdressers, nurses, is limited to the health industry. And you could effectively say that the same principle applied to virtually all those occupations. They are limited to an industry but they are fully portable within the industry in the same way as this licence is concerned.

I don't really understand the distinction which Mr O'Brien has drawn. It is not a requirement that all employees in the security industry have a gun licence. On the evidence of Mr Weir, it is the optimum and desirable position of certainly Wormald, that all employees be capable of carrying a gun, and that presumably is why they've conducted comprehensive training programs in the past for all employees.

That's the optimum position. But we wouldn't suggest for a moment that all employees of Wormald will be required to obtain a gun licence. That won't be the position. Essentially -

COMMISSIONER GOZZI: Well doesn't that support then what Mr O'Brien is saying?

MR ABEY: Well I don't think it does because there are positions, for example, if you wish to seek employment as a patrolman where it is a requirement to carry a gun, or to carry a weapon, then that is an occupational requirement, but is a segment within the industry. Now the flexibility of the industry is being compromised by the imposition of this cost. Ideally everyone should be capable of doing it so you can maximise the flexibility of your staff.

But it is a requirement. If for example, Wormald, advertises for a patrolman and a condition is that they hold a gun licence, how does that differ from advertising for a truck driver with an endorsed 'C' licence? The only distinction is that not everybody in the industry is required, but you could say that about surveyors, for example. Not everyone in the surveying industry needs to have a licence, but to do certain work you do.

COMMISSIONER GOZZI: I guess there would be nothing stopping anybody in the security industry advertising in the way that you portrayed it.

MR ABEY: Indeed, not.

COMMISSIONER GOZZI: What about the employees currently employed who are required to have a gun as part of their work, who are currently employed? What if they haven't got one? Presumably under this legislation now they have to have one.

MR ABEY: Well they'll have to have one if the employer requires them to carry a gun, yes.

COMMISSIONER GOZZI: So what's the industry saying about that?

MR ABEY: Well we're not offending it. We've done everything we can to avoid the cost and minimise the cost of this. You know, we find if you're dealing with the cost factor rather than the principle, then we find it indefensible that a security guard's gun licence costs \$150.00 and Joe Citizen's costs \$30.00. You know, there is just no argument that can sustain that sort of differential, no argument which has been presented to us which can sustain that.

But that is the will of the parliament, the democratically elected parliament. It's, you know, I suppose, no different to the decision made yesterday to impose fringe benefits tax if an employer pays the HECS fees on behalf of an employee. You know, it is the will of the parliament. There are a lot of people paying more as a consequence of the budget on Tuesday, but that's the will of the parliament. In this case

the will of the parliament, in our submission, is that anyone employed in this industry must have a licence. Someone has to meet the cost of that licence.

Now I'd put it in reverse. Why should the employer meet it? Why should the employer have to meet the cost of what is effectively an occupational licence? They seek to have someone to carry out certain work.

COMMISSIONER GOZZI: Well, I mean, that's the crux of what I'm going to have to determine ultimately.

MR ABEY: Well that's exactly right.

COMMISSIONER GOZZI: But the submissions of Mr O'Brien were that it is the employer that exercises the discretion for the employee to carry the firearm. In other words, if -

MR ABEY: Well that's true in part.

COMMISSIONER GOZZI: Yes.

MR ABEY: It is, I'm advised, the - the actual situation is that patrolmen in large measure are given the option of whether they carry a firearm for their own protection. And it is only in isolated circumstances that it is an actual requirement, particularly when ATMs are involved on their run.

COMMISSIONER GOZZI: I mean, the reality is that without a firearm a large part or, I would imagine, a significant part of the work force would not rate a security, I would imagine.

MR ABEY: A large part of the -

COMMISSIONER GOZZI: Of a security employer's work force wouldn't be able to work in the industry if they didn't carry a firearm.

MR ABEY: Well I don't know about a large part, but certainly a part.

COMMISSIONER GOZZI: Mm.

MR ABEY: I would concede that.

COMMISSIONER GOZZI: You see, the other thing is that given the award structure, the classifications go up, for a patrolman. Now if somebody hasn't got a firearm licence - it doesn't matter who pays for it - you can effectively say that they are then prevented from going through a career path.

MR ABEY: Well that's a valid argument and it's - just as it's a valid argument to say that a nurse who doesn't have

various endorsements on their registration is prevented from going down their career path.

COMMISSIONER GOZZI: Mm.

MR ABEY: Or that a surveyor who hasn't undertaken the requirements to obtain a licence, can only go so far in the industry. I think it's essentially on all fours. But the key issue is that it attaches to the individual and is portable, therefore it is an asset belonging to the individual and it's an asset to sell. The employer pays for it through the medium of paying wages.

And essentially, and the position is magnified many times by the fact that unlike most licences this is a one off lifetime licence. And so why should the employer of the day bear the cost of equipping someone for a lifetime probably with someone else. The evidence of Mr Weir also pointed to the fact that turnover in the industry was relatively high. His own figures for last year were 37 per cent for patrolmen and 21 per cent for guards. He conceded that that was slightly higher than the average, but again from our own inquiries, that's reasonably typical of the industry.

So in summary, Mr Commissioner, we would say that the existing clause was constructed in an altogether different environment and could not have contemplated the 1991 legislation. Secondly, we have gone to extraordinary lengths to find a way through the costs imposed by the legislation but to no avail. And even the comprehensive training program which has hitherto been provided by the major employer in the industry has been rendered of no consequence by the bureaucracy. And thirdly, and essentially this is the principle, the licence attaches to the individual, not the company, and is totally portable within the industry. That, we say, is consistent with the principle enunciated by Mr Commissioner Clarkson, that the cost of such a licence should be borne by the individual. If the commission pleases.

COMMISSIONER GOZZI: Yes, thank you, Mr Abey. Mr O'Brien?

MR O'BRIEN: Mr Commissioner, having appeared before Mr Commissioner Clarkson in a variety of matters, I'd have to say that I don't think Snowy Clarkson, as he was known to his associates in his day, ever intended that the decisions that he wrote where he'd deal with a series of claims out of a log of claims in a matter of a sentence or two, would ever have been intended to be taken as principles for the determination of serious matters in the future, but rather were some means by which Mr Commissioner Clarkson chose to deal with niggling side issues in a dispute when the substance of the dispute was really about other things. And that is the category which I would place this particular statement, which has apparently been edited by the photocopier.

MR ABEY: Only slightly. You can read the sense of it.

MR O'BRIEN: Oh well, I accept what Mr Abey says that there are words missing and I accept that they're probably the words that he says are missing. What I'm saying is that it's one sentence - sorry, two sentences amongst a number of others which say apparently that it's the driver's responsibility to fit himself out for the duties involved in his work. And this involves the endorsement of licences and the passing of tests, and that's his own responsibility.

I don't really think that the commission could say this is the authority for this issue upon which the commission can rely and, indeed, there are many decisions about licences that go in a variety of areas. The importance in this award, Mr Commissioner, is that the issue of licences is dealt with in the award, is dealt with in a way that clearly recognises that the obligations for licences falls in some substantial way upon the employer. And this is the changing circumstances brought about by legislation, and I'll come to Mr Abey's submission on the legislation now.

I would have to say that, having seen this correspondence today for the first time, without being critical of the way that the issue has been raised by the industry with the minister, would have to say that the issue that predominates is the issue of the cost to the industry. That's the issue, the theme that runs through all of these letters and in proposals which seek to mitigate or minimise those costs, particularly the cost of training but also the differential cost of licensing, the \$150.00 versus \$30.00 issue.

And that all goes to the submission which I put originally, which is that the predominant concern of the industry is really the cost and not the principle. Indeed, the industry previously agreed to meeting costs of licences, it now being faced with substantial or more substantial cost saying: You know, we don't want to pay them, we want the state to moderate them, and that will be a reasonable claim, we're not disagreeing with what they have said to the minister or the ombudsman about what ought to have happened, but that's not the issue for this commission, but it does raise in my mind or substantiate in my mind the submission that I put earlier which is that the major concern is the cost factor.

And I must say, that that's a major concern to my members. This is not a highly paid sector of the work force. You've heard that many of the employees are treated as casuals, rightly or wrongly, we'll that in other proceedings, without therefore any modicum of security of employment. Their employment in the employers' view is terminable on a day's notice. But the employer can require them to spend

\$300.00 to equip themselves to perform the duties he requires them to perform.

If we look at the occupations in exhibit 5 requiring registration and/or special licences, the employer probably didn't pay fees there, but if you look at the plumber, the electrician, the hairdresser, they're all apprenticeship occupations. They are all apprenticeship bound served with an employer, attended training in paid time without an obligation to continue to work for that particular employer. In relation to the surveyor, many surveyors in the past, at least, would have been engaged in cadetships where they would have had fees paid and employment during training and time off for training. That's not necessarily the total case. I'm certain that that's happened in the past.

Nursing has changed but in the days when nursing was a work and train profession that, in effect, the employees were paid whilst training and the training was provided at no additional cost, as were, in many cases, trainings for trades such as plumbers, electricians and hairdressers, although in recent days the public free education system has become, whilst still public, not free.

The critical issue, as Mr Abey puts it, is that the licence attaches to the individual stays with the individual for life. Well it doesn't really, I mean, it stays with the individual for their working life in the security industry. It's industry based. It's not, you know, a licence to use a or to have a weapon for private use or use outside of the security industry. That is an important point to make and it appears to have been sought to be glossed over in the statements which Mr Abey has made. Describe it as a lifetime licence. It's a work based licence. It's life is the person's working life in the security industry.

If the employer were to make this a condition of employment then that would be, in effect, trying to undermine the provisions which are already contained in clause 17. That's the real conditions of employment licence. You can't work in the industry without a licence - security agent's licence, and that provision deals with the licence.

It's true that the licensing provisions have changed, but it's also true that the award recognises the situation which existed in the past where the reality is - not only does the award say it but the employers did pay for all licensing required. And when you distil all of this you come down to that critical factor, the licences are not going to cost \$1.00 or \$3.00 now; they're going to cost \$300.00. The fact that it doesn't attach to Wormald may stick in the craw of Wormald and it may stick in the craw of other employers, but it's also - if this provision comes into being - it's also likely that whilst Wormald might equip other employers with licensed

employees, they could also be the beneficiary of receiving the services of an employee who had been licensed at the cost of another employer. So the swings and the roundabouts within the industry could be to the benefit of any individual company just as they could be to its detriment.

Now in relation to the rights that an employee acquires by obtaining a licence, sure, they are rights which now, as the current legislation stands, would allow them to work throughout the industry without paying another fee. I suspect - and I don't think it's an unreasonable suspicion in these days when governments are looking for ways of raising fees - that the licensing provisions, the payment of the up front fee and the one off training course, will soon be supplemented by further fees and further training courses. That's a suspicion; it's not something which is borne out on the evidence at this stage. But I believe it's not an unreasonable one. But in any case, if an employee comes into the industry, is required to be licensed and works for a few months and then is terminated because there is no other work, there's no guarantee that there will ever be any other work in the industry for that employee. There are people who come through the industry and leave the industry and never work in it again.

And so what the employer is suggesting was, you know, if they come to the industry they can obtain a licence that's only relevant for the industry but we can't guarantee that they'll be employed for a period to offset the cost of that licence. Again we come down to the point that I made, Mr Commissioner, about the use - the carrying of the firearm being at the discretion of the employer. And that's the sort of provision that we're talking about. We're not talking about an optional provision; we're not talking about a provision which under the law is required of each employee in the industry. We are talking about a provision which is relevant to those employees the employer requires to carry a licence - to carry a firearm, I should say.

Now if there are other employees who, as a matter of discretion, decided that they wished to and they choose to licence themselves, these provisions will not attend to that, but on the other hand I wouldn't like to see employees being sought to be put in a position where they were being told: Well, yes, if you want to carry a firearm you licence yourself, when the norm has been that the employer has supplied a firearm. And there are certain jobs which had traditionally attracted or required the carrying of a firearm direction of the employer. Now if that were to change one would have to be suspicious of motives if the provisions which we seek were included.

In summary, I think that our claim is justified. We do make the concession that Mr Abey has chosen has not to refer to in

his submissions, which would allow, where the employee leaves the employ of the employer, as distinct from being terminated by the employer, I must say, the employer to pay, to recover the licensing cost which has been paid under the principles which have been already agreed in relation to the general licence in the award.

That, in my submission, would be a concession we make in fairness to the suggesting by the employer that they might pay it and someone then leaves without them getting the benefit of that licence. It allows the employer to obtain the benefit of a licence that they require the employee to obtain, but if the employee does not give them that benefit then the employer has a right to recover an amount which reduces the longer the employee serves with the employer and provides them the benefit of that licence.

If the commission pleases, that's all I will submit on this aspect of the application.

COMMISSIONER GOZZI: Right. Thank you, Mr O'Brien. Mr Abey, do you want to raise any other points? I know you finished your submissions but particularly the point raised by Mr O'Brien going to the provision currently in the award, clause 17, the second proviso, having perhaps been considered by the commission pending on circumstances.

MR ABEY: This is on the -

COMMISSIONER GOZZI: Pay back.

MR ABEY: - pay back, yes. I hear what Mr O'Brien says. It's not inherent in his application and that's what we were responding to. I think at this stage - I would concede that that would make the situation marginally better than the worse case scenario. I don't put it in any other light. It addressed a small part of the problem but it doesn't go to the principle. And in our submission, it really needs for you to make a decision on the principle of the particular application and perhaps the details might be addressed after that.

COMMISSIONER GOZZI: Yes, thank you, Mr Abey. My ears pricked up when you said it wasn't inherent in the application because that certainly has or could have connotations, having regard to the emphasis that's been given to that in more recent times, about the subject matter having to be before the bench, before the commission.

MR O'BRIEN: I think there's no doubt about this one, Mr Commissioner.

COMMISSIONER GOZZI: All right. Thank you very much. We'll adjourn these proceedings to a date to be fixed with regard to the other parts of the application. And you'll let me know

what happens there. With respect to the matter discussed this morning, I'll reserve my decision, but will issue one quite apart from anything else in the file, in due course. Thank you.

HEARING ADJOURNED